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ARTICLE

CORPORATE GROUPS UNDER ITALIAN LAW: A COMPARATIVE APPROACH AND THE BRAND-NEW CRISIS CODE

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Abstract This paper provides an overview of the evolution of the harmonization process of European law in the field of group of companies, referring to the development of a national "group of companies law" — from the company law reform to the crisis and insolvency code — with the purpose of examining the main aspects of the regulation in force, considering mainly the possible interaction with the rules on the crisis of the groups of companies introduced by the Legislative Decree No. 14/2019, and with the aim of analyzing its suitability for being devoted to the prospect of harmonization across countries.

Keywords corporate groups of companies, group interest, liability of the parent company, insolvency of a group of companies, harmonization of law

Formattato

INTRODUCTION

The recent introduction in the Italian legal system of provisions regarding the insolvency of corporate groups (contained in the "*Codice della crisi d'impresa e dell'insolvenza*," which is "Code of the Business Crisis and Insolvency" or "CCII/Crisis

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Code" for short),[1] which will fully come into force on August 15, 2020) suggests that a second examination of the topic of corporate groups should be conducted, both at a national and a European level. At a European level, as well known, the crises of corporate groups are disciplined by the EU Regulation 848/2015, applicable in Italy since 2017, which governs cross-border bankruptcy procedures. From this Regulation, we can deduce a concept of corporate groups that is not identical to the one that can be extracted from varied Italian legal dispositions. In fact, the Regulation defines a corporate group by referring to the holding company as the "parent corporation" and to the subsidiary companies, which are directly or indirectly controlled, as "daughter companies" (*i.e.* subsidiaries). To put it simply, the European notion of a corporate group is based on a hierarchical model that tracks the activity of direction and coordination by the "parent company" with regard to the subsidiary corporations, apparently excluding all those forms of aggregation based on a lesser degree of control or a merely "factual connection."[2]

The criterion with which to pinpoint the holding company is the drafting of a consolidated financial statement, compliant with EU principles.[3] The new European legal discipline was introduced with the objective of filling any loopholes inside Council Regulation (EC) No. 1346/2000, which was in force for over a decade and did not provide a specific discipline for cross-border bankruptcy of corporate groups; the new discipline has the merit "of allowing member States to acquire the regulatory discipline, under the procedural and formal point of view, even with some critical points, stemming especially from the nebulous definition section and gaps in the discipline of corporate groups."[4]

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[1] On the impact of the Crisis Code on the structure and legal discipline of groups see: Giuliana Scognamiglio, *I gruppi di imprese nel CCII: fra unità e pluralità* (*Corporate Groups in the CCII: Between Unity and Plurality*), 2 Le Società (Company Review), 413 (2019). The Italian legislator chose the term "crisis" so as to include a wider notion than just that of insolvency, thus including, *e.g.* the notion of "lack of liquidity," able to cause the "crisis" of the company, even if not necessarily its bankruptcy (let us *e.g.* think about a company with no liquidity, but with assets that, if liquidated with enough time at disposal, would cover for corporate debts).

[2] Gabriela Fierbinteanu, *Groups of Companies in Insolvency Proceeding*, 2 Lex ET Scientia International Journal, 1(2014); Lorenzo Benedetti, *I flussi informativi nella crisi di gruppo* (*Informations in Group Crisis*), 1 Giurisprudenza Commerciale (Commercial Jurisprudence), 271 (2017); Daniele Vattermoli, *Gruppi multinazionali insolventi* (*Multinational Groups in Insolvency*), 1 Rivista di Diritto Commerciale (Commercial Law Review), 588 (2013).

[3] The EU Regulation sets forth types of cooperation and communication between insolvency procedures pending in different member states and contemplates the faculty to request the opening of a coordinated insolvency procedure for a corporate group with the appointment of a coordinator and the layout of a plan, as well as the possibility of requesting the suspension of asset liquidation in a procedure open to all companies of the group. This discipline follows the UNCITRAL Model Law and is inspired by the *separate entity approach* shared by European Court of Justice (ECJ) jurisprudence.

[4] Giuseppina Graci, *UE e disciplina dell'insolvenza (II parte) – Le procedure d'insolvenza delle società facenti parte di un gruppo di società* (*EU and Insolvency Law (Part II) — The Insolvency Procedures of Companies Belonging to a Group of Companies*), 2 Giurisprudenza Italiana (Italian Jurisprudence Review), 480 (2018), in which it is observed that "the absence of a statutory discipline has meant that in many occasions the European Court of Justice has had to perform the laborious task of reconstructing certain cardinal principles which can be applied to corporate groups, because routine procedure has shown that the majority of cases that it has tackled regarded insolvency procedures (especially reconstruction procedures of one or more components of a stable group of corporations)."

At a national level, the legal discipline of the "extraordinary administration" of corporate groups (Articles 80, et al. of Legislative Decree No. 270/1999, which extended to banks and insurance companies by Articles 98 and 105 through the Italian Banking Consolidated Act) that contained measures for industrial reconstruction and the management of large businesses in a state of insolvency (the so-called special procedure for immediate admission) was introduced by Legislative Decree No. 347/2003 (which was later converted to Legislative Decree No. 39/2004). As authoritative scholars have said, this legislation introduced the idea that a preventive control system for corporate crisis must take corporate group dimensions into account.[5]

In this panorama, the Crisis Code, enacted by Legislative Decree No. 14/2019 of February 14, 2019, to replace the previous Italian Bankruptcy Law, fills the gaps and introduces a comprehensive discipline for the economic crises of corporate groups (Articles 284–292 of the CCII). The new statutory instrument is to be welcomed because it introduces the legislative emersion of this phenomenon. However, it refrains from a unitary definition of the latter (it merely recalls the criteria of direction and coordination set forth by Article 2497 of the Civil Code and the presumption of the existence of such activities in any case in which there is a company that has to present a consolidated financial statement). The legislator, when reforming the Civil Code, followed the substantial and procedural lines contained in Article 3 of Law No. 155/2017, which takes into account the unitary nature of a group-crisis or group-insolvency, maintaining the principle of independence of active and passive assets of the corporate group, as well as the legal autonomy of each company belonging to it.

The exact basis of the distinction and separation of the assets (both active and passive)

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[5] Paolo Montalenti, *Amministrazione e controllo nella società per azioni: riflessioni sistematiche e proposte di riforma* (*Control and Administration in the Italian Public Companies: Systematic Reflections and Reform Proposals*), 1 Rivista delle società (Company Law Review), 42 (2013). Regarding group insolvency, see Stefano Poli, *Il concordato preventivo di gruppo* (*The Group Agreement with Creditors*), 4 Giurisprudenza commerciale (Commercial Jurisprudence), 735 (2014); Sido Bonfatti, *L'amministrazione straordinaria delle banche e dei gruppi bancari* (*The Special Administration of Banks and Bank Groups*), 1 Il nuovo diritto delle società (The New Company Law), 115 (2014); A. Pessina e C. Pessina, *Amministrazione straordinaria delle grandi imprese insolventi: il concordato* (*The Special Administration of Big Companies in Insolvency: The Agreement*), 1 Il nuovo diritto delle società (The New Company Law), 65 (2013); Alida Paluchowsky, *L'insolvenza dei gruppi tra tutela della personalità giuridica ed artifici virtuosi* (*The Groups Insolvency between Legal Entity Protection and Virtuous Artifices*), 1 Il nuovo diritto delle società (The New Company Law), 97 (2014); Fabrizio Guerrera, *Note critiche sulla cd. supersocietà e sull'estensione del fallimento in funzione repressiva dell'abuso di direzione unitaria* (*Notes on the So-Called Supersociety and the Extension of the Failure Procedures in Order to Repress the Abuse of Unitary Management*), 1 Diritto del Fallimento (Insolvency Law Review), 63 (2014); Luciano Panzani, *La disciplina della crisi di gruppo tra proposte di riforma e modelli internazionali* (*Group Crisis Discipline between Reform Proposals and International Models*), 9 Il Fallimento (Insolvency Review), 1153 (2016); Federica Pasquariello, *Italian Bankruptcy Code Moving — Toward a Reform Era*, 2 Diritto del Fallimento (Insolvency Law Review), 347 (2016).

of each company that is part of the group has always created significant inconsistencies.[6] A testament to this is the recent debate in jurisprudence about the possibility or not to configure, even without formal legal rules, a joint request to be admitted to a bankruptcy procedure on the basis of Article 160 (Italian Bankruptcy Law), endorsing the merit of a corporate group solution.[7]

Jurisprudence has often found itself struggling with the topic of procedural profiles of groups, treating a joint bankruptcy request as a series of separate procedures, with a certain connection, defined as "weak consolidation."[8] Even when lower courts tried to modify their perspective, the Court of Cassation found a joint agreement unacceptable. According to the Supreme Court (*i.e.* the Italian Court of Cassation), a different solution would spark confusion between the assets of the companies, favoring the creditors of one of these, and could not be justified, not even in the light of the theory of "compensational advantages." This has its "acid test" solely in the domain of liability of the holding company and is not extendable to the sector of economic crisis. In this sense, a confusion of the assets is opposed by the court because it is deemed damaging to all the creditors involved, whose interests are considered more important than those of the investors during bankruptcy, and would also conflict with the principles found in Article 2740 of Civil Code on debtor liability.[9]

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[6] See Scognamiglio, fn. 1; Alessandro Nigro, *Il "diritto societario della crisi": nuovi orizzonti?* (*The "Corporate Law of Crisis": New Frontiers?*), 12 Rivista delle società (Company Law Review), 1207 (2018); Oreste Cagnasso, *Il diritto societario della crisi tra passato e futuro* (*The Corporate Law of Crisis from Past to the Future*), 1 Giurisprudenza commerciale (Commercial Jurisprudence), 33 (2017); Giovanni Lo Cascio, *Il codice della crisi di impresa e dell'insolvenza: considerazioni a prima lettura* (*Code of Business Crisis and Insolvency: First-Read Considerations*), 1 Il Fallimento (Insolvency Review), 34 (2019); Alessandro Fosco Fagotto, *La rilevanza dei gruppi imprese alla luce del nuovo* CCII (*The Relevance of Corporate Groups in Light of the New CCII*), available at www.dirittobancario.it (last visited Sep. 5, 2019). The Italian statutory discipline appears to be similar to the one introduced in Spain with the *Ley Concursal*, which contemplates a joined declaration of bankruptcy and the unification of insolvency procedures without the consolidation of the assets of the single corporations.

[7] Corte di Appello di Genova, Dec. 23, 2011, 2 Il Fallimento (Insolvency Review), 358 (2012); Mario Sandulli, *Commento sub art. 160 l. fall.* (*Comments on Art. 160 in the Bankruptcy Law*), in Alessandro Nigro & Mario Sandulli, *La riforma della legge fallimentare* (The Reform of Bankruptcy Law), Giappichelli (Torino), 284 (2006).

[8] Tribunale di Roma, Jul. 25, 2012, 4 Il Fallimento (Insolvency Review), 748 (2013); Tribunale di Palermo, Jun. 4, 2014, 5 Il Fallimento (Insolvency Review), 941 (2014).

[9] See Corte di Cassazione, Oct. 13, 2015, No. 20559, 3 Giurisprudenza Italiana (Italian Iurisprudence Review), (2016), commented by Alfredo Di Majo, *Il fenomeno del concordato cd. di gruppo e il diniego espresso dalla Corte di Cassazione* (*The Phenomenon of the Group Agreement and the Negative Decision of the Court of Cassation*); Corte di Cassazione, Jul. 31, 2017, No. 19014, 11 Società (Company Review), 1386 (2017), commented by Giuseppe Fauceglia; Corte di Cassazione, Oct. 17, 2018, No. 26005, 2 Il Fallimento (Insolvency Review), 489 (2019), commented by Lorenzo Benedetti. For an overview of the rich jurisprudence, see Stefano Poli, *Il concordato di gruppo: II verifica critica degli approdi giurisprudenziali* (*The Group Agreement: Critical Review of Jurisprudence*), 1 Contratto e impresa (Contract and Company Review), 100 (2015); Marco Maugeri, *Gruppo insolvente e competenza territoriale* (*Insolvent Group and Territorial Jurisdiction*), 1 Banca borsa e titoli di credito (Bank Law Review), 22 (2018). For criticism of the theory proposed by the Italian Supreme Court, see Umberto Tombari, *Crisi di impresa e doveri di "corretta gestione societaria e imprenditoriale" della società capogruppo* (*Corporate Crisis and Duties of "Correct Corporate and Business Management" of the Parent Company*), 3 Rivista diritto commerciale (Commercial

I. AN OVERVIEW OF THE LEGAL DISCIPLINE OF GROUPS, AT NATIONAL AND EU LEVELS

A corporate group, which can assume many different forms and interests, and many different business realities with different dimensions, can be placed within the area of connections and cooperation among enterprises, articulated in different ways according to the different economic and legal contexts in which they work. However, the group distinguishes itself in such a context because of its compactness. In such a context, interests are multiplied, the concept of "monad company" cannot be considered universal, and belonging to a specific group is considered ever more a normal condition of economic reality.

At a European level, studies to harmonize legislation of member states in the sector of corporate groups go back to the 1960s. After the first draft Directive on groups in 1975, which attracted much criticism because it was too restrictive and unfavorable to the discipline of "strategies," the Ninth Directive was introduced in December 1984. This was inspired by theories on group directives, the admissibility of an influence on subsidiary companies motivated by group interest, the possibility to legitimize a compensational logic, and the recognition of group regulations and agreements.[10] In addition, the Ninth Directive was also inspired by German legislation, which was again the object of discussions (which were initially quite common and then progressively diluted even if, periodically, they resurfaced) and, yet, to this day, it has never been translated into a proposal for the European Commission. Originally, as stated in the 1985 White Book of the Commission, the drafting of a uniform legal discipline for corporate groups had assumed a preeminent position within the framework of EU policies, both with the prospect of economic and political integration and with the objective of filling gaps present in the legislation of several member states.[11]

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Law Review), 631 (2011).

[10] See the text in 12 Le Società (Company Review), 1987, 1308 ff. (with comments by Antonio Pavone La Rosa, *Osservazioni sulla proposta di Nona Direttiva sui gruppi di società* (*Observation on the Proposal of the Ninth Directive on Company Groups*), 4 Giurisprudenza commerciale (Commercial Jurisprudence), 831 (1986), and by Klaus J. Hopt, *L'armonisation de droit des groups des sociétées. La proposition d'une Directive de la Commission de la C.E.E.* (*Law Harmonization of Company Groups. The Proposal of Directive by C.E.E. Commission*), 7 Giurisprudenza Commerciale (Commercial Jurisprudence), 846 (1986). For a reconstruction of the debate by legal scholars, see Paola Balzarini, Giuseppe Carcano & Federico Mucciarelli, *I gruppi di società*: *atti del convegno internazionale di studi: Venezia* (*Company Groups: Documents from International Conference of Studies: Venice*), Giuffrè (Milan), at 16─18 (1996), and *Corporate Group Law for Europe*, 1 European Business Organization Law Review, 1 (2000), 2 Rivista delle società (Company Law Review), 341 (2001). Cf. Gustavo Minervini, *I gruppi di società nella Comunità economica europea. Problemi di diritto societario* (*Corporate Groups in CEE. Problems of the Corporate Law*), Cedam (Padua), at 22 (1975); Piergiusto Jaeger, *I gruppi fra diritto interno e prospettive comunitarie* (*Corporate Groups between Internal Law and International Perspective*), 1 Giurisprudenza commerciale (Commercial Jurisprudence), 91 (1981); La Rosa, Id. at 931; Agostino Gambino, *I gruppi in Italia alla luce del progetto di IX direttiva* (*Corporate Groups in Italy Considering the Draft of Ninth Directive*), 1 Giurisprudenza commerciale (Commercial Jurisprudence), 5 (1987); Alessandro Cerrai, *I gruppi di imprese nell'esperienza giuridica europea* (*Corporate Groups in European Judicial Experience*), 2 Rivista delle società (Company Law Review), 432 (1995).

[11] On this point, see M. Rondinelli, *Il processo di armonizzazione del diritto societario europeo* (*Harmonization Process of European Corporate Law*), in Elisabetta Pederzini, *Percorsi di diritto societario*

Also, the 1984 Project (with no successive drafts), even if inspired by a more modern conception of the phenomenon, had certain evident loopholes that presented obstacles to its common adoption. The Project was created to "manage corporate groups that had a public limited company as a subsidiary entity,"[12] with an unexplainable and inadequate limit for the evolution of economic reality. More generally, it seemed impermeable to diversification stemming from the different nature and hetero-direction of groups, where the variety of types has always depended both on the number of corporations and the relationship between the holding corporation and the companies belonging to the group.[13] These aspects influence profoundly the independence and autonomy of single corporations, the legal framework of the group, as well as its "corporate governance."[14]

The delay in the process of harmonization in the area of corporate groups inserts itself in a legal panorama that is very composite as the German system has been traditionally seen as the only one — at least in the beginning — to have a structured legal framework, and thus the only legal system that could be used as a model at a European level (a fact that triggered several objections).[15]

europeo (*Aspects of European Corporate Law*), Giappichelli (Turin), at 114 (2007); Alberto Santamaria, *Diritto commerciale europeo* (*European Commercial Law*), Giuffrè (Milan), at 228 (2008).

[12] The project centers on corporate groups in which a public company is a subsidiary, highlighting the fact that activities of direction and coordination may damage interests of minority shareholders, employees, and creditors of the latter. "[F]or this reason in the draft project of the directive the term 'public company' is used only in reference to a subsidiary, instead the word 'company' is employed with reference to all other entities — parent and subsidiaries, etc. belonging to a group." Rondinelli, Id.

[13] On the heterogeneity of corporate groups in the European system see Johannes Lübking, *Konzernrecht für Europa* (*European Corporate Groups*), Nomos (Baden-Baden), at 15, 330 (2000).

[14] Stefan Grundmann, *European Company Law: Organization, Finance and Capital Markets* (2nd edition), Intersentia (Cambridge), at 760 (2012); Klaus J. Hopt, *Corporate Governance in Europe. A Critical Review of the European Commission's Initiatives on Corporate Law and Corporate Governance*, European Corporate Governance Institute, (2015). For a recent investigation on the general characteristics of the topic of European harmonization, see Luca Enriques e Nadia Zorzi, *L'armonizzazione europea del diritto degli stati membri in materia societaria: profili generali*, *diritto societario europeo e internazionale (European Harmonization of the Right of Member States)*, in Massimo Benedettelli & Marco Lamandini, Diritto societario europeo e internazionale (*European and International Corporate Law)*, Utet (Turin), at 179 (2016).

[15] On the German model see Lydia Bittner, *Die Struktur der Unternehmensgruppe im deutschen und europäischen Recht* (*The Structure of Corporate Groups in European and German Law*), Nomos (Baden-Baden), (2009); Klaus Böhlhoff & Julius Budde, *Company Groups — The EEC Proposal for a Ninth Directive in the Light of the Legal Situation in the Federal Republic of Germany*, 1 Journal of Comparative Business and Capital Market Law, 164 (1984); Harald Halbhuber, *Neutrale Rhetorik, wertender Gehalt: Kommunikationsprobleme in der europäischen Gesellschaftsrechtsharmonisierung am Beispiel des Konzernrechts* (*Problems of Comunication in Corporate Groups Harmonization*), 2 Die Zeitschrift für Europäisches Privatrecht (The Journal of European Private Law), 236 (2002); Peter Hommelhoff, Klaus J. Hopt & Marcus Lutter, *Konzernrecht und Kapitalmarktrecht* (*Corporate and Market Law*), Beck (Munich), (2001); Klaus J. Hopt , *Konzernrecht: Die europäische Perspektive* (*Corporate Groups: European Perspective*), 1 Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht (*Journal of commercial and business law*) 1 (2007); Klaus J. Hopt, *L'harmonisation de droit des group des sociétés. La proposition d'une Directive de la Commission de la C.E.E.* (*Harmonization of the Corporate Law. The Proposal of CEE*

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In this sense, a weak point in the legal discipline of the legislation of the majority of member states is the circumstance that companies belonging to a group see different rules applied to them, according to whether they are companies with shares listed on the stock market or not, or, in any case, according to their legal type and not their belonging to a corporate group, or even in the application of the general discipline on corporations without any exceptions (except for those stemming from the harmonization of specific sectors).[16]

Conversely, it is necessary to structure a discipline whose objective is the protection of interests that are specifically pertinent to this type of corporate business in a way that is independent from the legal structure considered, which focuses on the protection of shareholders and creditors and the efficient allocation of decision-making power to different boards in companies which are part of the group (in relation to directive power and the identification of interests that must be pursued).

From this point of view, it is suitable to highlight how the French legal thought has underestimated the depth of the Italian legal model after the 2005 reform; it is, in fact, considered "a regime on liability in group relationships, more specifically on the question of to what extent coordination may take place without subjecting the holding company to a duty to compensate."[17] A few sectorial gaps must be signaled,[18] as highlighted by the Commission of three sectors "requiring special dispositions" (financial and non-financial information; the initiation of a group discipline; and company pyramid schemes — a peculiar European phenomenon) [19] and the Action Plan of 2003, which shows corporate

Directive), 4 Giurisprudenza commerciale (Commercial Jurisprudence), 846 (1986); Hans-Jurgen Hellwig, *Das deutsche Gesellschaftsrecht und Europa – Ein Appell zu mehr Offenheit und Engagement* (*German and European Corporate Groups*), 2 Zeitschrift der Germanisten Rumäniens (*Journal of Gemanist in Romania*), 216 (2013).

[16] After the Ninth Directive Proposal, statutes on corporate groups have been enacted in Portugal, Slovenia, and Croatia; see Grundmann, fn. 14 at 757. Also a specific discipline on corporate groups has been introduced in the Czech Republic (Arts. 71 et al. Law on Companies), see Katerina Eichlerova, *Group Interest in Czech Republic*, 5 Acta Universitatis Sapientiae, Legal Studies, 13 (2016), and also in Arts. 3–49 of the Hungarian Civil Code, see Tekla Papp & Adam Auer, *Group Interest in Hungary*, 5 Acta Universitatis Sapientiae, Legal Studies, 27–46 (2016).

[17] See Grundmann, fn. 14 at 757 ("Though Codified, Resembles more to the Trend in the Case Law in France (the so-called Rozenblum doctrine).").

[18] We are referring to European Legislation No. 435/1990 (modified by European Legislation 123/2003 and 1998/2006) regarding the tax regime applicable to both parent and subsidiary corporations of different member states; to which applies also the Seventh European Legislation on "consolidated accounts," approved in 1983, then modified and replaced by European Legislation No. 34/2003, on Jun. 26, 2013, as well as the regulation of corporate operations with connected parties or extraordinary operations, see Grundmann, fn. 14 at 765.

[19] Corporate pyramids are defined as a chain of corporate participation in which final control is ensured through a minimum capital investment, thanks to minority shareholders. These raise numerous problems of transparency, especially with regard to public companies. It has thus been recommended that national authorities do not admit to the stock exchange corporations belonging to "illegal pyramid structures," *i.e.* those companies whose main assets are a stock in another public company, with the exception of cases in which the economic value of the participation has been clearly proven, taking into consideration floating capital as well; see Paolo Montalenti, *Sociedades cotizadas, mercados financieros y relaziones con los*

groups and pyramid structures among areas in need of intervention, without taking into account if, in the meantime, the necessary political conditions for the different projects had been approved.

In the last decade, the European debate has been characterized by the absence of a strong cultural paradigm that can be used as a reference point, as support for the German model waned and no model was thereafter proposed as an alternative. However, it is emblematic that the subsequent Action Plan of 2012 (*European company law and corporate governance — a modern legal framework for more engaged shareholders and sustainable companies*), in which the initiatives that must be adopted are set forth in order to modernize company law and corporate governance, contains important guidelines for corporate groups.[20]

If there is lingering caution about the idea of introducing a uniform discipline on corporate groups, we can emphasize the need to guarantee more information on group structure and develop the notion of "group interest." Finally, there is also the need to improve transparency and the supervision of operations performed by connected parties within the framework of the reform of the directive on shareholder rights.

These are still generic indications, taken in part from the Green Paper of 2011, which identifies its objective as the need to "maintain and enhance the flexibility of management of a group in its international business activities."[21] The main aims of the Action Plan are, in fact, the pursuit of group politics to enhance group interest as well as to increase transparency and information requirements. These are the aims — as has been noted — partially underlying the Italian legislation; these same aims, at a European level, are not declared in a specific way. In fact, a characteristic of this historical period is the absence of strong models or ideas in the European debate on corporate groups.[22]

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inversores (*Listed Companies, Financial Markets and Relationships with Investors*), 1 Rivista delle società (Company Law Review), 28 (2015); Klaus J. Hopt, *Groups of Companies. A Comparative Study on Economics, Law and Regulation of Corporate Groups*, 1 European Corporate Governance Institute, 11 (2015).

[20] Action Plan 2012, Rivista di Diritto delle Società (Corporate Law Review), 228 (2013). Cf. Piergaetano Marchetti, *Il nuovo Action Plan europeo in materia societaria e di corporate governance* (*The New European Action Plan in Corporate Law and Corporate Governance*), 1 Rivista delle società (Company Law Review), 225 (2013); S. Alvaro & Bruno Lupini, *Le linee di azione della Commissione Europea in materia di corporate governance e i riflessi sull'ordinamento italiano* (*Guide Lines of the European Commission in Corporate Governance and Its Influence in the Italian System*), Quaderni Giuridici Consob (Law Editions Consob), Mondadori (Roma), (2013).

[21] Cf. *Report of the Reflection Group on the future of EU Company Law*, 8 Rivista di Diritto delle società (Corporate Law Review), 751 (2011); Francesco Chiappetta & Umberto Tombari, "*Report on the future of EU Company Law": una breve introduzione* ("*Report on the future of EU Company Law": A Brief Overview*), 8 Rivista di Diritto delle società (Corporate Law Review), 746 (2013).

[22] Cf. Umberto Tombari, *Il "diritto dei gruppi": primi bilanci e prospettive per il legislatore comunitario* (*"The Law of Groups": First Considerations and Perspectives for European Legislator*), in Vv. AA., *Il diritto societario riformato: bilancio di un decennio e prospettive in un quadro europeo* (*The Reformed Corporate*

There was hope that the EU Parliament Resolution of 14 June 2012, on the future of company law, in its indication of the Ninth Directive as one of the short-term objectives, could have been a partial inversion of this trend, but it was not so.[23] Of interest in this alternating context (as investigated in published reports on information flows of group interest and liability) is the recent European Model Company Act (EMCA), which was presented as a project in September 2015 at the annual conference on company law in Vienna and published in its current version in March 2017. This Act, as mentioned in the introduction, is a "free standing general company statute that can be enacted by Member States or neighboring countries either substantially in its entirety or by the adoption of selected provisions," with the ambitious aim of becoming the basis for a subsequent European harmonization. In this important document, the results of the work of important scholars in the field of company law of various countries, an entire chapter (Chapter 15) is dedicated to corporate groups.[24]

Without going into detail, it is emblematic that the law on corporate groups by the EMCA is inspired by views in part different and revolutionary when compared to both the EU approach and the Italian national approach. The declared objective of the model is not in fact centered on the protection of subsidiary companies and their minority shareholders and creditors but on the identification of rules that can bolster the organization and the functioning of this type of corporate organization.

The independence of this approach emerges from its definitions — where a "group" is defined as "the entity comprising the parent company and all its national or foreign subsidiaries or entities," where a "subsidiary" is "a company subject to a direct or indirect control, that can be partial or complete, by the parent company," and where "control" is

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Law: Considerations of a Decade and Prospects in the European Context), Atti del Convegno di Courmayeur (Courmayeur Convention), Giuffrè (Milan), at 114 (2014), where it was concluded that: "essentially, reading the few lines dedicated to corporate groups in the 2012 Action Plan, the strong impression surfaces that they have wished to buy time in order to find technical solutions, before political ones, that can be shared."

[23] Cf. Marchetti, fn. 20 at 227. See Para. 4.6: "The public consultation of 2012 has revealed that the general public is in favour of an EU initiative on corporate groups (feedback document of Jul. 17, 2012). Two key points have been identified based on the report of the think tank; the parties are in favour of a simplified form of communication with investors on group structure and the recognition of a group interest at an EU level. On the other hand, the idea of a global European framework on corporate groups has been greeted with caution."

[24] Marco Ventoruzzo, *The New European Model Company Act*, available at http://corpgov.law.harward.edu/2015/10/14 (last visited Sep. 7, 2019); Paul Kruger Andersen, *The European Model Company Act (EMCA) — A Tool for European Integration*, 1 ERA Forum, (2018); Alessio Bartolacelli, *Il progetto per un European Model Company Act* (*The Project of a European Model Company Act*), in Massimo Benedettelli & Marco Lamandini, *Diritto societario europeo e internazionale* (*The European and International Corporate Law*), Utet (Turin), at 689 (2016); Coutinho De Abreu, *The Law of Groups of Companies according to the European Model Company Act*, 1 Orizzonti del diritto commerciale (Horizons of Commercial Law), 1 (2017). On EMCA group and EMCA project, available at http://law.au.dk/en/research/projects/european-model-company-act-emca (last visited Jun. 19, 2019).

defined as the power of the parent company to "govern, alone or with other shareholders, the financial and operating policies of a subsidiary" — and within a framework similar in this respect to the Italian legal system that emphasizes a unitary governance, achievable not just with participation mechanisms but also with contractual and factual ones, and that is simultaneously more aware of the economic reality, recognizing the group as "an entity," while maintaining the independence of the subsidiary companies.

However, the peculiarity of the EMCA model's perspective emerges very strongly where it gives the parent company the right to impart instructions to the managers of the subsidiary corporation, without envisaging, as a counter limit, a specific form of liability. As can be read in the accompanying report to the model, the preferred approach has been that of considering corporate groups and managerial activities of the parent companies as "a reality which has not to be formally legalized or declared."[25]

Even though it does not contemplate a special regulation of the parent corporation's liability with regard to the overall management and direction of a group, this model identifies a set of mechanisms that aim to protect the subsidiary corporations, their minority shareholders and creditors.[26] Taking into consideration such an innovative approach that is projected towards the needs of the companies, it is surprising that this model appears oriented only towards public limited companies, underestimating the variety and multifaceted nature of corporate groups.

II. THE "ITALIAN MODEL" BETWEEN A GENERAL LEGAL DISCIPLINE OF CORPORATE GROUPS AND SPECIAL REGULATION FOR CRISES

A. Configuration of the "Group"

As mentioned above, at a European level, the multitude of definitions of what a corporate group is and the absence of coherence are a starting problem common to many legal systems. As a matter of fact, "there may indeed be differences only if different aims are pursued, but differences in definition really have to be justified by differences of

[25] The power to issue directives to the executive officers of a subsidiary encounters two limits: First, certain members of the board of directors of subsidiaries are exempt from the obligation of fulfilling the instructions imparted (the independent executives and those appointed by employees or those not appointed by the parent company); second, executive officers of the subsidiary are compelled to fulfill instructions given by the parent company only if they are in compliance with group interest (Section 16, while not describing what group interest is, illustrates in detail criteria for the prevailing of group interest over that of the single corporation).

[26] As can be read in Section 13, it is provided that the so-called "corporate opportunities" of the subsidiary must obtain the approval of independent managers or of the *non-controlling shareholders*; that the shareholders of a subsidiary have power to request inspections of the parent company with regard to the subsidiary; and finally, that a right of *sell-out* is recognized in favor of minority shareholders in those subsidiary corporations that are for 90% in the hands of the parent corporation.

scope/interests; otherwise, the definition should be uniform."[27]

In disdain of its increasing economic importance, also the Italian legislator has always avoided giving a legal definition of what a corporate group is, to tell us when one can be considered existent, showing itself not very forward-thinking in taking into consideration this phenomenon and its implications. The Italian Civil Code of 1942, in fact, ignored it, being worried exclusively about the legal regulation of pathological aspects of corporate control by single shareholders, which is the aspect that is normally considered the thread from which a corporate group comes into being and is an indicator of its existence. The fact stems from the purchase of stock of the subsidiary by the holding company. Even in subsequent decades, the delicate issues brought forth by the topic of corporate control, groups and unitary management were only dealt with occasionally and with specific sectorial requests (as in the new "Crisis Code"). Thus, all these legal provisions have sparingly — and in certain instances, only at a very embryonic level — dedicated themselves to the topic.[28]

After the reform of company law in 2003, the introduction of Articles 2497 to 2497-*septies* of the Civil Code was seen as the general recognition of the corporate group phenomenon that has slowly made its way through the Italian legal system, both at the levels of court decisions and statutory law (even if only in specific sectors). These statutory instruments regulate, even if not organically, the main topics connected to the phenomenon: advertising transparency, information commitments, corporate or holding liability, protection of minority shareholders and creditors, financing means of a corporation, and withdrawal right of an external shareholder.

From another perspective, we must highlight that in the Italian system we can find varying rules in different sources, regarding specific sectors of the group phenomenon, without ever offering a unified definition. Now a significant doctrinal effort has been made to place order in the fragmented discipline of group organizations, whose rules can be found in the Civil Code or specific statutes.[29] From this, we can see a varied panorama of rules to

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[27] See Grundmann, fn. 14 at 768.

[28] We must think of Law No. 216/1974 on special administration of large companies going through economic crisis (Law No. 95/79; Law No. 270/99); of legal regulation on company group formation (Law No. 287/93), of banking groups (TUB) and company groups in the area of financial services (TUF) and insurance groups (Law No. 174/95; Law No. 175/95; European Law No. 78/1998; Law No. 343/99; Law No. 239/2001); and also of legal regulation of consolidated balance sheets (Law No. 127/1991). See Luigi Arturo Bianchi, *Problemi in materia di disciplina dell'attività di direzione e coordinamento* (*Problems of the Discipline Concerning Direction and Coordination Activities*), Rivista delle società (Company Law Review), 320 (2013); Nicoletta Michieli, *La nuova direzione e coordinamento del gruppo bancario di credito cooperativo alla luce della legge n. 49/2016* (*The New Direction of Cooperative Credit Banking Group in the Light of law No. 49/2016*), 2 Giurisprudenza commerciale (Commercial Jurisprudence), 453 (2018); Scognamiglio, fn. 1.

[29] Umberto Tombari, *Diritto dei gruppi di imprese* (*Corporate Groups Law*), Giuffrè (Milan), (2010); Agostino Gambino, *Su taluni problemi in tema di gruppi* (*Some Problems about Corporate Groups*), 1 Giurisprudenza commerciale (Commercial Jurisprudence), 5 (2012); Fabrizio Guerrera, *I regolamenti di*

which there are different approaches according to the type of corporation considered: private limited companies or public companies, which make active use of the stock market, or intermediaries, such as banks and financial institutions. The membership to a group means the application of a series of norms, stemming from different sources, but all characterized by the pursuit of common objectives that together form a "trans-typical" legal regulation of groups in the Italian system, with respect to which there is a need to harmonize.

The Italian model, unlike other legislative models, is characterized by a trans-typical approach, allowing it to extend privileges provided for in Article 2497 of the Civil Code to all companies in a group.[30]

A condition for applying the discipline contained in the Code to corporate groups is the existence of an "activity of direction and coordination," whose existence is presumed (unless proven otherwise) when we can identify one of the conditions of Article 2497-*sexies* — that is the conditions for consolidated balance sheets or one of the requirements set by Article 2359 of the Civil Code[31] or Article 2497-*septies* of the Civil Code — that is the presence of a contract or clauses inserted in the bylaws that provide for a supremacy of one corporation on the others of the same group. With the recent reform, the defining characteristic of the "group" possesses a "unitary direction," consisting in an activity of management of the administrative decisions of the company. Such a characteristic is broader than the one of control, which encompasses the power to elect executive officers, organizational powers and the power to make decisions on the financing of the company.[32]

From Article 2497-*sexies* we can deduce that the existence of a power of control can

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gruppo (*Regulations on Corporate Groups*), 9 Le Società (Company Review), 1559 (2014).

[30] Giuseppe Portale, *Diritto societario tedesco e diritto societario italiano in dialogo* (*Dialogue between German and Italian Corporate Law*), 3 Banca Borsa Titoli di Credito (Bank Review), 597 (2018); Tombari, fn. 22 at 108.

[31] As is known, according to Art. 2359 of the Civil Code, we can consider subsidiary corporations as the following: a) companies in which another body corporate holds stock thanks to which it holds the majority of voting rights in the assembly, taking into consideration also votes in the subsidiary, fiduciary corporations or third parties (so-called *de jure* internal control); b) companies in which another holds stock, thanks to which it holds voting rights that are sufficient to exercise a dominating influence, on the body or the assembly, with regard to votes in subsidiary, fiduciary corporations or third parties (called *de facto* internal control); c) companies on which another exercises a dominant influence due to particular contractual rights (so-called "external or contractual control"). These are contracts (supply of goods; distribution; and franchising — often characterized by the presence of exclusive rights agreements) capable of determining the economic subjection of one company to another, independently of the purchase of stock.

[32] Paolo Montalenti, *Direzione e coordinamento nei gruppi societari: principi e problemi* (*Direction and Coordination in Corporate Groups: Principles and Problems*), 1 Rivista delle società (Company Law Review), 319 (2007); Paolo Montalenti, *Società per azioni, corporate governance e mercati finanziari* (*Public Company, Corporate Governance and Financial Markets*), Giuffrè (Milan), at 221 (2011); Bianchi, fn. 28 at 420. In jurisprudence see the latest Cassazione, Mar. 6, 2018, No. 31997, *CED Cassazione 2018*.

only allow a person to presume a unitary direction; however, such a direction can only be proved by the existence of other elements from which an observer can deduce a permanent and systematic activity of direction in the administrative decisions of a subsidiary company. To sum it up, we must verify whether strategic decisions in key sectors of activities of a corporation are in the hands of a holding, with more or less formal methods (*e.g.* deliberations or contracts among the corporations, coordination committees, directional acts service orders, instructions, rules of behavior, or even just directive communications between bodies of the holding company and the subsidiaries).[33]

The recent reform of the "Crisis Code" does not offer an *ad hoc* definition of corporate group and historically, economic crises for companies have been governed by statutes different from the civil code. In fact, in Article 2, comma 1, h) of the CCII, the corporate group is defined as "the set of companies, of body corporates and entities, different from the State, which, on the basis of Articles 2497 and 2545-*septies* of the Civil Code, are placed under the direction and coordination of a company, entity or physical person, on the basis of a participation bond or a contract; to this effect it is presumed, unless proven otherwise, that: 1) the activity of direction and coordination of a company is exercised by a company or entity which has to present a consolidated financial statement for all the corporations; 2) are under the direction and coordination of a company or entity all those subsidiary companies controlled directly or indirectly or placed under joint control, with respect to the company or entity which actually exercises activity of direction and coordination." This shows the will of the legislators to employ the notion of corporate group contained in the Italian Civil Code (especially in Articles 2497, 2545-*septies*, and 2359).

This link between the Crises Code and the traditional structure is evident and not exempt from criticism.[34] For instance, the reference, as it is worded, is confusing. On the one hand, it seems to refer only to subsidiary companies, as if the agent exercising the control and coordination (a corporation, entity, or physical person) was external to the case; an interpretation that is not plausible (and contradicted by the regulation of the procedure, in which the holding has a main role) and contrary to the rationale of the norms. However, in Article 2, f) of the CCII, which defines "corporate groups of relevant dimensions," the legislators have also mentioned the holding company: "Groups of corporations consisting

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[33] Cf. Stefania Giovannini, *La responsabilità per attività di direzione e coordinamento nei gruppi di società* (*The Responsability for Direction and Coordination in Corporate Groups*), Giuffrè (Milan), at 90 (2007); Andrea Niutta, *Sulla presunzione di esercizio dell'attività di direzione e coordinamento di cui agli artt. 2497 sexies e septies: brevi considerazioni di sistema* (*Presumption of Exercise of Management and Coordination Activities at Art. 2497 sexies and septies, Brief Considerations on the System*), 5 Giurisprudenza commerciale (Commercial Jurisprudence), 983 (2004). On this point, before the reform, see Rossi, *Gruppi e governo societario* (*Corporate Groups and Corporate Governance*), in I gruppi di società (Corporate Groups) Atti del Convegno internazionale di studi di Venezia (International Convention Venice), Nov. 16─18, 1995, Milan, at 20 (1996).

[34] See Scognamiglio, fn. 1.

of a holding and subsidiary corporations that must be included in a consolidated financial statement, that adhere to the numerical limits of Article 3, Paragraphs 6 and 7, of Directive No. 34/2013 of the European Parliament and of the Council of 26 June 2013."

On the other hand, although the legislator intends to prevent the government from undertaking any activity of direction and coordination — even over companies in which it holds shares — by not considering the government a body corporate subject to the direction and coordination of a holding company and prohibiting it from undergoing bankruptcy procedures, the Code does not make the government's exclusion clear.

Although the first jurists to interpret the regulations concluded that the legislator was maintaining the same direction of the 2003 reform, the recent reform has initiated some progressive shifts forward. First, the CCII is characterized by an inclusive approach, in the sense that it clarifies that the subject holding the direction and coordination activity can be both a company and an entity, and an individual, while Article 2497 ss. have been inapplicable to individuals.[35] Second, the approach put forward by the CCII seems more oriented towards an enhancing of the unity of the corporate group. This is most evident in restructuring procedures, aimed at salvaging a company and continuing its activity. In these cases, considerations regarding the economic, financial, and organizational connections among members of the group are considered prevalent in regard to the net worth of single corporations, even if shared foreclosure procedures and precautionary agreements save the general principle of autonomy of corporate assets.

Particularly significant is the approval of the group's foreclosure agreement (Articles 284–286 of the CCII) that offers a solution to the divergent interpretations of courts, which ended with the negative opinion of the Italian Court of Cassation in 2015. The legislative decree that reformed this sector has introduced an important novelty, consisting in the valid presentation of one petition by the whole group, requesting admission to the foreclosure procedure (by foreclosure we mean an "arrangement with creditors").

Article 284, comma 1 of the CCII establishes that "a multitude of corporations in economic crisis or insolvency, belonging to the same group and all having their main centre of business in Italy, may propose a plea to access a precautionary foreclosure agreement on

[35] In jurisprudence, see Cassazione, Mar. 6, 2017, No. 5520; Trib. Milano, Feb. 4, 2016, 3 Fallimento (Insolvency Review), 745 (2016); Cassazione, Nov. 18, 2010, No. 23344, *CED Cassazione*, (2010); Cassazione, Mar. 13, 2003, No. 3724, 3 Giurisprudenza Italiana (Italian Jurisprudence Review), 562 (2004). In doctrine, see Roberto Weigmann, *Nota sulla configurabilità di una holding di tipo personale* (*Note on the Configurability of a Personal Holding Company*), 1 Giurisprudenza Italiana (Italian Jurisprudence Review), 3 (2004); Marina Spiotta, *Concessione abusiva di credito. Fidarsi è bene, ma non fidarsi è meglio: osservazioni sulla concessione abusiva di credito* (*Abusive Credit Granting. Trust Is Good, But Not Trusting Is Better: Considerations of the Abusive Granting Credit*), 2 Giurisprudenza Italiana (Italian Jurisprudence Review), 480 (2018); Edoardo Morino, *La responsabilità della holding persona fisica: fisiologia o patologia?* (*Holding Individuals Liability: Physiology or Pathology?*), 2 Giurisprudenza Italiana (Italian Jurisprudence Review), 403 (2015).

the basis of Article 40, with a joint plan or a series of connected and interfering plans." However, the possibility of using only one foreclosure procedure for the whole group is dependent on the proof of the existence of "reasons of convenience, for a better satisfaction of the creditors and single corporations, in the choice to present a single foreclosure plan or a plurality of plans that are connected and interfering, instead of individual foreclosure procedures, one for each corporation."[36]

Group unity considerations are instead of less importance in the case of court liquidation (which will substitute the current foreclosure procedure of bankruptcy) in which the profile of "group unity" resides solely in the "means of coordinating active assets."[37] According to Article 287 of the CCII, more than one companies in a state of insolvency, part of the same group and all having their main center of business in the Italian State, can request that they follow the same court procedure and are heard by the same judge. This can happen, however, only "when a coordination between severance plans is opportune, with the aim of better satisfying customers of the corporations within the group," without bringing into question the independence of active and passive assets.

From this point of view, the court must take into consideration economic and productive ties between companies, the consistence of the capital of the different companies, and the presence of the same executive officers. Another aspect must be noted, from which the unitary character of the procedure emerges: the liquidation procedure. Article 292 of the CCII introduces a partial modification of the order of payments by the insolvency administrator: credits stemming from "downstream" and "upstream" financing of companies within the group[38] and stipulated at a later date (or during the year before) than the presentation of the plea for judicial liquidation, are deferred with respect to the distribution of current assets.[39]

Finally, it is worth highlighting the flexible nature of the new legal regulation as it does not contemplate the filing of a unique plea for all the corporations within the group as the

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[36] This procedure is regulated by Art. 286 of the CCII, which states that if "the different companies belonging to the group have their main centre of interest in different jurisdictions, the court competent for the hearing is the one identified by Art. 27, with regards to the centre of interests of the company, entity or physical person that exercises direction and control (on the basis of the information published according to Art. 2497-*bis* of the Civil Code) or, in the absence of this, of the company with the largest outstanding debt on the basis of the last financial report approved." In case of acceptance, the procedure is the same for all the companies, with one judge and one judicial commissioner for all companies of the group, only one fund and division of costs proportional of active assets of each corporation.

[37] See Scognamiglio, fn. 1 at 423.

[38] The legal rule has an area of application that is wider than that of Art. 2497-*quinquies* of the Civil Code, which only talks about credits stemming from loans descending from the holding corporation to other companies of the group.

[39] The legal rule raises delicate problems of coordination with the legal rule contained in Art. 2497-*quinquies* of the Civil Code, which is centered on the analysis of whether the loan made was reasonable and makes no reference to Art. 292 or to Art. 221 of the CCII.

sole remedy but allows the filing of independent pleas by the holding company and one or more of the subsidiaries. In the latter case, the procedure will follow its ordinary course; however, the existence of group connections with other enterprises will determine the application of information duties on the basis of Article 289 of the CCII[40] as well as duties to cooperate as set forth in Article 288 of the CCII[41] when a plea is filed by one corporation and another plea by other members of the group is simultaneously accepted (thus creating a multitude of procedures).

B. Transparency and Disclosure Obligations within Corporate Groups

Among the most important innovations introduced by the recent CCII regarding corporate groups (connected to the general principles of Article 2497 of the Civil Code) are the information duties imposed on a corporation that is a part of a group. The fulfillment of these information duties is a prerequisite for entering a crisis or insolvency procedure. Non-compliance with these duties makes the plea filed before a court inadmissible. Specifically, Article 289 of the CCII establishes that "the plea filed in order to access a procedure to regulate a crisis or a situation of insolvency, presented by a corporation belonging to a group, must contain analytical information on the group's structure and the participation or contractual restrictions existing among the companies and specify the company registration list or lists in which information duties have been carried out under Article 2497-*bis* of the Civil Code. The corporation must also deposit the group financial statement, where it has been compiled."

The statutory provision is strictly connected to the power, given to the directive body of the procedure (both in the foreclosure agreement and in the judicial liquidation procedure), to obtain information from offices of distinct and parallel foreclosure procedures pertaining to corporations of the same group (Article 288 of the CCII), in a spirit of cooperation to handle the crisis efficiently. It must be noted that similar forms of cooperation already exist

[40] Art. 284 CCII prescribes that: 1) the plea must contain detailed information on group structure and on participation or contract restrictions existing between companies and also the company registration list or lists in which the appropriate legal information can be found (in compliance with Art. 2497-*bis* of the Civil Code); 2) The consolidated financial report of the group, if written, must be attached to the plea along with appropriate documentation, with regard to the agreement of composition with creditors or restructuring agreements; 3) the unique plan or connected plans, addressed to creditors (*ex* Art. 56, co. 2), must be capable of fixing the outstanding debt of each corporation and allow the composure of the financial situation of each one. An independent professional figure will attest the veracity of company data and the feasibility of the plan or plans. On request of the debtor companies, such plans will be published in the registration lists indicated in Art. 2497-*bis* of the Civil Code.

[41] If companies in the group have their center of business in different jurisdictions, the competent court is the one in which the first plea was deposited. If the pleas for liquidation procedure were all present at the same time, the court that is competent for the hearing is the one identified on the basis of Art. 27, in regard to main business center of the corporation that exercises direction and coordination, or in the absence of such an entity, of the corporation with the highest outstanding debt on the basis of the last financial report.

in the area of insolvency management in cross-border situations via the stipulation of protocols between insolvency procedures (EU Regulation No. 848/2015).

Such a need to ensure a flow of information that is useful to reconstructing connections within a group helps explains why Article 289 of the CCII provides that "the court or the insolvency administrator or the judicial commissioner may, in order to ascertain the existence of group connections, request [from] the Italian Commission for Companies and the Stock Exchange [*i.e.* the Italian equivalent to the American SEC] or any other Public Authority and trust companies, information on shareholders and stock assigned to them[.]" Replies to such requests must be received within 15 days of the request. Finally, more transparency on the structure and the organization of the corporate group is indispensable to the ability of the insolvency administrator to exercise the powers invested in him/her by Articles 290 and 291 of the CCII.

The ample space dedicated in the new regulations to information duties is the latest testimony of the central position of transparency in corporate matters, both at European and national level.[42] At the national level exists the Action Plan 2012, which has among its main objectives "the improvement of available information on corporate groups" and at the European level exists the EU Directive on the Rights of Shareholders,[43] which emerges strongly in Article 2497-*bis* of the Civil Code, both in the pursuit of transparency of group structures and the disclosure of the main acts and facts regarding it. These efforts allow the public to know and evaluate the level of risk in an investment or commitment, and are important both from an internal and an external point of view.[44]

The first pursuit of transparency of group structure consists of the strengthening of the position of the subsidiary company, the minority shareholders, and the creditors, all of whom come into contact with the corporation and must be placed in the condition to make an informed decision about entering or remaining in the group, or whether or not to initiate dealings with corporations belonging to it.[45] The second effort of disclosure of the main

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[42] Cf. Grundmann, fn. 14 at 778; Marco Maugeri, *Gruppi di società e informazioni privilegiate* (*Corporate Groups and Inside Informations*), 4 Giurisprudenza commerciale (Commercial Jurisprudence), 907 (2017).

[43] Paolo Montalenti, *L'informazione e il diritto commerciale: principi e problemi* (*Information and Commercial Law: Principles and Problems*), 4 Rivista di diritto civile (Civil Law Review), 780 (2015); Marchetti, fn. 20.

[44] Cf. Tombari, fn. 29; Paolo Montalenti, *Società per azioni, corporate governance e mercati finanziari* (*Public Company, Corporate Governance and Financial Markets*), Giuffrè (Milan), at 255 (2011).

[45] Paolo Montalenti, *Gruppi e conflitto di interessi nella riforma del diritto societario* (*Corporate Groups and Conflict of Interests in the Corporate Law Reform*), 3 Giurisprudenza commerciale (Commercial Jurisprudence), 628 (2002). In the same direction, see Umberto Tombari, *I gruppi di società*, in Oreste Cagnasso & Luciano Panzani, *Le nuove s.p.a.* (*Corporate Groups, New Public Companies*), Zanichelli (Bologna), at 1743 (2010); Alberto Jorio, *I gruppi* (*Corporate Groups*), in Stefano Ambrosini, *La riforma delle società. Profili della nuova disciplina* (*The Company Reform. Aspects of New Discipline*), Giappichelli (Turin), at 198 (2003); Francesco Galgano, *Il nuovo diritto societario* (*New Corporate Law*), in Francesco Galgano, *Trattato di diritto commerciale e di diritto pubblico dell'economia* (*Commercial law and public*

acts and facts is expressed by Article 2497-*bis* of the Civil Code, which contemplates some very articulated formalities that range from publicity duties in specific sections of the company register on the belonging to a group, in corporate acts, and correspondence (according to Article 2199 of the Civil Code), to transparency in the note to the financial statement and the report on the statement itself. This information concerns the relationship between subsidiaries and holding corporations.

Publicity in the company register, if nothing is specified otherwise, serves merely to certify the company's existence to third parties, allowing the latter to understand the fact that a company is under the direction of another, where such influence has a significant effect on the policies and outlooks of a company, without being opposable to them until it is proved that they effectively were aware of this fact. Not by chance, the start and the end of the activity of direction and coordination constitute one of the three hypotheses in which a shareholder may withdraw, according to Article 2497-*quarter* of the Civil Code, as they concern an alteration of the level of risk of their investment and allow a certain flexibility in the management, without permitting any marauding techniques.

The importance of information duties emerges even more evidently during the implementation of the group activity, embracing all its life and action, and acquiring a particular importance in the evaluation of the executive officers and their hypothetical liability.[46] The central role of transparency and the enhancement of information in group contexts emerge from numerous indications of the Italian Stock Market Autoregulation Code in its most recent version from July 2018.[47] The Code is in line with EU Recommendation No. 208/2016 and Regulation No. 22/2016[48] enacted by the Italian

economic law), XXIX, Cedam (Padua), at 191 (2003).

[46] We can refer to the obligation to state in a specific voice of the report a summary of the main specification of the parent company and its last financial report *ex* Art. 2497-*bis*, co. 4, or the obligation under Art. 2497-*bis*, co. 5, to draft a report on the interactions with the person/company exercising direction and coordination and other companies that are in a similar situation, as well as the effects of such power on the administering and performance of the company. Another obligation is present in Art. 2497-*ter* of the Civil Code, which establishes that the decisions that the subsidiary companies make must be well justified, indicating the reasons and interest that led to the adoption of the decision. Also, the executives of the corporation must indicate sufficiently these points in their final report to make the evaluation of group policies and coordination activity easier.

[47] The Code was approved by the Committee for corporate governance in March 2006 and was last modified in March 2010. The latest version of July 2018. See Simone Alvaro, Paolo Ciccaglioni, e Giovanni Siciliano, *L'autodisciplina in materia di corporate governance. Un'analisi dell'esperienza italiana* (*The Self-Discipline in Corporate Governance. An Analysis of the Italian Experience*), Consob Edition, Mondadori (Rome), (2013).

[48] For a general overview see Giovanni Strampelli, *L'informazione societaria a quindici anni dal TUF: profili evolutivi e problemi* (*Corporate Information of Fifteen Years from TUF: Aspects of Evolution and Problems*), 7 Rivista delle Società (Company Law Review), 991 (2014); Paolo Montalenti, *L'informazione nei gruppi societari, Le società per azioni oggi. Tradizione, attualità e prospettive* (*Corporate Information, Italian Public Company, Tradition, Today and Prospectives*), 2 Rivista delle società (Company Law Review), 312 (2007); Paolo Montalenti, *Corporate governance, sistema dei controlli interni e ruolo della Consob: da garante della trasparenza a presidio della correttezza della gestione* (*Corporate Governance, Internal*

Authority for Vigilance of Insurance companies (*i.e.* Institute for Insurance Supervision). These favor the iteration of control mechanisms on different corporations via informative and consulting procedures. Despite this, the organizational structure of checks falls within the right of self-organization of the company based on the type of the activity and the dimension and structure of the group (also taking into account the legal context in which it operates).[49]

C. Group Interest and "Compensational Advantage Theory"

In addition to being very complex and articulated, the debate on group interest is a source of delays in the evolution of the proposed directive for the harmonization of legislation in this sector. At the EU level, two different models have clashed: the German model and the French model, the latter closer to Italian legislation, which is, in its own, an interesting evolution.

In the German model, the possible disadvantages suffered by a subsidiary are legitimized only if the losses are compensated at the end of the financial year in which a specific operation was conducted. Otherwise such a management decision is invalid and triggers the duty to pay damages. The German model was adopted in the 1984 Proposal of European Legislation and translates into a very rigid "case by case" approach, which aims to prevent any harm to subsidiary corporations that cannot be met by some forms of compensation.

The codification of the "business judgment rule" is centered on the company's interest. This depletes the group's interest and, therefore, the executive officers of the subsidiary corporation cannot rely on this rule to mitigate their liability.[50] In contrast, the French courts proposed a solution in the 1980s that was inspired by the "Rozenblum Doctrine,"[51]

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Control System and the Role of Consob: As Guarantor of Transparency to Safeguard the Correctness of Management), 1 Rivista delle società (Company Law Review), 120 (2015); Giuliana Scognamiglio, *Recenti tendenze in tema di assetti organizzativi degli intermediari finanziari (e non solo)* (*Recent Trends in the Organization of Financial Intermediaries (and Others)*), 1 Banca borsa e titoli di credito (Bank Law Review), 137 (2010).

[49] See Montalenti, fn. 48.

[50] Christoph Teichmann, *Europäisches Konzernrecht: Vom Schutzrecht zum Enabling Law* (*European Group Law: From Intellectual Property to Enabling Law*), 58 Die Aktiengesellschaft (*Stock Corporation Act*), 191 (2013); Tombari, fn. 22 at 107; Francesco Chiappetta & Umberto Tombari, *Perspectives on Group Corporate Governance and European Company Law*, 1 European Compenu and Financial Law Review, 261 (2012); Hopt, fn. 14 at 15.

[51] So called because of the decision by the penal chamber of the French Court of Cassation that first enunciated the principle. The framework linked to the principle of compensational advantages expressed by the "Rozenblum Doctrine" was considered adequate also by the *Forum Europaeum*, which drafted a recommendation that EU bodies should send to member States, based on the following principles: a) the group must be structured in a balanced and stable way, b) the company is placed inside a coherent and stable group policy, c) the executive officers can reasonably believe that any prejudice will be compensated within an appropriate time period (for further information see Vv. AA., *Corporate Group Law For Europe: Forum*

which aims to expand the admissibility of group strategy even at a detriment to the subsidiary, attributing relevance to the following four elements that are deemed conditions of admissibility of directional acts of a group: a solid group structure; a coherent group strategy in which every single management act is rooted; the fact that a subsidiary company that is damaged does not systematically incur disadvantages from group strategy; and, finally, a company not in decline.[52] It must also be said, however, that the enthusiasm that surfaced during the drafting sessions for this second approach has received severe criticism because of the belief that such an option would have opened the door "for unforeseeable inroads into the means of subsidiaries."[53]

Even when compared to the two approaches, which continue to find scholarly support, the solution adopted in the Italian system is extremely competitive, connecting itself to the Rozenblum Doctrine and focusing on the balancing of group interest and subsidiary interest. The Italian legal system has developed the theory of "compensational advantages"[54] in relation to what can be reconstructed as group interest. This is fundamental in the application of rules governing liability for unitary management, the evaluation of the legitimacy of group operations and, in case of insolvency procedures/liquidation, the repeal or ineffectiveness of such operations.

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As stated in Article 290 of the CCII, the insolvency administrator may initiate, against the corporations that are a part of the same group, the following actions: a) actions intended to obtain a declaration of ineffectiveness of acts and contracts concluded in the five years before the filing of a plea for judicial liquidation, which have moved resources for the benefit of a specific company of the group, damaging the creditors of another except for cases established in Article 2497, comma 1 of the Civil Code (the beneficiary corporation can prove it was unaware of the prejudicial nature of the act or contract); b) filing of a

Europaeum Corporate Group Law, 1 European Business Organization Law Review, 165 (2000).

[52] On French trend see William Parienté, *The Effects of the Concept of Corporate Group in France*, 2 ECFR, 317 (2007); Yves Guyon, *The Law of Groups of Companies in France*, in Eddy Wymeersch ed. *Groups of Companies in the EEC — A Survey Report*, De Gruyter (Berlin), at 141 (1993).

[53] See Grundmann, fn. 14 at 772, No. 59.

[54] The majority of legal scholars, while considering that group interest may not be pursued to the detriment of subsidiaries, has come to recognize that the disadvantage to the subsidiary can be compensated by an advantage to all the group (Franco Bonelli, *Conflitto di interesse nei gruppi di società* (*Conflict of Interest in Corporate Groups*), 1 Giurisprudenza commerciale (Commercial Jurisprudence), 219 (1992); Paolo Montalenti, *Conflitto di interessi nei gruppi di società e teoria dei vantaggi compensative* (*Conflict of Interests in Corporate Groups and the Theory of Compensatory Benefits*), 5 Giurisprudenza commerciale (Commercial Jurisprudence), 710 (1995); Gastone Cottino, *Dal vecchio al nuovo diritto azionario: con qualche avviso ai naviganti* (*From the Old to the New Corporate Law: With Some Warning to Interested Parties*), 1 Giurisprudenza Italiana (Italian Jurisprudence Review), 5 (2013). For the latest court decisions, see Cassazione, Jan. 30, 2019, No. 10633; Cassazione, Sep. 14, 2017, No. 50080 (on the relevance of compensatory benefits for criminal purposes); Cassazione, Nov. 10, 2016, No. 22215; Cassazione, Mar. 17, 2015, No. 23997, Diritto e giustizia (Law and Justice), (2015); Cassazione, Mar. 12, 2015, No. 17355; Cassazione, Apr. 24, 2013, No. 28520; Cassazione, Feb. 21, 2013, No. 20039.

motion for revocation of acts put into being after the insolvency plea was filed, based on Article 166, comma 1, letters a), b) and two years before the filing of the plea or the year just before, hypotheses established by Article 166, comma 1, letters c) and d).[55] From these statutory provisions we can infer a connection and other points to think about when contemplating the notion of "group interest" connected to the area of corporate liability.

D. Abuse of Unified Management

Starting from the legal defense of group interest, the legal rules laid down by the Code on the abuse of a directional position, filtered through the lens of compensational advantages when examining the special powers invested in the insolvency administrator, assume a new meaning within insolvency procedures. In fact, according to Article 291 of the CCII, this administrator — both in case of an insolvency as a single procedure for the entire group, or in the case of a multitude of single insolvency procedures — may legally initiate lawsuits against the executive officers, based on Article 2497 of the Civil Code. Moreover, he/she may also file the special complaint (Article 2409 of the Civil Code) against executives and auditors of corporations belonging to the group that are not a part of any insolvency procedure. Considering also that the CCII contemplates a physical person as the holding entity, we can assume that the filing of a lawsuit for special liability (Article 2497 of the Civil Code) is also possible.

As known, Article 2497, comma 1 of the Italian Civil Code states that corporations or entities that are engaged in activities of direction and coordination of other companies, if acting in their own business interest or in others' in violation of the principles of correct company and business management of the subsidiaries, are directly responsible to the shareholders of the subsidiaries in case of damages to the profitability and economic value of their shares.[56] They are also responsible to company creditors for damages to the net worth of the company and their expectation of payment.[57]

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[55] The reference is to the legal discipline contained in the CCII, in which a part of Art. 67 of the old Bankruptcy Law was inserted, doubling, however, the time period for a court appeal with reference to certain categories of acts. It is thought that discrepancies may well be amended thanks to enabling act No. 20/2019.

[56] Vincenzo Cariello, *Direzione e coordinamento di società e responsabilità: spunti interpretativi iniziali per una riflessione generale* (*Direction and Coordination of Companies and Liability: Some Interpretative Keys for a General Reflection*), 10 Rivista delle società (Company Law Review), 1241 (2003); Giovannini, fn. 33; Marco Maugeri, *Interesse sociale, interesse dei soci e interesse del gruppo* (*Company Interest, Interests of Shareholders and Group Interest*), 1 Giurisprudenza commerciale (Commercial Jurisprudence), 66 (2012).

[57] Incidentally, we wish to indicate also that British legal experience knows an embryonic discipline of parent company liability with respect to creditors of a subsidiary corporations. We refer to the liability for wrongful trading established by Section 214 of the 1986 Insolvency Act. The latter establishes a liability on the managers in case of continuing activities knowing that the company could not have avoided an insolvency procedure. This kind of liability is extended to the so-called "shadow director," and via him to the parent company if the latter acted as such with regard to the subsidiary. Taking from the British model, a liability for wrongful trading which the parent company can incur has been recommended by the "Forum Europaeum" on

It is evident that executives are liable when they have the sole and unique direction of a group only when the holding corporation acts "in its own interest or in another's interest in violation of principles of correct company and business management of subsidiary companies." This means that the source of liability is not the unilateral direction but only an "abuse" of it. This elucidation is particularly evident in the final part of Paragraph 1 of Article 2497, in which we find a limit to this liability. The rule states that "there is no liability when the damage is missing in the light of the total result of the activity of direction and coordination" (so-called "liability for missing compensation"); or "(when the damage) results completely eliminated, even subsequently to operation which are designed to obtain such a result" (so-called "liability for omission of compensative operations").

From here, we can infer the clear intent of Article 2497 to privilege the executive officers, as it allows the board of administration of the holding not just to impart orders to subsidiary corporations[58] but also to impart orders that are *prima facie* detrimental, with a greater range of the one characterizing the German law on stocks. The latter is limited to public limited companies and requires an accountancy form of compensation for damages.[59]

Within the context of the group, at the heart of the system of liability there is an entity that exercises an activity of direction and control and not the single executive officers. [60] According to the majority opinion, from the existence of an activity of direction and management stems a real "obligation with external effects" — operative also in regard to external shareholders, or a corporation in which stock is held, and its creditors — to the correct company and business management, with the aim of protecting minority shareholders and creditors of the subsidiary corporations.[61]

Doctrinal studies and jurisprudence are divided on the content and the exact extent of this general provision, which has been criticized for its vagueness.[62] Some have considered it a genuine duty to act respecting the principles of correct company management and so it consists of the duty to draft adequate plans and strategies; others, instead, consider it a criterion for the exercise of an economic activity, and, as such, discretionary.

The criterion would, thus, assume a double function: evaluative (*i.e.* an inspection of the

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the law of corporate groups, see Tombari, fn. 29 at 55; Paul Davies, *Introduction to Company Law*, Oxford University Press (Oxford), at 95 (2002).

[58] Danilo Galletti, *Analitica della responsabilità patrimoniale e principio di proporzionalità* (*Analytics of Asset Liability and the Principle of Proportionality*), 1 Giustizia civile (Civil Justice Review), 161 (2019).

[59] Volker Hemmerich & Mathias Habersack, Akzien – und GmbH-Konzernrecht. Kommentar (*Stock corporation and Gmbh Act. Kommentar)*, Beck (Munich), at 678 (2013); Uwe Hüffer, *Aktiengesetz* (*Stock Corporation Act*), Beck (Munich), at 1705 (2012).

[60] This framework is like the EMCA model.

[61] The prospective in this case is diametrically opposite to the EMCA model.

[62] Roberto Sacchi, *Sulla responsabilità da direzione e coordinamento nella riforma delle società di capitali* (*On the Direction Liability in the Reform of Corporate Law*), 2 Giurisprudenza commerciale (Commercial Jurisprudence), 274 (2003).

content of a specific operation) and supplementary (*i.e.* a duty of conduct or to act on the dominant corporation).[63] According to the theory adopted, we can ascribe omissions as well to the holding company, in order to sanction (as legal scholars proposed before the latest reform[64]) not just abuses but also a failure to exercise uniform direction and control of the group. The latter may well consist of an omission, characterized by recklessness regarding group structure.[65]

With regard to an abuse of unitary direction of the group, single shareholders of a subsidiary may have standing for detriments to the turn over and the market value of their stock[66]; creditors may also have the same standing (or in case of bankruptcy, the insolvency administrator of the corporation) for the "damage" to the corporation's net worth, as well as to the subsidiary itself.[67] The liability of the parent company towards an external shareholder and a creditor is subsidiary in nature: basically, the company exercising control has a sort of "benefit" residing in the fact that a person must first file a plea against the subsidiary. This mechanism for the protection of an external shareholder and creditor of the subsidiary (overlooked at the EU level[68]) is further evidence of the importance of the "group" because the liability of the subsidiary company is automatic and not connected to any evaluation concerning its abetting and/or intention in the commission of the damaging

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[63] Fabrizio Guerrera, *«Compiti» e responsabilità del socio di controllo* (*"Tasks" and Liability of the Controlling Shareholder*), 1 Rivista di Diritto Societario (Corporate Law Review), at 20 (2009); see also, with a different interpretation, Umberto Tombari, *Poteri e doveri dell'organo amministrativo di una s.p.a. «di gruppo»* (*Rights and Duties of Directors in a Company "Belonging to a Group"*), 1 Rivista di Diritto Societario (Corporate Law Review), at 131 (2009); Maura Garcea, *I gruppi di società di persone* (*Partnership Groups*), Jovene (Naples), at 146 (2008).

[64] Piergaetano Marchetti, *Sul controllo e poteri della controllante* (*On Control and Rights of the Parent Company*), in Balzarini, Carcano, e Mucciarelli, fn. 10 at 1558.

[65] See Pierpaolo M. Sanfilippo, *Il controllo di meritevolezza sugli statuti di società* (*The Merit Control on the Statutes of Companies*), 1 Giurisprudenza commerciale (Commercial Jurisprudence), 159 (2015).

[66] Antonio Rossi, *Il ruolo della controllata e la tutela del socio esterno nella nuova disciplina dei gruppi* (*The Role of the Subsidiary and the Protection of the External Partner in the New Group Regulation*), 7 Giurisprudenza commerciale (Commercial Jurisprudence), 979 (2014).

[67] Oreste Cagnasso, *La qualificazione della responsabilità per la violazione dei principi di corretta gestione nei confronti dei creditori della società eterodiretta* (*The Qualification of the Liability for the Violation of the Principles of Correct Management towards the Creditors of the Heterodirect Company*), 11 Il Fallimento (Insolvency Review), 1438 (2008); Galgano, fn. 45 at 981; Giuliana Scognamiglio, *Danno sociale e azione individuale nella disciplina della responsabilità da direzione e coordinamento* (*Company Damage and Individual Action in the Discipline of Management Liability and Coordination*), in Pietro Abbadessa & Giuseppe Portale, *Il nuovo diritto delle società. Liber amicorum Gian Franco Campobasso (The New Corporate Law*), Utet (Turin), at 947 (2007); A. Pinto, *La responsabilità degli amministratori per «danno diretto» agli azionisti* (*The Administrator Liability for "Direct Damage" to Shareholders*), Id. at 938; Sacchi, fn. 62 at 668; Antonio Pavone La Rosa, *Nuovi profili della disciplina dei gruppi societari* (*New Aspects of Corporate Groups Law*), 3 Rivista delle società (Company Law Review), 765 (2003); Roberto Weigmann, *I gruppi di società* (*Corporate Groups*), in VV. AA., *La riforma del diritto societario* (*The Corporate Law Reform*), Giuffrè (Milan), at 210 (2003).

[68] See Grundmann, fn. 14 at 780.

act.[69]

Along with the liability of the person exercising activities of control and direction there is that of the person who "in any way took part in the damaging act and, within the limits of the advantages received, whomever benefitted from it" (Article 2497, comma 2 of the Civil Code). This statutory disposition seems to include a multitude of people, including executives and directors of the parent corporation; auditors not exercising their power set forth in Article 2409, Section 1 and last, of the Italian Civil Code; executives of the subsidiary that put directive orders into effect, even if these were not prejudicial; shareholders of the holding that voluntarily and knowingly benefitted from the abuse perpetrated; and other companies that received a benefit from resources that were employed illegally.[70]

Combining the principles of liability with the theory of compensational advantages, the honesty of the conduct of the parent company executives will consist not only in the correctness of the instructions on management of the corporation but also with respect to the balance between the interests of the holder and those of the subsidiaries.[71] In jurisprudence, after a decade of the application of Article 2497 and the aforementioned criteria, a difficult problem has emerged on the possibility to define compensational advantages, which may be thought of from a purely quantitative and proportional point of view, with the aim of obtaining an equivalent compensation that is certain and determined in amount. The alternative is a more elastic definition of such advantages, taking also into consideration the possible (and future) positive effects that may stem from such operations.

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The evaluation may arrive at results that are the complete opposite if we adhere to the theory that an advantage may rise from an overall evaluation of the corporate group's performance or the theory for which a rigorous comparison between positive and negative effects of the subsidiary's operation must be done. This means that possible benefits obtained or obtainable by a subsidiary from other means cannot be taken into consideration.

The theory that reconstructs the advantage via a procedure that takes into consideration

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[69] Oreste Cagnasso, *Le azioni di responsabilità sociale nei confronti degli amministratori e i tempi e i contenuti della deliberazione dell'ente socio* (*The Actions of Liability towards the Directors and Timing and Contents of the Resolution of the Shareholders*), 1 Il Nuovo diritto societario (The New Company Law), 7 (2015).

[70] Giuseppe Guizzi, *Partecipazioni qualificate e gruppi di società* (*Qualified Holdings and Corporate Groups*), in Niccolò Abriani, *Diritto delle società. Manuale breve* (Corporate Law), Giuffrè (Milan), at 325 (2012); Weigmann, fn. 67 at 208; Sacchi, fn. 62 at 661; Cariello, fn. 56 at 1249.

[71] For the criminal consequences of such conduct see Ignazio Zingales, *La Cassazione sul Crac Cirio: ancora cautela nell'interpretazione della clausola sui vantaggi compensativi applicata ai reati fallimentari che coinvolgono gruppi di società* (*The Court of Cassation on Bankruptcy: Still Caution to the Interpretation of the Theory on Compensatory Advantages Applied to Bankruptcy Crimes Involving Groups*), 12 Cassazione Penale (Criminal Court Review), 2427 (2018). In jurisprudence, see Cassazione, Oct. 6. 2017, No. 4400; Cassazione, Sep. 27, 2016, No. 52316, 12 Cassazione penale (Criminal Court Review), 3352 (2017), commented by Rossi.

both the possible future consequences and possible benefits that do not stem directly from the operation considered seems preferable[72] and is susceptible to being applied to moments of economic crisis of the group as well.

CONCLUSION

The novelties introduced by the CCII are important additions to the newly emergent "trans-typical" nature of corporate groups whose legal evolution has been described. These additions have solidified the CCII's importance in the influential sector of insolvency.

In the present work, we have tried to briefly examine the main characteristics in relation to the overall legal regulation of corporate groups; so, in conclusion, it is appropriate to highlight the following aspects. First, the legal innovation is a demonstration of the importance of company structure within groups. Whatever the structure may be, the subjugation to another company's directional power entails the relocation of decisional power outside of the subsidiary's structure, with a substantial redefinition of the organizational shape of the subsidiaries (with identification of formalities and functions of company bodies as a whole) and their interior decisional processes, and is susceptible to engendering "virtuous synergies" or, in other cases, "inefficient overlapping and duplications."[73]

From the point of view of organizational layouts, the power of direction and coordination has, as a consequence, a more or less severe restriction of managing autonomy of the subsidiary company, resulting in a remodeling of the company's interest that is specifically pursued by the latter, also in view of applying Article 2391 of the Italian Civil Code and the possible alteration of tasks (and liability) of the inner bodies.[74] This is particularly evident in situations of insolvency and the legislator is aware of this fact both in

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[72] Cf. Cassazione Dec. 5, 2017, No. 29139, available at *il societario.it*, (2018) (last visited Sep. 15, 2019), commented by Marzo (*La posizione della società eterodiretta nel regime di responsabilità per i danni* (*The Role of the Heterodirect Company and Its Liability*).

[73] Paolo Montalenti, *Il sistema dei controlli societari: un quadro d'insieme* (*The System of Company Control: An Overview*), Giurisprudenza Italiana (Italian Jurisprudence Law), 1175 (2013); Riccardo Perotta & Luca Bertoli, *Assetti organizzativi, piani strategici, sistema di controllo interno e gestione dei rischi. La corporate governance a dieci anni dalla riforma del diritto societario* (*Organizational Assets, Policy Plans, Internal Control System and Risk Management. The Corporate Governance of Ten Years from the Corporate Law Reform*), Rivista dei dottori commercialisti (Chartered Accountants Review), 863 (2013).

[74] Fabrizio Guerrera, *La responsabilità "deliberativa" nelle società di capitali* (*The "Deliberative" Liability in Companies*), Giappichelli (Turin), at 153 (2004); Giuseppe Di Sabato, *Il principio di correttezza nei rapporti societari* (*The Priciple of Correctness in Company Relations*), in Abbadessa & Portale, fn. 67 at 131 (2006); Giuseppe Portale, *Rapporti fra assemblea e organo gestorio nei sistemi di amministrazione* (*The Relation between Shareholders and Management in Corporate Governance*), in Abbadessa & Portale, fn. 67 at 31; Giuseppe Portale & Alessandra Daccò, *Accentramento di funzioni e di servizi nel gruppo e nel ruolo dell'assemblea della società controllata* (*The Centralization of Functions and Services in the Corporate Group and in the Role of the Subsidiary Company's Shareholders*), 2 Rivista di diritto privato (Private Law Review), 463 (2006).

the moment when it explicitly gives value to synergies within the group in the construction of plans to solve an economic crisis, and also when the legislator indicates that group logic and interest are an element for evaluating the legitimacy of corporate acts that are potentially damaging to creditors and corporations belonging to the group.

From another point of view, this is a confirmation of the relevance that activities of direction and coordination have assumed (also when the holding corporation is actually a physical person) as a linchpin for the application of the statutory legislation regarding corporate groups, along with the recognition of the role assumed by private legal autonomy, which is given ample space in the new legal discipline. In this sense, it connects itself to the importance of group regulation or the routine approach, which is now widespread to discipline relations between group entities through a specific contractual regulation. As known, in the Italian legal system, there is no specific statutory discipline or definition of what group regulation should be, much less of what a "directional contract" is (a legal institute that exists in the German system). The rule set forth in Article 2497-*septies* is significant because it gives importance to "activity of direction and coordination of companies based on a contract…or company statute terms." At an EU level, the proposed directive, the 2000 European Forum, and the Action Plan of 2003 have already adopted the practice and correctly underlined the usefulness of this instrument to regulate the emanation of directives, create a unified decision center and legitimize possible compensational mechanisms.

Even in the regulation of group insolvency, attention to the importance of contracts is emerging. Contracts are used as an instrument not just to regulate relationships between corporations that are part of the group but also to solve situations of insolvency. In the CCII, private autonomy assumes great importance both when it concerns the severance plan with creditors of the group and in relation to agreements on information flows between insolvency procedures, inspired by the EU (see the regulation of transparency in cross-border operations). For example, in case of one severance agreement for an entire group, it is possible to imagine the liquidation of only certain corporations, with others continuing their activities based on a prognosis of the utility for creditors of all the companies within the group.

Could we not consider this fact a promotion of private autonomy, in the context of economic activities exercised as a group instead of individually, taking into consideration group structure and economic flows with this entity? The space assigned to private autonomy is truly wide, if we think that the legislator is contemplating the introduction within the plan of contractual and reorganizational operations (including the transferring of resources within the group), these operations would be put under the attention of an independent professional to establish if they are necessary to continue corporate activities and also to evaluate their coherence with the objective of the best possible satisfaction of

creditors of all corporations involved, and (of course) the latter's approval.[75]

Finally, the CCII demonstrates that it is aware of the fundamental multifaceted nature of corporate groups. This aspect is addressed with a flexible answer. In fact, already the trans-typical Italian legal discipline on direction and coordination has been positively received, being considered a reference point for the European Action Plan, which stresses a certain need to introduce an appropriate legal discipline of group interest.

Given the occasion, it is also possible to reflect on certain complementary aspects, such as a more in-depth focus on the theme of group structure; the importance of information; the configuration of a group interest; and a perfecting of the criterion of "compensational advantages."[76] In this sense, the Italian model presents strong traits of originality both because of its trans-typical nature and because of its foundation on general principles and clauses. These set forth rules of behavior, which can adapt themselves to the variable structures of groups, present less rigidity, and lend themselves to legal harmonization.[77] This and other peculiarities that have been highlighted seem better suited to new legal categories and more adapted to economic reality and the legal regulation of a group, which seems ever more a sole entity, as what emerges from the discipline of group insolvency because of the complexity and heterogeneity of the phenomenon.

From this prospective, in the end, the Italian model for regulating economic crisis with a corporate group offers an adequate answer to the need of flexibility, which mirrors the multifaceted nature of a corporate group, in order to effectively solve a crisis. Early commentators of the discipline have underlined the fact that in this subject a high degree of flexibility is indispensable.[78]

Laying down a unitary discipline of the phenomenon with the aim of regulating liquidation or renovation of the company and its outstanding debts means pursuing the highest level of coordination within a system based on the principle of separation of assets (which at present seems insurmountable) in order to protect creditors. But conserving and placing on the same level the possibility to access insolvency procedures for single corporations means that high standard of flexibility that the varied nature of the group imposes is guaranteed.

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[75] It is expected that the negative effects of such operations can be contested by the creditors, by the dissenting creditors (belonging to the appropriate class of dissenters), or, in the absence of the formation of classes among creditors, those creditors that represent 20% of the credits admitted to vote in a single corporation, via the homologation of an insolvency agreement. The creditors that do not adhere may oppose the approval of any restricting agreements in court.

[76] Paolo Montalenti, *Il diritto societario a dieci anni dalla riforma: bilanci, prospettive, proposte di restyling* (*Corporate Law of Ten Years after the Reform: Considerations, Perspectives and Restyling Proposals*), 5 Giurisprudenza commerciale (Commercial Jurisprudence), 1077 (2014).

[77] On the importance of general clauses for the reconstruction of the legal discipline see Montalenti, fn. 43 at 779.

[78] Cf. Scognamiglio, fn. 1.