

Questionnaire on Group liability

Liability of the Holding companies and their directors for activities of their affiliates

(ITALY)

1. Which companies can be liable for acts committed by their affiliates or other group companies?

According to Italian law a liability may arise when a company is in the situation of management and coordination of another company, and this happens in case of (i) so-called “controlling” companies, as defined under the Italian Civil Code, as well of (ii) companies that are obliged by law to prepare consolidated financial statements, and of (iii) companies performing “management and coordination activities” pursuant to an agreement or of (iv) companies performing management and coordination in accordance with statutory provisions.

2. What kind of liability may arise?

If a situation of “management and coordination” of one company by another arises (normal situation within a group), then the company which exercises such role may be held liable for damages vis-à-vis:

- group companies,
- minority shareholders or
- creditors of the group.

3. Which behaviours are relevant?

The liability of an holding company (or of a company in a situation of management and coordination of another company) may arise

- in case of acts or decisions taken in a conflict of interest situation (also within different companies of the Group, i.e. actions taken not in the best interest of the subsidiary but to satisfy an interest of the controlling entity or of a sister company) and
- in case of violation of the “principles of proper company and enterprise management” (very broad definition, which certainly includes decisions or actions that may affect the profitability, the distribution of dividends and the company objectives);

4. Who can be held liable?

The liability in question may affect:

- the Controlling Entity,
- anyone who was involved in the relevant decision/action (managing bodies of controlling entity / subsidiary, supervisory bodies of controlling entity / subsidiary, shareholders of controlling entity), and
- such liability is extended also to those who took advantage of or benefited from the damaging action (including therefore other companies of the group). In such case, the liability cannot exceed the advantage/benefit.

5. What damages are relevant?

For the shareholders of the subsidiary:

- Loss of value of the participation
- Loss of profitability of the participation

For the creditors of the subsidiary:

- Loss (of value) of debtor company's assets

6. Is there any publicity requirement for holding or controlling companies?

According to Italian law the directors of an holding or controlling company have:

- the obligation to file with the Companies Registry the corporate relationship of "management and coordination" between the companies involved;
- the obligation to disclose the corporate relationship on documents, in correspondence, in the notes to the annual accounts and in the directors report of the company concerned;

7. Do the group liability rules have any impact in the corporate governance?

An obligation exists to duly motivate decisions if an interest of another company of the group (controlling company but also other affiliates of the group) may subsist or if such decisions are taken as the consequence of the management and coordination performed by the group.

8. Do minority quota-holders or shareholders of a company that is subject to the management and coordination of another company have a right of withdrawal from the company?

The minority quota-holders or shareholders of a company that is subject to the management and coordination of another company are entitled to withdraw as quota-holder or shareholder in case of:

- transformation of the company implying a change in the nature and purpose of the same (e.g. from SPA/SRL to cooperative company)
- modification to the company objectives having a material and direct impact on the economic conditions of the company and/or its value
- controlling entity found liable by a court for its activity of direction and coordination
- change of control

9. Is the reimbursement of an intercompany loan granted by the holding company to the controlled entity possibly affected by the position of “direction and coordination” of the holding?

Yes. An holding company financing the controlled companies may be subject to:

- a deferred reimbursement of its loan with respect of the settlement of other creditors or
- an obligation to return to the controlled entity the sums repaid by this latter in the year preceding the bankruptcy of the controlled company;
- a revocation of any repayment of the loan incurred in the year preceding the declaration of bankruptcy.

10. Group liability and bankruptcy: can the receiver bring an action against the holding company for mismanagement of the controlled entity? Can a new owner of the subsidiary bring the same action? If yes who has the burden of proof?

Yes, in case of bankruptcy of the subsidiary an action for damages can be brought by the receiver.

A new owner of the subsidiary in principle cannot bring the same action, except if he was already previously entitled to bring such action because of his position of minority shareholder or creditor of the subsidiary, and if he suffered a damage for that.

The bankruptcy receiver or the new owner have the burden of proof both of the mismanagement of the controlled entity and of the damage suffered as a consequence of such mismanagement.

11. Is it possible for the holding company to avoid liability risks for mismanagement of the controlled entity by contracted provisions?

This would theoretically be possible only in a contractual agreement with the damaged third party or creditor or group company which expressly covers a specifically identified initiative. A generic previous waiver would not be valid under Italian law.