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ABSTRACT

The central theme of this thesis is the phenomenon of “company groups”, in the light of the innovations introduced through the company law reform.

The research takes cognizance of the introduction into the Italian Civil Code of a series of norms which allow the definition of a proper « law on groups of companies » and, despite the lack of provisions considering all the complex aspects related to the formation, the organization, the operation and the costitutive components of a group, the possibility exists to try and actually reconstruct a *Konzernorganisationsrecht*.

Starting from a thorough study on what is considered to be the essential and characterizing feature of the phenomenon of groups, that is to say the management and coordination activity of companies, both in case the aggregation is based on equity control and in case it relies on a contract, the investigation discovered all the peculiar aspects characterizing the management and coordination activity, with the aim of obtaining a prompt identification through objectively verifiable data and of circumscribing the application scope of the relevant norms, in a context where the legislator’s choice was not to define the phenomen in rigorous and precise terms. Subsequently, the possible sources of power of unitary management and, last, the formation way of company groups were identified.

The thesis includes the study of the relationship between control, unitary management and group, which closely investigates the role played by the former as potential source of power of unitary management, though in the awareness of its inadequacy as a necessary and sufficient parameter to determine the group existence. Other possible instruments for group formation are identified among which, in particular, the trading tool.

A close investigation regarding contractual unitary management was developed in such a way as to face, in critical terms, the problems connected with the potential entry into the Italian law system of the so-called domination contracts (*Beherrschungsvertrag*), provided by the German law but up to now opposed by the Italian law, because considered in contrast with the general principles of company law;

and, in positive terms, the potentialities of this “instrument” of group formation, through which the organization of the aggregation phenomenon does not simply represent a possible consequence of control any longer, but the necessary and intended effect of a contract whose cause is specifically defined in the fulfillment of unitary economics of many agents by means of the creation of a structure where companies or aggregated parties preserve their distinct legal status.

An analysis is then presented concerning some of the most problematic aspects linked with the necessity to adapt to the group’s reality, and therefore to “aggregated” companies, law provisions issued in order to regulate companies considered isolated items. For this purpose, the need was recognized to revise some principles of the traditional Italian company law, which is necessary in order to avoid that literal transposition from a context to another results in dooming the group to powerlessness, denying legitimation to its basic premises.

The research continues with a thorough analysis of those provisions which, though not being enough yet to form a proper organic discipline on company groups, are considered a “resolute step forward” towards the establishment of a first “law system of company groups”. An analysis was carried out focusing on the norms contained in the new Section IX of the Italian Civil Code dedicated to “Company management and coordination”, with particular attention to the provision on liabilities arising from the management and coordination activity (Art. 2497, Italian Civil Code), a provision examined not only as for its aim to regulate the “pathological” hypothesis related to the practice of such activity in defence of minority partners and creditors of controlled companies, but also because containing actually positive behaviour rules to be respected by the controlling company in the practice of unitary management within the group.

In such a context, particular attention is paid to the so-called theory of the compensatory advantages, potentially one of the most pressing items in the regulation of the management and coordination activity, according to which the atomistic perspective, typical of a monad company, seems to be surpassed by a global, «group» vision where,

despite the lack of specific mentions, the molecular structure of aggregation gains concrete relevance.

In this context, a critical judgement was applied on the existence of the so-called “group interest”, concluding by stressing how the choice made by the legislator delegated to legitimize the introduction of the principles of the compensatory advantages into the Italian law system, accomplished by adding the last part of the first clause of Article 2497 of the Italian Civil Code, actually was not by itself enough to effectively recognize the existence of a «group interest», in the name of which the legitimacy or non-legitimacy of the behaviour of those practising unitary management can be evaluated. In fact, the analysis points out that, even though the parameter for evaluating managing actions was considerably enlarged, the interest considered in order to evaluate the existence of a damage concerning liabilities arising from the management and coordination activity, is not that of the group but always and only that of the company individually considered.

As a necessary completion of the topic dealt with, a chapter was added concerning the “cooperative joint group”, where after emphasizing the legislator’s inclination to surpass a group vision based only on control, constantly with the aim (stressed above) of secure effective legitimacy to integration forms among enterprises realized through contractual models, the research concentrated in particular on the concept of paritetic participation and on the risks of incompatibility between the phenomenon of group aggregation and the typical templates of cooperative mutuality.