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PUBLIC COMPANIES BETWEEN THE MARKET AND SELF-ORGANIZATION OF ADMINISTRATIVE AUTHORITIES

ANNUAL REPORT - 2011 - ITALY

(May 2011)

Prof. Stefano CIVITARESE MATTEUCCI

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1. PUBLIC COMPANIES IN THE ITALIAN LEGAL SYSTEM

In Italy since the '90s – when the transformation of big public monopolist corporations into joint stock public companies began – we have had a strong increase in companies totally or prevalently owned by the State. This process is also known as "formal privatization", because it left the ownership of newly constituted "normal" commercial companies to the State. However, unlike the previous State use of controlled or its own companies to pursue various public tasks (what in the Italian system bore the name of "State Sharing"), the wave of privatizations, under the pressure of European Law, had the objective of fostering the opening to the market of different sectors of public utilities. As the doctrine has emphasized, however, all public corporates operating as industries or in a company-like manner have been involved in that phenomenon of privatization, in such a

way as to give place to a number of patterns of "public companies", which cannot be collected under the single scheme of a big commercial company whose goal is to sell shares into the financial market[1].

Scholars have argued that public companies, thanks to special rules, have gained a specific position in the legal system, and therefore it is a hazard to continue sustaining that with the choice of creating a joint stock company «The State subjects itself to company law to carry out its own management with simpler forms and new chances of achieving its objectives» (from the Explanatory Report to the 1942 Civil Code).

If, indeed, the discipline of these companies is in general terms constituted by private law (Civil Code), a number of exceptions, established by legislation, are aimed at guaranteeing the realization of public ends.

As mentioned by professor Clarich[2], the Association of "Joint Stock Companies incorporated in Italy"[3] has proposed, in a recent report, on the one hand, to eliminate companies that are actually quasi-public administrations – considered hybrid entities undermining the model of private companies –, on the other hand, to repeal limits provided

[1] G. Napolitano, *Le società pubbliche tra vecchie e nuove tipologie***,** in Riv. soc., 2006, 5-6, 999.

[2] M. Clarich, *Società di mercato e quasi-amministrazioni*, in Dir. amm. 2009, 2, 253.

[3] This association, created on 22th November 1910, represents nowadays the galaxy of joint stock companies in their different branches: industry, finance, insurance, services (http://www.assonime.it/AssonimeWEB/public/initAction.do?evento=english)

by legislation for companies (created or participated by the State or local authorities) which operate in a competitive market[4].

In such a report three categories of "quasi-public administrations" are singled out: "in house providing" companies, which are entrusted by local authorities to manage public services without open procedures of selection; companies created for carrying out public functions (as National Corporate for Roads or National Corporate for Flight Assistance); companies which carry out instrumental activities on behalf of administrative authorities, especially regional and local, subjected to a restrictive set of rules (act of Parliament 248/2006).

This classification is useful to have an idea of the "galaxy" of public companies, but actually it is not possible to draw a clear boundary between companies, which normally work in the market, and others, which should be considered disguised public authorities. There is a variety of situations and «the distinctiveness of public companies is probably a question of degree, varying, according to legislation, without solution of continuity, from a minimum to a maximum: from a minimum of distinctiveness (or with no distinctiveness at all), when a company is wholly regulated by private law and the State or a local authority are the owner of stocks to a maximum, when deviations from private law are so important as to cause the predominance of public law regime»[5].

The most common deviations from private law concern the subjection of companies to forms of financial assessments of the Court of Auditors[6], the possibility of

[4] Assonime, *Principi di riordino del quadro giuridico delle società pubbliche*, Roma, September 2008, in *http//:www.assonime.it.*

[5] M. Clarich, *quoted*, 254.

[6] See below in the text the reference to Constitutional Court decision n. 466/1993).

personnel being accused of administrative liability before the Court of Advisors, and the obligation for companies to award contracts according to European Law procedures, about which Administrative Courts have the power to rule.

With regard to this, Constitutional Court (case 466/1993), adopting a substantive notion of public company, has established that companies of "special law" can be defined as the ones which are regulated by a mixture of public and private law, adding that the Court of Advisors keeps its power to assess joint stock companies constituted after the transformation of economic public corporates (like IRI, ENI, ENEL, INA, etc.) until the State has the majority of shares.

According to a part of the doctrine this particular “mixed regime” should determine the acknowledgment of public companies as corporates having not a private but a public law personality, in this way outlining the new category of administrative agencies with the structure and form of companies[7], and going back, somehow, to that public corporate body from which the process of privatization started. This kind of approach – excluding in principle the bodies at stake are commercial companies – assumes a totally different perspective from those who criticize the “betrayal” of company law brought about by the legislation under exam. And yet, also for this “public law perspective” the problem is about generalization: when does a company become an administrative agency with the structure of a company due to deviations from its normal way of operating?

All public companies born by transformation of industrial public corporations (according to the act of legislation n. 359 of 1992), for example, were created not by contract, but through a statute or an administrative act, and moreover they did not possess

[7] See G. Rossi, *Gli enti pubblici in forma societaria*, in *Serv. pubbl. app.*, 2004, 221 ss.; M. Renna, *Le società per azioni in mano pubblica. Il caso delle s.p.a. derivanti dalla trasformazione di enti pubblici economici ed aziende autonome statali*, Torino, 1997, 101 ss.

the requisite of the plurality of members: therefore we notice, from their creation, a significant deviation from the private law pattern. Other deviations deal with a functional perspective: for example the public owner, usually the Minister of Finance, is strongly limited in exercising his own rights and prerogatives by the interference of people formally extraneous to the governance of the company (other Ministers, Prime Minister).

Then, since the second half of the '90s, also administrative courts, developing further the position expressed by the Constitutional Court about the substantive notion of public administration, have reached the opinion that public corporations can have the structure of a company, which, however, the typical principles and rules of administrative action apply to (see Cons. Stato, VI, n. 1206/2001).

2. RECENT REFORMS AIMED AT GUARANTEEING MARKET COMPETITION AND FUNDING CUTS IN PUBLIC COMPANIES

The most recent legislation seems to confirm a tendency towards treating public companies as unique and special figures placed midway between public and private law and articulated in various sub-categories.

Aspects of distinctiveness can be related to two objectives of policy. The first concerns the choices of the State as a shareholder, the second the activity of companies. The first group of limitations is not, in principle, in contrast with normal company law whereas the second is since it determines substantive limitations for management to pursue its own business[8].

[8] For these remarks see M. Clarich, *quoted*.

As regards the first group of limitations we can mention different rules about the "moralization" of the expenditure of public companies not quoted on the stock exchange, controlled directly or indirectly by the State (except for companies only linked to the State), provided by Parliamentary act n. 244/07, *finance maneuver for 2008*, as modified by n. 69/09 and n. 102/09 Parliamentary acts.

These rules establish that statutes of companies have to provide reductions in the maximum number of members of boards and in the compensations of managers by at least 25%. They establish, moreover, the possibility to abolish the figure of vice-president and several other limitations regarding wages and indemnities for members of corporate governance and managers.

We can include in this line of policy other recent legislative rules which concern a manager's liability. A person who has already held the position of manager of a company totally or prevalently owned by the State for five years cannot be reappointed to the position if in three consecutive years of the five the company had a bad financial record caused by avoidable managing strategies.

The other group of rules influence the activity of public companies in a more substantive way. We can think, on the one hand, about decisions on budget, mission, sharing frame, and corporate governance taken directly by legislature, and, on the other hand, about the power of taking directives and approving main managing decisions by the controlling Minister[9].

Referring particularly to the relationship between these companies and the market, recent legislation has introduced a number of dispositions to guarantee market competition.

[9] See M. Clarich, *quoted*, and G. Napolitano, *quoted*.

Art. 13 of the above quoted Bersani-decree of 2006 establishes that «in order to avoid alterations or abuses regarding market competition and to guarantee equality between operators in the national territory, companies, which have their shares totally or partially owned by a public authority or are constituted or participated in by regional and local authorities, as instruments of their ordinary action to produce goods and services, must act with the authorities which created or participated in or entrusted them, and they cannot provide any services for either private or public persons, either through a direct assignment or a selective procedure, and they cannot join other companies or corporations having their headquarters within national boundaries».

Companies that carry out local public services are exempted from this prohibition.

Even deeper consequences are produced by Act n. 244/07 *finance maneuver for 2008,* which seems to reserve market competition to private actors only introducing a general prohibition for public authorities to create companies «having the mission to produce goods and services» and to acquire or maintain participation, albeit a minority in such companies, with the exception of cases in which these companies are strictly instrumental in pursuing institutional tasks[10]. The body in charge must give a reason for its decision to create a company or acquire shares, demonstrating the actual existence of such a necessity, and the relative act must be transmitted to the Court of Advisors, which, evidently, has the duty to assess the lawfulness of such arguments.

This rule seems to confirm that the legislative intent is towards permitting the use of a company-like frame only for better making the organizational frame of public bodies

[10] Also in this case it is possible to create companies which produce services of general interest and which provide commissioning services at a regional level, in support of non profit corporate bodies and authorities granting public contracts, as well as participation in such companies.

fit for pursuing their own specific institutional goals[11]; in fact, on the one hand, private patterns are reshaped to suit public law needs whereas on the other hand, the law obliges public companies not to enter the market in competition with private operators.

We can see this pan-public law tendency also in more recent legislative rules relating both to the way of controlling expenditures and to the extension to public companies of rules regarding organization and the managing of personnel (art. 71 of Act n. 69/2009 as modified by art. 19 of Act n. 102/09).

From the first point of view we notice a considerable increase in the importance of the Minister of Economics. In the case of creation of new national public companies shares must be attributed to this Minister, who is compelled to exercise shareowners' rights with the cooperation of other ministers involved in the subject. Moreover, State authorities have to be authorized by a Prime Minister's decree, under a proposal of the competent Minister with the agreement of the Minister of Economics, to acquire new participations or maintain those already held.

From the second point of view it has been established that companies totally owned by public authorities, which manage local public services, must adopt criteria and rules in recruiting personnel based on principles of publicity, impartiality and competitiveness in force for public servants. Other public companies are expected to follow criteria of transparency, publicity and impartiality in hiring people, even though they do not have the obligation to observe the principles regarding the recruitment of public servants.

Act n. 102/09 has, moreover, extended the prohibitions and limitations regarding the recruitment of people by local authorities to local public companies, which are either directly entrusted with public services without any competitive procedure, or necessary for

[11] See B. Giliberti, I. Rizzo, *Posizionamento e margini di operatività delle società pubbliche nel mercato*, in Foro amm.-CdS, 2010, 2526.

the institutional action of such authorities. Every public company must comply with the regime of authority by which it was created also regarding contracts, consultancies and compliance with the "internal stability pact", the latter according to modalities that are to be defined by the Minister of Economics after consulting the "Conferenza unificata" between the State, the Regions, and local authorities. This latter provision has, however, been quashed by the Constitutional Court (case n. 325 del 2010), which has ruled that the modality of application of the "internal stability pact" regarded the issue of public finance coordination (cases n. 284 e n. 237 of 2009; n. 267 of 2006), about which the legislative competence is shared by State and Regions. Indeed, in cases such the latter, according the Italian Constitution, the regulatory power belongs to the Regions and does not to central government.

Some final remarks are needed about certain clauses of Act n. 102/09, since they are not in line with the above mentioned legislative intent and are perhaps in contrast with the European law of competition.

We would like to mention, first of all, the repeal of the prohibition of the so called "indirect participation", according to which administrative authorities were not allowed to acquire or maintain, through the control of an intermediate company, shares of companies which had as a mission the production and supply of goods and services not strictly instrumental in pursuing the institutional ends of an administrative authority. The threat is that through the veil of their own companies which are strictly instrumental in pursuing institutional ends – and therefore not acting on the market – the public powers can go back to the market.

Also another clause casts doubt on its European compatibility. It is the one that makes it possible for State administrations to confer the management of public funds directly to public companies totally owned by the former over which they exercise a control analogous to that exercised over their own offices and, moreover, which «carry out their activity almost exclusively towards the State administration». This very vague use of the word "almost" opens margins of discretion and uncertainty which could undermine the reference to the usual requisites of "in house providing" companies.

3. BIBLIOGRAPHY

For an annotated bibliography see the Documents area in the Public utilities section.