

**STATE-OWNED ENTERPRISES: “COMPANIES - ENTERPRISES”
AND PUBLIC ENTITIES ORGANIZED AS COMPANIES. A
REVIEW OF APPLICABLE RULES.**

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12. STATE-OWNED COMPANIES AND ADMINISTRATIVE ACTIVITY

1. INTRODUCTION.

The current legal framework for State-owned companies is complex and is conditioned first of all by the great diversity of the figures falling within this broad category. This translates into a variety of regulatory systems, mainly due to the nature of the companies in question. The situation is also indicative, on one side, of the basic intent to create a balance between “State” and “market” and, on the other, of the need to preserve public enterprises as a tool to implement social and economic policies while abiding by the rules of fair competition and the principle of equality between State-owned and private companies. On the other hand, it is clear the purpose to allow government authorities to make use of more agile organizational models, compared to the traditional organizational arrangements, to carry out public functions as well as instrumental activities¹, without betraying the

¹ For a distinction within the operations carried out by economic public agencies between pure business activity and functionalized activity, see: ALB. ROMANO, *La concessione di un pubblico servizio*, in various authors, *La concessione di pubblico servizio*, edited by G. Pericu - A. Romano - V. Spagnuolo Vigorita, Giuffrè, Milano, 1995, 11 and see R. CAVALLO PERIN, *Comuni e province nella gestione dei servizi pubblici locali*, Napoli, 1993, 21 et seq., 39 et seq. On the different types of State-owned companies, see the recent description by V. CERULLI IRELLI, *Amministrazione pubblica e diritto privato*, Torino, 2011, 30-33, e 35 et seq. and, among many others, F. G. COCA, *Il punto sulle c.d. società pubbliche*, in *Dir. econ.*, 2005, 239 et seq., G. NAPOLITANO, *Le società pubbliche tra vecchie e nuove tipologie*, in *Riv. soc.*, 2006, 5-6, 999, M. CLARICH, *Società di mercato e quasi - amministrazioni*, in *Dir. amm.*, 2009, 2, 253 et seq., ID., *Le società partecipate dallo Stato e dagli enti locali fra diritto pubblico e diritto privato*, in F. Guerrera (edited by), *Le società a partecipazione pubblica*, Torino, 2010, 1 et seq., M.P. CHITI, *Carenza della disciplina delle società pubbliche e linee direttrici per un riordino*, in www.astrid-online.it., C. IBBA, *Le società a partecipazione pubblica: tipologie e discipline*, in C. Ibba, M. C. Malaguti, A. Mazzoni (edited by), *Le “società pubbliche”*, Torino, 2011, 1 et seq., A. MASSERA, *Le società pubbliche: principi di riordino del quadro giuridico. Osservazioni in margine al rapporto Assonime*, su www.astrid-online.it. See the carefully shaped views of M. DUGATO, *Le società a*

constitutional and institutional principles related to “public administration” and the inherent guarantees associated with its role².

These fundamental needs justify, especially in relation to the past few years, the proliferation of rules and regulations on companies in public hands, including wholly-owned State enterprises, with the tendency to subject public companies limited by shares to the general company law system, especially due to the influence of European laws. On the other hand, there is a large number of rules related specifically to the State as shareholder and to its investees, in contrast – though often only apparently – with the development process described above³. Next, there is the large number of “singular” provisions related to those that today are commonly referred to as “companies - governmental entities”⁴.

partecipazione pubblica, in *Giorn. dir. amm.* no. 7/2013, 855 et seq. With special emphasis on local public utilities: E. SCOTTI, *Servizi pubblici locali*, in *Dig. disc. pubbl.*, Agg., 2013, F. LUCIANI, “Pubblico” e “privato” nella gestione dei servizi economici locali in forma societaria, on www.giustamm.it.

² Reference to the “archipelago” of “State-owned companies”, considering this definition “totally generic and unable to provide an all-inclusive definition”, is made by G. MORBIDELLI, *I controlli sulle società a partecipazione pubblica* in A. Predieri (edited by), *Controlli societari e governo dell’impresa*, Torino, 1999, 99 et seq., now in ID., *Scritti di diritto pubblico dell’economia*, Torino, 2001, 257 et seq.

³ For recent works of a general nature on the subject, attention is called to: M. CAMELLI - M. DUGATO (edited by), *Studi in tema di società a partecipazione pubblica*, Torino, 2008, F. SANTONASTASO, *Le società di diritto speciale*, Torino, 2009, F. GUERRERA (edited by), *Le società a partecipazione pubblica*, Torino, 2010, C. IBBA, M. C. MALAGUTI, A. MAZZONI (edited by), *Le “società pubbliche”*, cit., F. FIMMANÒ (edited by), *Le società pubbliche. Ordinamento, crisi ed insolvenza*, Milano, 2011.

⁴ See below, § 3

This paper will attempt to draw, albeit not in an exhaustive manner, a picture to summarize this legislative framework and the main related problems, focusing on State-owned “companies - enterprises” operating in the market but paying attention also, in terms of differences, to the phenomenon of companies organized under private law engaged in public functions⁵.

2. STATE OWNERSHIP AND PRIVATIZATIONS

The current State shareholding system is the outcome of a long and well-known evolution, which should be at least mentioned in general terms here, given that it is the basis of the current legislative framework and it is at the foundation of the main theories on companies in public hands.

The image of the State as a market player, directly or through State-owned companies, dates back, in Italy, to the beginning of last century.

In the 19th century, the laissez-faire ideology produced the essential protection for private property and individual freedoms, while, in the period following the 1861 unification, efforts were made to solidify the new national unity also through the implementation of an integrated market, adopting protectionist measures against foreign

⁵ For a distinction between “business companies” and “quasi-governmental” companies, see Constitutional Court 1 August 2008 no. 326, on www.giurcost.org, Id., 8 May 2009 no. 148, ibidem, in general, the Assonime report published in 2008: “*Principi di riordino del quadro giuridico delle società pubbliche*”, on www.assonime.it, and the recent Report “*Le società a partecipazione pubblica*” – Camera dei Deputati, XVI legislatura, Documenti e Ricerche, on www.documenti.camera.it, in addition to the scholarly works cited above.

imports and, at the same time, relying on market forces. Though State-owned companies were not unheard of, they were definitely a rather isolated phenomenon⁶.

At the dawn of the 20th century, views began to change and public enterprises in the form of State-owned companies began to flourish, from public utilities to banking firms⁷, starting what would be called a lasting “alliance” between public and private capital⁸ but without any intent of introducing State dirigisme in the economy.⁹

State intervention through the direct operation of business firms would intensify after a war or the big economic crises. In particular, it was the crisis of 1929 and its effects on the industrial sector, threatening seriously the banking system, which gave the impetus to the construction of the peculiar Italian model of State ownership. This model featured “public groups” under the direction of economic entities acting as holdings – so-called “management agencies” – where State ownership was concentrated. The first such holding was Istituto per la Ricostruzione Industriale (“IRI”).

This approach gave rise to the phenomenon known as “IRI system”, thus as the “system of State ownership”, the brainchild of the “rationalizing” component typical of the

⁶ This is the case, for instance, of the Loan and Deposit Fund (Cassa Depositi e Prestiti), established in 1863. See S. CASSESE, *La “vecchia” costituzione economica*, in S. Cassese (edited by), *La nuova costituzione economica*, V ed., Roma - Bari, 2012, 11.

⁷ For an accurate reconstruction of this process, reference is made to the well-known study by M. S. GIANNINI, *Le imprese pubbliche in Italia*, in *Riv. soc.*, 1958, f. 2, now in *Scritti*, Vol. IV, 1955-1962, Milano, 2004, 360 et seq.

⁸ F. GARGANO e G. VALERIO, *Memoria sulla società per azioni* (1843), in *Riv. soc.*, 1970, 682, now in A. MIGNOLI (edited by), *La società per azioni. Problemi-letture-testimonianze*, Milano, 2002, II, 892 et seq.

⁹ S. CASSESE, *Loc. ult. cit.*

fascist order¹⁰ which survived fascism and was regarded as compatible with the principles of the “mixed economy” embraced by the republican Constitution.¹¹

IRI, which was established in 1933 on a temporary basis to deal with emergencies, took over bank-owned companies that were experiencing difficulties to restructure them and eventually sell them to other market operators. In 1937, it became a stable entity, a key player in economic growth, especially in the 1950s and 1960s; after it had progressively expanded the scope of its operations.¹²

In the following decades, other management entities were created - such as ENI, EFIM, EGAM, EAGC, ENEL; management agencies owned essentially holding companies that, in turn, had equity investments in operating companies in specific sectors.¹³

¹⁰ For the origins of the system and the place of IRI in the corporatist system, see the seminal study of F. MERUSI, *Le direttive governative nei confronti degli enti di gestione*, Milano, 1977, 1 et seq

¹¹ Reference is made to article 41 of the Constitution. As to scholarly works, the following publications are quite exhaustive: G. MORBIDELLI, *Iniziativa economica privata*, in *Enc. Giur. Treccani*, Roma, 1989, 1, G. GUARINO, *Pubblico e privato nella economia. La sovranità tra Costituzione e istituzioni comunitarie*, in *Quad. cost.*, 1992, G. AMATO, *Il mercato nella Costituzione*, in *Quad. cost.*, 1992, 1, 7 et seq. More recent: A. POLICE, *Tutela della concorrenza e pubblici poteri*, Torino, 2007, 22. For a detailed reconstruction of constitutional case law on article 41 of the Constitution, see M. RAMAJOLI, *La regolazione amministrativa dell'economia e la pianificazione economica nell'interpretazione dell'art. 41 della Costituzione*, Report at the Conference AIPDA «*Il diritto amministrativo nella giurisprudenza della Corte costituzionale*», 27-28 September 2007, Bologna, in *Dir. amm.*, 2008, 1, 121 et seq.

¹² A. ARMANI - F. A. ROVERSI MONACO, *Le partecipazioni statali. Un'analisi critica*, Milano, 1977, 17 et seq

¹³ For example, IRI created Finmare in 1936, Finsider and STET in 1937 and, after WWII, Finmeccanica, Fincantieri, Finelettrica. On the system of State-owned companies, reference is made in particular to: S. CASSESE, *Partecipazioni statali ed enti di gestione*, Milano, 1962.

The management agencies were economic public entities, which were required to act according to “cost-effectiveness criteria”¹⁴, with the objective of rewarding the factors of production, though not for profit, acting in accordance with the guidelines set out, in the general interest, by the inter-ministerial committees, CIPI and CIPE. The system was eventually completed with the institution of an ad hoc Ministry, to guide and direct all the public enterprises and companies in public hands¹⁵, the Ministry of State Holdings (Ministero delle Partecipazioni Statali)¹⁶, which ceased operations in 1993¹⁷.

The underlying idea was that the investee companies would not change their nature as a result of partial State ownership and that policies would find a natural limit in the entrepreneurial nature of the economic entities for which they were intended¹⁸.

In addition to the companies included in the “system of State holdings” there were numerous other economic public bodies, which determined the idea of the State as a major enterprise engaged, also in this capacity, in every aspects of Italy’s economy¹⁹

¹⁴ On the “cost-effectiveness criteria” referred to also by law no. 1586/1956, see, among others, A. ARMANI - F. A. ROVERSI MONACO, *Le partecipazioni statali*, cit., 68 and the recent synthesis by M. D’ALBERTI, *Lezioni di diritto amministrativo*, Torino, 2012, 86 et seq.

¹⁵ On these events, see: F. MERUSI, *Le direttive governative nei confronti degli enti di gestione*, cit., passim.

¹⁶ Established with law 22 December 1956, no. 1589.

¹⁷ The Ministry of State Holdings was closed down in 1993, following a referendum that repealed the law instituting it.

¹⁸ See N. IRTI, *Dall’ente pubblico economico alla s.p.a. (profili storico-giuridici)*, in various authors, *Le privatizzazioni in Italia*, edited by P. MARCHETTI, Milano, 1995, 366, G. MARASÀ, *Le società senza scopo di lucro*, Milano, 1988, 377, and see Relazione al Codice civile (no. 998).

Excessive political meddling in business decisions and the progressive transformation of State holding management in a “welfare” activity - to help companies that could no longer be helped – as well as the wasteful use of resources, with the resulting burden of these “groups” on public finances-, went against the supranational principles of fair competition, the free market and the prohibition to provide State aid, the European-mandated budget restrictions and, in particular, the discipline dictated by the prospects of the customs union of 1992 and the adoption of the single currency, in accordance with the Maastricht Treaty.²⁰

This and the progressive spread of laissez-faire around the world prompted the start of the privatizations of the early 1990s; these privatizations were first of all “formal”, in that government entities, starting from economic entities – including those that managed State holdings – were changed to companies limited by shares²¹ or adopted other private-law legal forms²²; yet these privatizations were also “substantive”, when the State placed in the market over half of its holdings in a given company.²³

¹⁹ See CERULLI IRELLI, *Impresa pubblica*, in C. Pinelli, T. Treu (edited by), *La costituzione economica: Italia, Europa*, Bologna, 2010, 127 et seq.

²⁰ See Ministero del Tesoro, del Bilancio e della Programmazione Economica, *Libro Bianco sulle Privatizzazioni*, 2001, su *www.dt.tesoro.it.*, 13-15 and M. CLARICH, *Manuale di diritto amministrativo*, Bologna, 2013, 349.

²¹ See, as initial measures, law decree 5 December 1991 no. 381, signed into law on 29 January 1992 no. 35 but, most of all, the subsequent law decree 11 July 1992 no. 333, converted into law 8 August 1992 no. 359, which was the true starting point of the privatization process

²² Particularly important is enabling law no. 59/97 which prescribed the “change to associations or legal entities governed by private law of entities that do not perform functions or services of significant public interest”, with the resulting delegated decrees giving rise to entities that, by law, were formally private.

²³ See Constitutional Court, 28 December 1993, no. 466 in *Foro amm.*, 1995, 298. As to scholarly works, see the following stand out among others: M. CLARICH, *Privatizzazioni e trasformazioni in atto nell'amministrazione*

Therefore, if in the past decades the Italian State's business interests in the economy were comparable to those of socialist States²⁴, the policies adopted in these years resulted in a significant reduction of that presence in the market. However, this is far from being a demise of the "State as shareholder", with the most important aspect being, more than a quantitative shrinkage of its position, the "forced" qualitative change of the rationale underlying State-run business activities.

Currently, the State as shareholder is, in essence, embodied by the Ministry of the economy and finances. In fact, this Ministry has been progressively transferred all the State's holdings²⁵; in addition, this Ministry acts as co-manager or co-policymaker in relation to enterprises owned by the other ministries.²⁶

However, in most cases this Ministry does not act as a "direct" shareholder in "enterprises", which are often held by companies created or resulting from transformations by operation of law – i.e. "instrumental public corporations" - to perform general interest

italiana, in *Dir. amm.* 1995, 519 et seq., M. CLARICH – A. PISANESCHI, *Privatizzazioni (ad vocem)*, in *Dig. Disc. Pubbl. Agg.* 2000, Torino, 432 et seq., R. GAROFOLI, *Le privatizzazioni degli enti dell'economia. Profili giuridici*, Milano, 1998, 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, M. SANINO, *Le privatizzazioni*, Roma, 1997, E. FRENI, *Le privatizzazioni*, in S. Cassese (edited by), *La nuova costituzione economica*, cit., 239 et seq.

²⁴ A. MAZZONI, *Limiti legali alle partecipazioni societarie di enti pubblici e obblighi correlati di dismissione: misure contingenti o scelta di sistema?*, in C. Ibba, M. C. Malaguti, A. Mazzoni (edited by), *Le società "pubbliche"*, cit., 57 et seq

²⁵ For the current shareholdings of the Ministry of the Economy and Finances, see www.mef.gov.it.

²⁶ Suffice to think, among others, of Difesa servizi s.p.a., a "legal" in house company of the Ministry of Defence, which engages in the provision of production activities and technical and administrative support, as per article 535 of legislative decree, 15 March 2010 no. 66: "Code of the military order".

tasks and for the proper implementation of specific economic policies, including through the exercise of shareholder rights.²⁷ Such companies, then, turn policy into actual market choices; they serve, as specified by policy itself, the “public interest”, but in line with the profit-seeking purpose of the “company limited by shares”.²⁸

Thus, when reference is made to the “State as shareholder”, it is clear that all these players call to mind, though with some differences, the old “management agencies”.

Following the wave of privatizations, which were often only formal, new entities have been arising organized as companies limited by shares, with the Ministry of the economy and finances acting as a leading operator and shareholder.

At any rate, current laws on State holdings in enterprises allow the State’s role as shareholder provided that these investee companies serve “significant national interest”, have sound operating performance and financial conditions and “are expected to be profitable in the future”²⁹. It is clear that this is intended to prevent the State from

²⁷ See, among the most significant examples: Cassa Depositi e Prestiti s.p.a., which was changed to a company limited by shares (S.p.A.) by article 5 of legislative decree 263/2003, converted into law no. 326/2003, whose functions were recently redefined by paragraph 8 bis of law decree of 31 March 2011, no. 34, converted into law 26 May 2011, no. 75. See also, for instance, the Agency to attract investments (Invitalia) S.p.A., which was originally regulated by article 1 of legislative decree no. 1/1999 and redesigned by law 296/2006 (Budget law 2007), article 1, paragraph 460).

²⁸ For the relevance of these policies, in the relationship between policy-makers and company: V. CERULLI IRELLI, *Amministrazione pubblica e diritto privato*, cit., 65. Some scholars regard this type of influence more effective than that implemented through traditional guidance and supervision powers: G. P. ROSSI, *Gli enti pubblici*, Bologna, 1991, 182; see also M. RENNA, *Le società per azioni in mano pubblica*, cit., 124-125.

²⁹ See article 7 of law decree 31 March 2011 no. 34, which includes paragraph 8 bis in article 5 of law decree 269/2003, converted into law no. 326/2003, for the change of Cassa Depositi e Prestiti to a company limited by shares. See also, for instance, article 1, paragraph 2 of legislative decree no. 1/99, as amended by article 1 of legislative decree 14 January 2000, no. 3, with respect to Invitalia S.p.A.

becoming a “cash dispenser” disguised as a shareholder, as it is required to comply with market and competition rules, acting, in its pursuit of the long-term general interest, as a “prudent businessman”³⁰, according to European imperatives.

3. PUBLIC ENTITIES ORGANIZED AS CORPORATIONS.

In addition to “companies in State hands”, which were quite common as early as last century, the past few years have seen a proliferation of companies limited by shares established, by operation of law, to pursue the general interest or to perform instrumental activities or as a result of the formal transformation of pre-existing public entities, largely of an economic nature.³¹

These entities operate under a “singular law” (i.e. “ad hoc rules for the specific entity”) which deviate substantially from those laid down by the civil code for companies limited by shares. Such entities are created by operation of law or on the basis of an express

³⁰ On this aspect, see V. CAPUTI JAMBRENGHI, *Gli aiuti di stato nel diritto comunitario vivente*, in *Riv. it. dir. pubbl. com.*, 1998, 6, 1259 et seq., P. LAZZARA, *La pubblica amministrazione come imprenditore privato*, in Proceedings of the Conference AIDPA 30 September-1 October 2011, L’atto autoritativo: convergenze e divergenze tra ordinamenti”, Napoli, 2012, passim, F. GHELARDUCCI - M. CAPANTINI, *Gli aiuti di Stato e il “principio dell’investitore privato” negli orientamenti della Commissione e nella giurisprudenza comunitaria*, in *www.astrid-online.it.*, M. G. DELLA SCALA, *Società per azioni e Stato imprenditore*, Napoli, 2012, 234 et seq.

³¹ Suffice to think – among many other examples of companies established by Law to pursue the public interest, according to a plan that deviates from the rules laid down in codes and such as to attribute them instrumental role with respect to government– of such companies as Italia Lavoro s.p.a., Arcus s.p.a., Invitalia s.p.a., Consip s.p.a., Equitalia s.p.a., Coni Servizi s.p.a., Simest s.p.s., ecc.; tra quelle derivanti dalle privatizzazioni di preesistenti enti pubblici: Enav s.p.a., Eur s.p.a., Anas s.p.a., Cassa Depositi e Prestiti s.p.a., Sace s.p.a., etc.

authorization issued by Parliament³², with “necessary” government shareholders and “unsaleable” equity investments as well as with a legal definition of share capital, corporate purpose, registered office and name. In addition, often these entities feature mechanisms for the appointment of officers and governance bodies exercised outside general meetings of shareholders; special ways for the government shareholder(s) to exercise their rights; submission to external policies. Sometimes, express reference is made to the control powers of the Court of Accounts, as exercised with respect to public entities or to the possibility for the company to be represented legally by the Italian State Attorney.³³

These figures are not unknown to pre-existing State³⁴ and regional³⁵ legislation; actually, they were rather common as early as the 1970s and were the subject of important

³² See P. PIZZA, *Società di diritto singolare: rassegna 1999-2003*, in *Giorn. dir. amm.*, 2004, 4, 372 et seq.

³³ For an illustration of these rules, see P. PIZZA, *Le società per azioni di diritto singolare tra partecipazioni pubbliche e nuovi modelli organizzativi*, Milano, 2007, G. GRÜNER, *Enti pubblici a struttura di S.p.A. Contributo allo studio delle «legali» in mano pubblica di rilievo nazionale*, Torino, 2009. For a similar phenomenon that concerned entities constituted in the forms under book I of the civil code: S. DE GÖTZEN, *Le «fondazioni legali» tra diritto amministrativo e diritto privato*, Milano, 2011. In general terms, last but not least: D. MARRAMA, *Soggetti «legali» e autonomia privata. Sui limiti dei poteri legislativi e dell'interpretazione*, Torino, 2012.

³⁴ The most telling case is that of Agecontrol s.p.a., which was qualified by Law as “a public-law legal entity”, established under article 188 law no. 887/1994, implementing article 1 of Council Regulation (EEC) no. 2262/84, to exercise public control functions to aid olive oil production. This company’s functions were specified by law decree no. 701/1986, redrawn by legislative decree no. 419/1999, as they were extended to controls over the fruit and vegetable market, and revised further by subsequent legislation.

³⁵ This refers first of all to “regional financial companies”, for which see G. SANVITI, *Società finanziarie regionali*, in *Enc. Giur. Trecc.*, Milano, Giuffrè, XXIX, 1993, A. PREDIERI, *Le società finanziarie regionali*, Giuffrè, Milano, 1972, 16, 30 et seq., E. BUGLIONE, *Le finanziarie regionali pubbliche*, in *Riv. trim. dir. pubbl.*, 1975, 172.

studies, though limited in number, in the last century³⁶. For the purposes of the relevant rules, case law, in the name of a certain formalism, has long been paying little attention to any systematic-reconstructive question, emphasizing instead organizational form and considering, in essence, every company limited by shares a private entity and company law applicable for every aspect not otherwise governed by the singular legislation concerning the specific company.³⁷

In the last two decades, the debates and uncertainties on these particular figures have been extensive in legal discourse, due their constant increase in positive law. While there has been a certain resistance to admit the “public nature” of the entities in question or, otherwise, the preponderance of such public nature for purposes of the reconstruction of the overall applicable provisions, over time both prevailing scholarly views, and consequently case law, have progressively recognized a certain “neutrality” of the corporate organizational form.³⁸

In the wake of the most important studies on the concept of “instrumental entity”, administrative law scholars, in particular, have emphasized the regulatory elements that shape the types of connection between “legal company” and State administration – i.e. “indicators of public nature” - thus of the relevant “functionalization” for public interest

³⁶ Attention is called in particular to works by C. IBBA, *Le società “legali”*, Torino, 1992 and even before, on the uncertain figures of the “enterprises” for public interest purposes organized as legal entities: G. ARENA, *Le società commerciali pubbliche*, Milano, 1942

³⁷ This is the reasoning, for instance, of the United Sections of the Court of Cassation for the recognition of the private nature of Agip s.p.a., See Cass. United Sections, 26 April 1940 no. 1337, in *Foro amm.*, 1940, II, 97, rejecting the different conclusion of the Council of State in its decision of 19 January 1938, no. 33, now in *Le grandi decisioni del Consiglio di Stato*, Milano, 2001, 235 et seq. Actually, the configuration of public agencies in corporate form cannot be ruled out, at least in theory, but this form suggests the “assumption” of a private legal status.

³⁸ See, for example, State Council, Sect. VI, 7 September 2002 no. 4711, in *Riv. Corte Conti*, 2002, 5, 224.

purposes³⁹, allowing the definition of these companies as “instrumental public corporations”⁴⁰, even though organized as private-law entities⁴¹. This tendency has arisen several times, also in the case law of the Constitutional Court.⁴²

According to a different view, consideration is given to the extent of the deviations from common company law to appreciate the distance from the general “type” of company limited by shares and to qualify or not the company as a “true” company limited by shares.⁴³

³⁹ For the importance of functionalization for the purpose of the definition of the public nature of the entity, see as fairly representative of all the works in the area: ALB. ROMANO, *I soggetti e le situazioni giuridiche soggettive del diritto amministrativo*, in various authors, *Diritto amministrativo*, Bologna, 2005, I, 145 et seq., 152-156.

⁴⁰ For significant considerations on this notion: V. OTTAVIANO, *Considerazioni sugli enti pubblici strumentali*, Padova, 1959, now in *Scritti giuridici*, Milano, 1992, III, 429 et seq., G. MIELE, *La distinzione tra ente pubblico e privato*, in *Studi in memoria di R. Ferrara*, Milano, 1943, now in *Scritti giuridici*, Giuffrè, Milano, 1987, 365 et seq.

⁴¹ Allow me to refer to M. G. DELLA SCALA, *Le società legali pubbliche*, in *Dir. amm.*, 2005, 2, 391 et seq.

⁴² See first of all the well-known pronouncement of the Constitutional Court of 19 December 2003 no. 363, in *Foro amm. – CdS*, 2003, 3566, where Italia Lavoro s.p.a. is considered an “instrumental entity” of the State on the basis, among others, of the consideration that this company is “a special public company limited by shares with capital totally paid in by government”; that the Ministry of the Treasury exercises shareholder rights as directed by the President of the Council of Ministers, in agreement with the Ministry of labour and social policies; that this company cannot choose its tasks on its own but they are instead indicated on the basis of the above-mentioned provisions and consist, in essence, in the supply of services intended to promote employment – and especially socially useful employment as an active labour policy tool – throughout the entire national territory, particularly with respect to the more disadvantaged situations”.

⁴³ For a summary of the different positions, see P. PIZZA, *Le società per azioni di diritto singolare*, cit., 308 et seq.

However, these perspectives seem to be mostly complementary to the extent that, for qualification and regulatory purposes, once the “specialty” of the company is identified and the difference with the “general type” is established, it is necessary to evaluate its “substance” and its rationale to determine whether the company is part of the “public administration” in a subjective sense.⁴⁴

At any rate, today it is commonly accepted that the nature of a company in public hands should be considered on the basis of the criterion of the “substantive public nature”, by looking at the manner of incorporation, its organizational profiles, the nature of the activity performed, and the purpose pursued.⁴⁵

In addition to the provisions of the individual singular laws, the legal nature of the entity organized as a company limited by shares is relevant today, for instance, in terms of controls by the Court of Accounts and the kind of liability of its directors; perhaps in terms of the legal nature of the acts taken to select staff for the purposes of access to employment; in terms of the extension of the rules on access to administrative documents; and, more generally, in terms of the possibility to apply the general law on the administrative procedure, no. 241/1990, just to mention but a few controversial issues.

Lawmakers, too, have finally adopted and helped along – though not always in a systematic and fully consistent manner - this progressive extension of administrative law, despite the use of private-law legal forms. This in the name of a “substantivist” view of phenomena and the need, commonly referred to, that the private-law parts of the State’s organization do not end up eluding constitutional and institutional principles and the

⁴⁴ R. GAROFOLI, *Le privatizzazioni degli enti dell’economia. Profili giuridici*, cit., 381, M. RENNA, *Le società per azioni in mano pubblica*, cit., 103. For the thesis on the need to “pierce the corporate veil”: F. GOISIS, *Contributo allo studio delle società in mano pubblica*, Milano, 2004, 247.

⁴⁵ State Council, Section VI, 11 January 2013 no. 122, on www.giustizia-amministrativa.it.

fundamental safeguards that, in the Italian system, are related to the “public administration” and the “exercise of the administrative function”.⁴⁶

This will be addressed in the following paragraphs.

4. THE STATE’S “SPECIAL POWERS” IN PRIVATIZED COMPANIES AND THE CONTRAST WITH THE EU LAW.

In the path to the progressive “despecialization” of the rules on State-owned companies, attention is called to developments in the so-called “golden share”.

The substantive privatization of public economic entities was subject in some cases - largely in the utilities sector to be liberalized and in the sectors considered strategic for the national community – by the addition, in the articles of association of the companies resulting from the change, of “special powers” in favour of the State in its capacity as shareholder.

Article 2 of law decree no. 332 of 31 May 1994 provided that – for defence, transportation, telecommunications, and energy companies, as well as other utilities - “a decree of the President of the Council of Ministers adopted upon proposal of the Minister of the treasury, in agreement with the Ministers of the budget and economic planning and the industry, commerce and artisanship as well as with the Ministers responsible for the sectors concerned, following a notice to the competent parliamentary commissions” should identify those whose articles of association that. should be amended “before any action resulting in the loss of control” via the introduction of a clause, approved by the body of

⁴⁶ See V. CERULLI IRELLI, *Amministrazione pubblica e diritto privato*, cit., 30 et seq.

shareholders in a general meeting of shareholders, attributing to the Ministry of the treasury one or more “special powers”, such as: “approval” for significant equity investments; “approval” for pacts or agreements on voting rights and the purchase or transfer of shares, involving at least one-twentieth of share capital represented by shares with voting rights in the general meeting of shareholders (...); “veto” to the adoption of resolutions to wind up the company, to transfer the company, to merge, to demerge, to transfer headquarters abroad, to change the corporate purpose, to amend the articles of association in ways capable of repealing or changing the above powers; “appointment” of at least one director or a number of directors not greater than one-fourth of the members of the board and one statutory auditor”.

This is the recognition, in the founding document of companies limited by shares, of “exceptional” powers, which deviate from those established by company law, for the shareholding public body, which formally are not inherent in any share.⁴⁷

However, in addition to the principle of the “neutrality” of the supranational order with respect to share ownership, given that both State-owned and private firms can operate in the market⁴⁸, the European Treaties establish the “equality” of both types of company⁴⁹, with the obligation for the States to reduce “special regimes”, which are rather common in

⁴⁷ See P. LAZZARA, *Libera circolazione dei capitali e “golden share”*, in *Foro amm. CdS*, 2002, 1607 et seq.

⁴⁸ See article 345 TFEU (ex article 295 TEC), whereby, in fact: “The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership”.

⁴⁹ See article 106 of the Treaty on the functioning of the European Union (formerly article 86 TEC) and, for credit entities, articles 123 and 124.

the different legal orders, laying down special rules in favour of the “State as entrepreneur” and the “State as shareholder”.⁵⁰

Accordingly, the European institutions have taken a negative view of golden shares and “special powers”, which are considered violations of the “golden rules” of the single market and the economic freedoms called for by the Treaties, particularly the “right of establishment” and the “free movement of capital”.⁵¹

⁵⁰ See also directive 2006/111, of 16 November 2006 “on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings”, which replaces oft-amended directive EC 723/80. The 5th “whereas” provides that “the Treaty requires the Commission to ensure that Member States do not grant undertakings, public or private, aids incompatible with the common market”.

⁵¹ See first of all article 26 of the consolidated text of the Treaty on the functioning of the European Union (ex article 14 of the TEC) and article 63, paragraph 1, of the Treaty (ex article 56 of the TEC). The first freedom, according to a widely-accepted interpretation, the ability of a citizen of a Member State to acquire equity interests in companies established in another Member State to such an extent as to “allow him to influence decisions” by the company and “to allow him to direct its activity”; the second includes the ability to make “direct investments” to such an extent as to allow effective “participation” “in the management of the company or in its control”. See for all: EU Court of Justice, First Chamber, 10 November 2011, no. 212, C-212-09, *EU Comm. v. Republic of Portugal*, in www.eur-lex.europa.eu. According to EU law, these freedoms can be sacrificed only in the presence of “fundamental interests” and through suitable, proportionate and non-discriminatory measures. See article 65 TFEU (ex article 58 TEC) which recognizes the right of member States (...) to take all requisite measures to prevent infringements of national law and regulations (...), or to or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security, without prejudice to the applicability of restrictions on the right of establishment which are compatible with the Treaties, provided that these restrictions are not covert discriminations. In this sense: European Court of Justice, 13 May 2003 no. 98, C-98/01, *Com. v. United Kingdom of Great Britain*, in www.eur-lex.europa.eu, European Court of Justice, 28 September 2006 no. 282, C-282/04 and C-283/04 *Commission v Netherlands* in www.eur-lex.europa.eu, a case where the absence of any condition that justifies “special rights” is indicated.

Therefore, the special powers involving authorizations or prior consent by “public authorities” (including through “instrumental companies”) for privatized companies to carry out certain transactions or to manage their operations are regarded as contrary to the above “single market” principles, both because they are intended to protect interests that are not in keeping with the exceptions permitted by the Treaty and because they are based on grounds that are too generic and disproportionate with respect to the objectives pursued.⁵² These considerations were extended also to powers of veto and opposition⁵³, even though they are considered less pervasive than those exercisable *ex ante*.

On the other hand, it does not matter whether these “powers” are set out in the articles of association⁵⁴. What matters is the special role of the public shareholder with respect to the rules applicable to the private sector, which is enough to dissuade entrepreneurs and investors from acquiring shareholdings that would allow them to exercise influence or even to make mere “portfolio” investments.⁵⁵

⁵² Among others: European Court of Justice, First Chamber, 8 July 2010 no. 171, C-171/08, EU Commission v Republic of Portugal, in www.eur-lex.europa.eu.

⁵³ See, for example, European Court of Justice, Third Chamber, 26 March 2009 no. Commission v Republic of Italy, in www.eur-lex.europa.eu; see European Court of Justice, 23 May 2000, C-58/99, Commission v Republic of Italy, *ibidem*. See also, e.g., European Court of Justice, Sect. I, 11 November 2010 no. 543, Commission v Republic of Portugal, in www.eur-lex.europa.eu, on *Electricidade de Portugal SA*. See T. AJELLO, *Le golden shares nell'ordinamento comunitario: certezza del diritto, tutela dell'affidamento degli investitori e "pregiudiziale" nei confronti dei soggetti pubblici*, in *Dir. unione eur.*, 2007, 4, 815 et seq.

⁵⁴ Among others: European Court of Justice, First Chamber, 10 November 2011 no. 212, C-212/09, Commission v Republic of Portugal, in eur-lex.europa.eu.

⁵⁵ Particularly meaningful is the decision by the European Court of Justice, 13 May 2003 no. 98, C-98/01, in www.eur-lex.europa.eu, Commission v United Kingdom of Great Britain and Northern Ireland.

Even though the provision under law no. 448/1999 (budget law 2000), which – somewhat contrary to the original rules – required the inclusion of the above powers in the articles of association “in suitable and proportionate manners and extent”, in view of the need to protect “significant and fundamental reasons of public interest - concerning essentially “public peace”, “public health”, and “defence” – did not prevent the Court of Justice from handing down its negative decision ⁵⁶; this because the law was enacted after the end of the period necessary to correct the violation. Thus, the cited law decree no. 332/1994 was regarded as unlawful because the special powers laid down therein were judged able to give the Italian State a “potential discrimination power” which could be used “arbitrarily”.

Eventually, the rules were amended by article 4, paragraph 228 of law no. 350 of 24 December 2003 (2004 budget law). The “special approval powers” were changed, in essence, to powers of opposition *ex post*; a “veto” would have to be “duly reasoned in relation to the actual damage inflicted to the State’s vital interests” while an “appointment” would concern only a director without voting rights. The decree of the presidency of the Council of Ministers of 10 June 2004, moreover, mandated the exercise of said powers subject to “serious and actual risks” of damage to essential goods, such as security of energy sources, public service obligations, security of grids and plants, national defence and military security.

However, the supranational institutions did not consider these amendments sufficient to solve the differences with the European legal order. Thus, in 2009 the Commission started a new infringement procedure (no. 2009/2255). As a result, article 3, paragraph 2, of law decree no. 21 of 15 March 2012, no. 21, as converted into law no. 56 of 11 May 2012 finally repealed the above rules effective as of the date of entry into force of the new decrees of the President of the Council of Ministers which must identify the companies requiring “special powers” (article 1 of cited law decree).

⁵⁶ European Court of Justice, 23 May 2000 no. 58 C-58/99, in *Giur. it.*, 2000, 1657

These decrees are nowadays called upon to identify: “*the activities of strategic relevance for the defence system and national security, including key strategic activities*”, in relation to which (...) the following powers may be exercised in the presence of an “*(actual) threat of serious harm to the essential interest of national defence and security*”:

a) introduction of specific conditions related to the security of supply lines, security of information, technology transfers, export control in case of purchases, for any reason, of equity interests in companies performing *key strategic activities for national defence and security*”; “b) veto to the adoption of resolutions by the company’s body of shareholders or governance bodies on any merger or demerger of the company, sale of the company or of any branch or subsidiary thereof, transfer of headquarters abroad, change in the corporate purpose, wind-up of the company, amendments to any clauses of the articles of association adopted pursuant to article 2351, third paragraph, of the Italian civil code or introduced pursuant to article 3, paragraph 1, of law decree no. 332 of 31 May 1994 as amended, “any transfer of property rights or rights of use related to tangible or intangible assets or the assumption of restrictions limiting their deployment”; c) opposition to the purchase, for any reason, of equity investments by entities other than the Italian State, Italian public bodies or entities under their control, “if the buyer comes to achieve – directly or indirectly, including via subsequent purchases through third parties or otherwise related parties – a level of share ownership with voting rights capable of jeopardizing in the specific case national defence and security interests (...).⁵⁷

This would seem to have solved all the differences of the Italian system with the European legal order, which tolerates very limited departures from common company law, provided that such departures are grounded in “specific and objective circumstances”, such as the “effective and sufficiently serious threat to one of the collectivity’s fundamental

⁵⁷ For the implementation of these provisions, see decree of the President of the Council of Ministers no. 253 of 30 November 2012 “Rules on the identification of activities of strategic relevance for the national defence and security system, in accordance with law decree no. 21 of 15 March 2012, converted into law, as amended, by law no. 56 of 11 May 2012”.

interests”⁵⁸. Yet, as the special role of certain government-owned companies in terms of common company law loses relevance, on the other hand certain “non-transitory” needs seem to be arising which justify the presence of some limited “special” powers attributable to the State, closely related to its sovereign prerogatives.

As to the legal nature of the above “special powers” and the acts through which they are exercised, despite some opposing views, it seems to be widely accepted the notion that such nature is grounded in public law,⁵⁹ falling therefore within the jurisdiction of administrative courts.

On the other side, any problem of jurisdiction seems to have been recently solved at the root by Parliament, which devolved any dispute to the exclusive jurisdiction of the administrative courts.⁶⁰

In fact, article 3 of law decree 21/2012 laid down procedural rules amending and supplementing legislative decree no. 104 (Code of judicial proceedings before

⁵⁸ Such “permitted” purposes might include for example, the reinforcement of “public security”, such as the need to protect energy grids and oil supplies, or the telecommunication grid (in cases of crisis, war, or terrorism”. See among others: European Court of Justice, 14 March 2000, C-54/99, *Association Eglise de Scientologie de Paris and other v Republic of France*, on www.eur-lex.europa.eu, Id., 4 June 2002 no. 483, C-483/99, *Commission v Republic of France*, ibidem, Id., Third Chamber, 26 March 2009 no. 326, C-326/07, *Commission v Republic of Italy*, cit. and see Communication of the Commission on Certain Legal Aspects Concerning Intra-EU Investment (97/C 220/06), in EC Official Journal no. C 220, 19 July 1997. On the other hand, no restrictions would be justified by the need, for instance, “to avoid any financial market turmoil” and to protect “competition”: Id., 4 June 2002 no. 367, C-367/98, *Commission v Republic of Portugal*, ibidem, European Court of Justice, Sect. I, 8 July 2010 no. 171, C-171/08, *Commission v Republic of Portugal*, in www.eur-lex.europa.eu

⁵⁹ See also the considerations by the European Court of Justice, 13 May 2003 no. 98, C-98/01, in www.eur-lex.europa.eu.

⁶⁰ See State Council, plenary conference, 3 June 2011 no. 10, in *Foro amm. – CdS*, 2011, 6, 1842, and see Constitutional Court, 10 February 1997 no. 29, in *Giur. cost.*, 1997, 233.

administrative courts), designed to extend the exclusive jurisdiction of the administrative courts over disputes relating to the exercise of the special powers inherent to strategically relevant activities in defence and national security as well as in the energy, transportation and communication sectors⁶¹; to extend the necessary functional responsibility of the administrative regional court (TAR) of Lazio, venue of Rome, for disputes related to the exercise of the above special powers⁶²; to apply the fast track procedure under article 119 of the Code of administrative court procedure to measures adopted in exercising the above special powers.⁶³

5. THE “EXCLUSIVE POWERS” TO APPOINT OFFICERS AND MEMBERS OF THE GOVERNANCE BODIES IN ACCORDANCE WITH THE CIVIL CODE, AND THE “POISON PILL”.

Generally, the regulatory system for State-owned companies has always been central in the debate on the Italian legal order, even though lawmakers decided from the very start not to enact any special provisions for them. In fact, according to the civil code, they are subject to the same rules as private companies limited by shares, including exposure to bankruptcy proceedings.⁶⁴ This seemed to signal the specific choice to preserve the purely private nature of companies limited by shares, even though “in public hands”, limiting to the utmost any distinction in the legislation.

⁶¹ See new article 133 of Code of judicial proceedings before administrative courts., para. *z quinquies*.

⁶² See new article 135 of Code of judicial proceedings before administrative courts

⁶³ See new article art. 119 of Code of judicial proceedings before administrative courts.

⁶⁴ Actually, article 2221 of the civil code shields “public bodies” from bankruptcy, not State-owned companies.

This reconstruction was also helped, during the long phase of the “system of State-owned enterprises”, by the approach whereby investments were held by public economic entities and not directly by the State through a Ministry; in this way, the State exercised, in principle, its policy-making powers by setting targets for the management agencies while State holding agencies could easily exercise their influence on investees solely through the common mechanisms of company law.

However, the original version of the civil code – regardless of the above rules resulting from the privatization processes – did permit exceptions to general company law in matters of appointments made outside general meetings⁶⁵ of shareholders. Article 2458 of the civil code provided that when the State or other public bodies had equity investments in a company limited by shares, the articles of association could allow them to appoint one or more directors, or statutory auditors – with the same rights and obligations as those appointed by the body of shareholders in general meetings - who could be terminated only by the appointing entity. Similar provisions could concern also companies that did not have the State as shareholder (article 2459).

It is affirmed that companies limited by shares held in whole or in part by the An even greater impact in terms of possible exceptions to company law was the definition of a company limited by shares as a “national interest company” (article 2461 of the civil code), which was subject to the general rules on companies limited by shares “in keeping with the special laws that lay down for these enterprises special provisions on management, the transferability of shares, the right to vote and the appointment of directors, statutory auditors and managers”. This was the admission that there were companies governed by “special laws” that characterize the experience of positive law, in addition to the large number of the above-mentioned “singular law” companies.

⁶⁵ Article 2460 of the civil code provided that the chairman of the board of statutory auditors had to be selected from among State-appointed statutory auditors.

According to several legal scholars, the appointment of directors and statutory auditors by the State outside the mechanisms of general meetings of shareholders, according to the cited civil code provisions, reflected the exercise of private law powers.⁶⁶ Others, instead, saw the process through the lenses of public law, equating appointments and removals to administrative measures.⁶⁷

Lastly, there was a school of thought that distinguished between State-owned company and company without the State among its shareholders, considering the public nature of the above actions only in the second case.⁶⁸

In most instances, case law would not have accepted the State's appointments and removals of members of the governance bodies as administrative measures under current legislation, regarding them instead as the province of "special private law of Public Administration", with the necessary consequences in terms of jurisdiction.⁶⁹

⁶⁶ See R. URSI, *Riflessioni sulla governance delle società in mano pubblica*, in *Dir. amm.*, 2004, 747 et seq., A. MALTONI, M. PALMIERI, *I poteri di nomina e revoca in via diretta degli enti pubblici nelle società per azioni ex art. 2449 c.c.*; in *Dir. amm.*, 2009, 2, 267 et seq. Lately, reference to "special private law" was made by V. DONATIVI, *La nomina pubblica alle cariche sociali*, cit., 243.

⁶⁷ F. A. ROVERSI MONACO, *Revoca e responsabilità dell'amministratore nominato dallo Stato*, in *Riv. dir. civ.*, 1986, I, 258 et seq., G. VERUCCI, *La revoca dell'amministratore nominato dallo Stato o da enti pubblici*, in *Riv. dir. comm.*, 1965, II, 35 et seq. In case law, see e.g. Cass. 15 July 1982 no. 4139 in *Giur. comm.*, 1983, II, 509.

⁶⁸ A. SCOGNAMIGLIO, *Sulla revoca dell'amministratore nominato dallo Stato o da enti pubblici ex art. 2458 c.c.*, cit.

⁶⁹ For a distinction between "relationship provisions", which govern the interaction of all the persons and entities in a legal order, and "action provisions", which govern the powers of Government (or, according to a different approach, which protect legitimate interests), in order to draw the line between the jurisdiction of ordinary courts and that of administrative courts: Cass. United Sections 4 July 1949 no. 1657, est. Ferrara, in *Foro it.*, 1949, I, c. 926 et seq. For the acceptance of two different sets of provisions related to Government, see, among others: Cass.

State do not change their private-law nature because of their ownership structure; the relationship between the company and the public entity is understood to be of “total autonomy”, to the extent that the latter is prohibited from influencing unilaterally company actions through the exercise of authoritative powers, since it can operate solely with the tools made available by company law, through State-appointed members of the company’s governance bodies⁷⁰. The power to appoint directors in companies where the State is the majority shareholder derives from the State’s ownership rights, hence the jurisdiction of ordinary courts in connection with disputes on the foregoing appointments and removals.⁷¹

The negative decisions by European institutions on special regimes in favour of the State and public bodies involved also the general “exclusive” powers to appoint members of governance bodies, directors first of all, such as those provided for by the civil code in Italy, these powers being considered – although apparently with a more limited

United Sections, 8 May 1980 no. 3024, in *Riv. giur. ed.*, 1980, I, 544, Cass. United Sections, 11 April 1981 no. 2113, in *Giust. civ.*, 1981, I, 2008, Cass. United Sections, 4 March 1983 no. 1622, in *Rass. avv. Stato*, 1983, I, 315, Cass., United Sections, 11 July 1984 no. 4056, in *Giust. civ. Mass.*, 1984, fasc. 7, Cass. United Sections, 6 October 1988 no. 5395, in *Giust. civ. Mass.*, 1988, fasc. 10, Cass. United Sections, 3 April 1989 no. 1590, in *Foro it.*, 1989, I, 3145, Cass. United Sections, 10 April 1992 no. 4411, in *Foro it.*, 1992, I, 2671, Cass. United Sections, 11 November 1994 no. 9418, in *Giust. civ. Mass.*, 1994, fasc. 11, State Council, Section IV, 5 October 2004 no. 6489, in *Foro it.*, 2006, 4, III, 201, TAR Roma, Lazio, First Chamber, 24 April 2007 no. 3623, in *Foro amm. TAR*, 2007, 4, 1340, State Council, Section VI, 8 September 2009 no. 5266, in *Foro amm. CdS*, 2009, 9, 2080, State Council, ad. pleno., 24 May 2007 no. 8, in *Foro amm. CdS*, 2007, 5, State Council, ad. pleno., 22 October 2007 no. 12, *su www.giustizia-amministrativa.it*, State Council, Section IV, 24 February 2011 no. 1239, *Ibidem*. On the traditional allocation of jurisdiction on the basis of the subjective legal situation in the case, subjective right – ordinary jurisdiction/administrative power – administrative jurisdiction, see for all: ALB. ROMANO, *Giurisdizione amministrativa e limiti della giurisdizione ordinaria*, Milano, 1975, ID., *Giurisdizione ordinaria e giurisdizione amministrativa dopo la legge n.205 del 2000* (Epitaffio per un sistema), in *Dir. proc. amm.*, 2001, p. 602.

⁷⁰ Cass., United Sections, 15 April 2005, no. 7799, in *Foro it.*, 2005, I, 2726.

⁷¹ See, e.g., State Council, Sect. V, 13 June 2003, no. 3346, in *Foro amm. - CdS*, 2003, 1894

weight with respect to the “golden share” - as restrictions to economic freedoms and departures from the principle of “equal treatment of shareholders”⁷², as laid down in the European rules to harmonize company laws.

The introduction of such provisions into company law was of little consequence, as they are intended to attribute rights that cannot be granted to regular shareholders; nor did it matter that they were based on articles of association, given the difficulty to amend them and the possibility for the State and the other public bodies to maintain, through them, “long-lasting and direct economic ties” with the company.

With decision 6 December 2007, C-463/04 and C-464/04⁷³, the First Chamber of the European Court of Justice considered unlawful those Italian provisions that allowed the exercise of “direct” appointment powers pursuant to article 2449 of the civil code, thus enabling the State (and other public bodies) “to participate in a more significant manner in the activity of the board of directors of a company limited by shares than their status as shareholders would normally allow”. To this end, the Court considered whether article 2449 of the civil code, either by itself or in conjunction with the powers still attributable to the public body pursuant to law decree 332/1994, was in contrast with article 56 TEC. It was observed how, even though such “right of appointment” was not “permanent”, considering that it appeared in the articles, as it might be amended upon a subsequent

⁷² See article 42 of the second EEC directive 77/91 to harmonize company law; in the presence of different classes of shares, the principle refers to “equal treatment” of shareholders of the same class. See G. OPPO, *Diritto delle società e attuazione della 2a direttiva CEE. Il decreto di attuazione in Italia. Rilievi sistematici*, in *Riv. dir. civ.*, 1986, I, 565 et seq., now in *Scritti giuridici*, II, *Diritto delle società*, Padova, 1992, 440 et seq., and see F. SANTONASTASO, *Dalla “golden share” alla “poison pill”: evoluzione o involuzione del sistema? Da una prima lettura del 381°- 384° comma dell’art. 1 l. 23 December 2005 no. 266*, in *Giur. comm.*, 2006, 3, 383 et seq., F. GOISIS, *La natura delle società a partecipazione pubblica tra interventi della Corte europea di giustizia e del legislatore nazionale*, in *Riv. it. dir. pubbl. com.*, 2008, 1, 396.

⁷³ C-463/04 and C-464/04, *Ass. azionariato diffuso Soc. AEM C. Com. Milano*, in www.eur-lex.europa.eu, related to AEM, a company owned by the Comune di Milano engaged in the distribution of gas and power.

revision of such articles, the public body still enjoyed a “relatively high degree of protection”, as it could “benefit from the guarantee of continuity which the articles of association of a company limited by shares provide”, since amendment of those articles requires a “qualified majority” of shareholders⁷⁴.

On closer scrutiny, these considerations concern in essence mixed-ownership enterprises engaged, at least in theory, in business activities. Actually, it is precisely the companies operating under this model that need to be placed “on an equal footing” with private firms, so as to comply with the EU and “global” principles to protect market competition.⁷⁵

The experience of the golden share and special powers, especially in privatized companies, represented a chance to systematize the Italian “private company law”, inclusive of rules on “companies – enterprises” in public hands.

While article 2450 – which had incorporated the provisions of the former article 2459 of the civil code after the company law reform⁷⁶ – was repealed⁷⁷, also article 2449,

⁷⁴ Thus, to amend the articles of association, the private operator would have needed a “much larger investment” than that required – in other circumstances and according to company law – for such operator to influence the company in question. See e.g., among others: European Court of Justice, First Chamber, 11 November 2010 no. 543, C-543/08, *Commission v Republic of Portugal*, in www.eur-lex.europa.eu, on *Electricidade de Portugal SA*, and Id., 10 November 2011, C-212/09, *Commission v Republic of Portugal*, *Ibidem*.

⁷⁵ To this end, for a clear distinction between State-owned companies, intended to perform public service tasks, and mixed-ownership companies, see OECD, *Accountability and Transparency. A Guide for State Ownership*, 2010, particularly pages 12 and 24.

⁷⁶ Legislative decree no. 6 of 17 January 2003, implementing delegated legislation no. 366. 3 October 2001.

⁷⁷ Following the infringement procedure opened against Italy (no. 2006/2014), due to violation of articles 56 and 43 of the treaty by article 3 of law decree no. 10 of 15 February 2007 (Provisions designed to implement

which reproduced in its entirety the provisions of the former article 2458 of the civil code⁷⁸, was rewritten – as were the rules on the powers that could be included in the articles of association of privatized companies. This - in the version resulting from the amendments introduced by article 13, paragraph 1 of Law no. 34 of 25 February 2008 – draws a distinction between “unlisted companies limited by shares” and “companies limited by shares listed on regulated exchanges”, thereby giving life to a recurring theme in the rules on State-owned companies in the last few years. For the former, the right to appoint is proportionate to the shareholding while for the latter that right is closer to that provided for by general company law⁷⁹.

community and international obligations), converted as amended into law no. 46 of 6 April 2007, effective from 16 February 2007.

⁷⁸ However, the previous text was amended with the addition of a fourth paragraph, whereby: “This without prejudice to any special laws”.

⁷⁹ For the former, the wording is as follows: “1. If the State or government bodies have an equity interest in a company limited by shares that is not listed in an equity market, the articles of association may confer upon them the right to appoint a number of directors, statutory auditors or members of the supervisory board proportionate to the shareholding. 2. Directors, statutory auditors or members of the supervisory board appointed as per paragraph 1 can be terminated only by the bodies that appointed them. They have the same rights and obligations as those of members appointed at general meetings of shareholders. Directors cannot be appointed for more than three fiscal years and their term of office expires on the date of the general meeting of shareholders convened to approve the accounts for the last fiscal year of their term of office. 3. Statutory auditors or members of the supervisory body are appointed for three fiscal years and their term of office expires on the date of the general meeting of shareholders convened to approve the accounts for their last fiscal year of their term of office”. To companies listed on equity markets common company law shall apply, but the board of directors may also propose to the body of shareholders – which adopts resolutions on the basis of the majorities provided for ordinary general meetings of shareholders – that the administrative rights laid down by the articles of association in favour of the State might be represented by a special class of shares. To this end, it is necessary to obtain the consent of the State or the public body holding those administrative rights.

However, not all doubts are dispelled on the ability of this framework to achieve equal treatment between public and private shareholders. With respect to unlisted companies, in particular, one cannot fail to notice how current article 2449 of the civil code still gives the public shareholder a power “to participate in a more significant manner than its status as shareholder would normally allow”, by making the right to appoint, thus not merely the right to vote, proportionate to shareholding.⁸⁰

A set of “transitory” provisions was introduced by paragraphs 381-382 of article 1 of law 23 December 2005 (2006 budget law), whereby to foster privatizations and the advancement of share investments, the articles of association of companies where the State holds significant equity interests may call for the issue of equity instruments, pursuant to article 2346, sixth paragraph of the civil code, or the creation of classes of shares, pursuant to article 2348 of the civil code, “including following conversion of part of the existing shares, which attribute to the holders of such shares the right to request the issue, and the assignment such holders of new shares – also at their nominal value – or new equity instruments with voting rights at ordinary and extraordinary general meetings, to the extent determined by the articles of association, also in relation to the shares held upon attribution of that right”.⁸¹

⁸⁰ See e.g. C. IBBA, *Le società a partecipazione pubblica*, cit., 6 et seq. For a comprehensive view of the extent of the current article 2449, also in light of EU law: A. MALTONI, M. PALMIERI, *I poteri di nomina e di revoca in via diretta degli enti pubblici nelle società per azioni ex art. 2449 c.c.*, cit.

⁸¹ In addition: «The financial instruments and shares which attributed the rights contemplated hereunder may be issued as a bonus to all shareholders or for consideration to one of more shareholders, also on the basis of the equity interests held (...). Moreover, these have limited rights to profit-sharing and distributions upon liquidation and the relevant issue can take place in a departure from article 2441 of the civil code”. Furthermore, it is contemplated that “Such resolutions by the body of shareholders as create share classes or financial instruments under paragraph 381, and paragraph 384, do not cause the right to withdraw”.

In this area, reference is made to *poison pills* and rules that, even though they should protect national interests, are considered as the expression of persisting “murkiness”, potentially in contradiction with the “general European interest”.⁸²

The case is different when the State owned companies become “instrumental public corporations”⁸³; in these cases, as already noted, exceptions to company law, in relation to appointments, are so many in positive law as to become evidence of the degree of their instrumentality more than illegal departures from the general law⁸⁴.

Actually, attentive scholars stress how the analysis and interpretation of the rules on appointments and removals cannot be fit into a single overall pattern, given the large number of government-owned companies operating under different models. A review would have to consider whether the “public interest” is part of the organization, as the

⁸² See F. SANTONASTASO, *Dalla “golden share” alla “poison pill”: evoluzione o involuzione del sistema? Da una prima lettura del 381°-384° comma dell’art. 1 l. 23 December 2005, no. 266, in Giur. comm., 2006, 3, 383 et seq., with reference to G. ROSSI, Capitalismo opaco, Bari-Roma, Laterza, 2005, in particular 35 et seq. Per alcuni rilievi critici, v. anche S. VANONI, *Le società miste quotate in mercati regolamentati (dalla “golden share” ai fondi sovrani, in various authors, Le società “pubbliche”* (edited by C. Ibba, M. C. Malaguti, A. Mazzoni), cit., 187 et seq. See also I. DEMURO, *L’incompatibilità con il diritto comunitario nella nomina diretta ex. art. 2449 c.c.*, in *Giur. comm.*, 2008, II, 581 et seq., F. GHEZZI, M. VENTORUZZO, *La nuova disciplina delle partecipazioni dello Stato e degli enti pubblici nel capital delle società per azioni*, in *Riv. soc.*, 2008, 703 et seq., C. PECORARO, *Privatizzazione dei diritti speciali e dell’ente pubblico nelle s.p.a.: il nuovo art. 2449 c.c.*, in *Riv. soc.*, 2009, 947 et seq.*

⁸³ For this definition, reference is made just to the cited Constitutional Court decision no. 363 of 19 December 2003, on “State organization”, related to Italia Lavoro s.p.a.

⁸⁴ See above, § 3.

above conclusions may be rejected with reference to companies where the public shareholder is permitted to pursue “directly” its institutional purposes.⁸⁵

Thus, also case law recognizes that appointments and removals in essentially State-owned companies (where it is clear that the “appointing” public authority acts as “authority”, not as shareholder) that pursue general interest purposes, or are organized in such a way as to operate under the direction of State or of a local authority, are tantamount to administrative measures, falling under the administrative jurisdiction and the courts tasked with judging the lawfulness of the activities related to the administrative function.⁸⁶

Lastly, certain scholars maintain that, in the case of “anomalous” companies subject to the special direction and supervision of public authorities, even when appointments and removals are made formally through general meetings of shareholders – but are in fact the result of significant influence or even “instructions” – the administrative jurisdiction is justified by the administrative nature of the instructions themselves and the cause-effect relationship between instructions and resolution adopted by shareholders in their general meeting, which is generally qualified as a mere implementing action. In this case, there is recognition of the “nullifying” effect of the instructions on the subsequent decision, thus the interest to challenge the instructions before an administrative court.⁸⁷

⁸⁵ See M. CAMELLI - M. DUGATO, *Lo studio delle società a partecipazione pubblica: la pluralità dei tipi e le regole del diritto privato. Una premessa metodologica e sostanziale*, in M. Cammelli - M. Dugato (edited by), *Le società “pubbliche”*, cit., 1 et seq., 2-3.

⁸⁶ See e.g., recently, TAR Lazio, Latina, First Chamber, 9 January 2013 no. 17, in *Diritto & Giustizia*, 2013, 11, State Council, Section VI, 11 January 2013 no. 122, on www.giustizia-amministrativa.it, concerning Istituto Luce Cinecittà (actually a limited liability company, though with considerations that can be easily applied to State-owned companies limited by shares.).

⁸⁷ TAR Lazio – Roma, Section III, 16 November 2007 no. 11271, in *Foro amm. TAR*, 2007, 11, 3494, on the well-known “Petroni” case.

6. The operational limits of the spoils system.

In terms of special rules on appointments and removals of directors of State-owned companies, attention needs to be paid to the issues raised by article 6 of law no. 145 of 15 July 2002, “Provisions for the reorganization of the management body in the public administration and to foster the exchange of experience and public-private interaction”, which extends the mechanism of the so-called spoils system to appointments made by public authorities in entities, companies and agencies.

Generally, it is provided that: “1. The appointments of officers and directors or equivalent office-holders in public bodies, companies controlled in whole or in part by the State, agencies or other entities regardless of their name, by the Government or the Ministries in the six months prior to the end of the Parliament’s term, as calculated from the date of the first meeting of the Chambers, or in the month prior to the dissolution of both Chambers, may be confirmed, terminated, amended or renewed within six months of the vote of confidence to the Government. If no action is taken in this period, the appointments are confirmed until the date of expiration of the relevant terms of office (...)”.

The specific purpose of the above provision requires a clear assessment and delimitation of its scope, indicating not so much the existence of appointment powers by the State, or the source of this power, but merely the associated ability to pursue the policies of the new Government.⁸⁸

⁸⁸ State Council, Chamber VI, 22 November 2010 no. 8123, in *Foro amm.* – CdS, 2010, 11, 2462. In general terms, the spoils system has limits and temperaments set by the different rulings of the Constitutional Court, as summarized in Constitutional Court, 24 February 2010 no. 81, on www.giucost.org. See A. ANGIULI, *Le società in mano pubblica come organizzazione, in various authors, L'interesse pubblico tra politica e amministrazione*, Napoli, 2010, 157 et seq. On the spoils system in general, see among others: S. BATTINI, *Dirigenza pubblica*, in *Dizionario di diritto pubblico*, S. Cassese editor, Milano, Giuffrè, vol. III, p. 1859-1867, C. PINELLI, *L'avallo del sistema delle spoglie, ovvero la vanificazione dell'art. 97 cost.*, in *Giur. cost.* 2006, 3, 2357, G. D’ALESSIO

This limits to a significant extent the number of companies limited by shares whose directors are subject to the *spoils system*. These do not include State-owned companies in general or all the companies in public hands or held entirely by the State; they do include companies pursuing public-interest purposes, characterized by an instrumental position with respect to the government authorities and their policies, as attested, for example, by special financing mechanisms and their subjection to special direction and supervision powers.⁸⁹

It is clear that, for State-owned companies, powers attributed are of a public nature and that the exercise of these powers is part of the “high-level administration” realm, as it fulfils in fact a “liaison function between policy-making and administrative activity” and is characterized by significant discretionality. Concerning these powers, the position of the individuals that are members of the board of directors in question can only be of “legitimate interest”, to be dealt within an administrative court in the event that such interest is challenged.⁹⁰

On the other hand, even though the company is one of those falling within the purview of the above rules, it is necessary for these rules to be applied solely to the cases contemplated therein. Therefore, the administrative jurisdiction over any litigation which might arise against the “high administration” acts does not attract the judicial dispute on the resolution to remove directors approved by the body of shareholders of the State-owned company, according with the articles of association, with a resolution which is distinct from

(edited by), *L'amministrazione come professione. I dirigenti pubblici tra spoils system e servizio ai cittadini*, Bologna, 2008.

⁸⁹ See State Council, Section VI 22 November 2010 no. 8123, cit.

⁹⁰ State Council, Section VI, 2 March 2011 no. 1305, in *Foro amm.* – CdS, 2011, 3, 943. In the presence of a different case, where termination is determined by operation of law, see State Council, Section V, 5 December 2012 no. 6237, in *Foro amm.* - CdS, 2012, 12, 3244.

the appointment or dismissal resolution adopted by the public body. If this were not so, the purpose for creating a company governed by private law – even though designed to pursue public interest purposes - would be defeated, given this company’s inability to exercise the prerogatives of its legal status.⁹¹

7. The liability of directors of state-owned companies limited by shares and jurisdiction issues.

According to article 28 of the Italian Constitution “Officials of the State or public agencies shall be directly responsible under criminal, civil, and administrative law for acts committed in violation of rights. In such cases, civil liability shall extend to the State and to public agencies”.

In incorporating the content of royal decree no. 2440/1923 (New provisions on the State’s administration and public budget), article 13 of royal decree no. 1214 of 12 July 1934 (Consolidated law on the Court of Accounts) already contemplated, among the relevant attributions, the jurisdiction “over the liability for losses inflicted to the State by civil servants, paid for by the State, in performing their duties”; these rules were further developed by Presidential Decree no. 3 of 10 January 1957 (Consolidated Law on the Charter of Civil Servants).

The Court of Accounts has long been recognized - by the United Sections of the Court of Cassation – as the authority competent in determining any liability not only of State and local authorities functionaries and employees but also of directors and employees of non-economic public agencies, since the concept of “public budget” is linked to the

⁹¹ State Council, Section VI, 2 March 2011 no. 1305, citation referred to also by TAR Campania, Napoli, Section. I, 23 November 2011 no. 5510, in *Foro amm.* – *TAR*, 2011, 11, 3562.

public nature of the entity that employs the agent and to the equally public nature of the money or the asset under administration that gave rise to the liability⁹².

Law no. 20 of 14 January 1994 specified and extended administrative liability, and the jurisdiction of the Court of Accounts, by providing that it would have the authority to determine the administrative liability of public directors and employees even when the loss is caused to authorities and public agencies other than those that employ them (art. 1).

The broad provisions of this Law have been deemed to cover also “economic public agencies” while recognition of the jurisdiction of the Court of Accounts over non-contractual administrative liability – i.e. liability toward a party other than the tortfeasor’s employer – flows into a new concept of “contractual” liability - it being understood that contractual liability concerns also any loss inflicted by the director or the employee of the economic public agency to the entity to which such director or employee belongs -.

On the other hand, the proliferation - due to privatizations as well as to “outsourcing”⁹³ - and the creation by operation of law of State-owned companies to carry out general interest functions have prompted the evolution of the concept of “public administration”⁹⁴, recognizing as government-related also activities performed by private-

⁹² Cass. civ. United Sections, 22 December 2003 no. 19667, in *Giur. it.*, 2004, 1830, also with reference to the dating decision by the United Sections, no. 363/1969.

⁹³ I.e. the outsourcing of public tasks to non-governmental entities. This is analysed, among others, by F. DE LEONARDIS, *Soggettività privata e azione amministrativa*, Padova, 2000, in partic. 227 et seq., P. CHIRULLI, *Autonomia pubblica e diritto privato nell’amministrazione. Dalla specialità del soggetto alla rilevanza della funzione*, Bologna, 2005, A. MALTONI, *Il conferimento di potestà pubbliche ai privati*, Torino, 2005.

⁹⁴ For general considerations on this aspect, see M. CAMELLI, *La pubblica amministrazione. Cosa è, cosa fa e come è cambiata la pubblica amministrazione*, Bologna, 2004, particularly 93 et seq. As to the liability regime for directors, V. CAPUTI JAMBRENGHI, *Azione ordinaria di responsabilità ed azione di responsabilità amministrativa in materia di società in mano pubblica. L’esigenza di tutela degli interessi pubblici*, in various authors, *Responsabilità amministrativa e giurisdizione contabile ad un decennio dalle riforme*, Proceedings of LI

law bodies and economic entities⁹⁵ as well as, in some cases, by entities organized as companies, with their employees qualified as “public officials” or “public service representatives”.⁹⁶

This whenever there is such an operational or even an organizational link between State or local authority and the private-law company so as to suggest that the latter is an extension of the former – at least in “functional” terms, by being part of the public agency’s operational processes – as a “participant in the public entity’s general interest activity”.⁹⁷ Subsequent case law, especially by the Court of Accounts, enlarged to a significant degree the confines of its powers.⁹⁸

Article 16 bis of law decree no. 248 of 31 December 2007, converted as amended into law no. 31 of 28 February 2008, provided directly, in part, for the matter at hand, establishing the principle that directors and employees of companies listed on regulated exchanges, with the State or other public authorities holding less than 50% of all the shares

Convegno di Studi di Scienza dell’Amministrazione, Milano, 2006, R. URSI, *Verso la giurisdizione esclusiva del giudice contabile: la responsabilità erariale degli amministratori delle imprese pubbliche*, in *Foro amm. – CdS*, 2004, 3, 693.

⁹⁵ Cass. United Sections, 22 December 2003 no. 19667, cit

⁹⁶ Cass. United Sections, 22 December 2003 no. 19667, cit.

⁹⁷ The first significant ruling that opened this new avenue is: Cass. United Sections, 26 February 2004 no. 3899, in *Foro it.*, 2005, I, 2675, on SO.GE.MI, a company established and majority-owned by the City of Milano.

⁹⁸ See, extensively, M. ANTONIOLI, *Società a partecipazione pubblica e giurisdizione contabile*, Milano, 2008. For recent criticisms: M. CLARICH, *Le società partecipate dallo Stato e dagli enti locali fra diritto pubblico e diritto privato*, cit., 1 et seq. and see considerations by L. TORCHIA, *La responsabilità amministrativa per le società in partecipazione pubblica*, Paper presented at Convegno Assonime-LUISS, “*Le società pubbliche tra Stato e mercato: alcune proposte di razionalizzazione della disciplina*” Roma, 13 May 2009, on www.assonime.it.

outstanding, and their subsidiaries (...) ⁹⁹, would be held accountable under private law, with the relevant disputes to be devolved before ordinary courts.

As with the standards applicable in other cases, the United Sections of the Court of Cassation clarified the principle whereby the Court of Accounts would have jurisdiction where a director or a statutory auditor of the State-owned company acts in a way that would be detrimental directly to the shareholding authority. A typical example of this would be “detriment to image”, as provided for by article 17, paragraph 30 ter of law no. 102/2009 ¹⁰⁰. If this were not so, the reaction against the loss inflicted to the assets of the State-owned company could only be prompted by the rules laid down by the civil code, as there would be no direct employment relationship between the shareholding authority and the company’s director and there would be no loss that could be qualified as a “State economic loss”; the application of ordinary laws attracts civil law jurisdiction. ¹⁰¹

⁹⁹ These provisions did not apply, however, to cases pending on the date of entry into force of the Law converting the Decree. For a comment on the Law, see G. CAIA, *La giurisdizione della Corte dei Conti nel sistema amministrativo e della contabilità pubblica*, in *www.giustamm.it*, 2008, 2. On the debate by scholars and the latest stances of case law: L. TORCHIA, *Società pubbliche e responsabilità amministrativa: un nuovo equilibrio*, in *Giorn. dir. amm.*, 2012, 3, 323 et seq., F. CINTIOLI, *Disciplina pubblicistica e corporate governance delle società partecipate da enti pubblici*, in F. Guerrera (edited by), *Le società a partecipazione pubblica*, cit., 143 et seq.

¹⁰⁰ On the extent of this, see Court of Accounts Lombardy region, Jurisdiction section., 20 October 2009, no. 641, in *Ragiusan*, 2011, 321-322, 82. In general terms, on detriment to the Public Administration’s image, see Cass. United Sections, decision 25 June 1997 no. 5668, in *Foro it.*, 1997, I, 2872; more recently, among others: Cass. United Sections, 20 June 2007 n. 14297 in *Foro amm. - CdS*, 2007, 10, 2738, Court of Accounts, Section III, 14 December 2011, n. 861, Red. Giuffrè, 2011. See, among others, Cass. United Sections 22 June 2010 n. 16287, on *www.dejure.giuffre.it*, Cass. United Sections 15 January 2010 n. 521, *Ibidem*. More recently, see Court of Accounts, Section II, 14 March 2012 no. 228, in *Riv. Corte Conti*, 2012, 1-2, 202.

¹⁰¹ Cass. United Sections, 19 December 2009 no. 26806, in *Foro amm. - CdS*, 2010, 1, 59. See also TAR Campania, Naples, Section I, 10 March 2008, no. 1184, in *Foro amm. - TAR*, 2008, 3, 782

While this view is confirmed in subsequent case law for most companies in public hands, a necessary exception would be, once again, the specificity of those State-owned companies whose articles of association are subject to “special legal rules”¹⁰². Thus, whenever a company limited by shares is essentially a public entity, despite the private-law legal status, losses inflicted to such a company by its agents and the agents of the shareholding authorities should be qualified as losses inflicted to the State, thereby giving rise to administrative liability proceedings before the Court of Accounts.¹⁰³

The distinction between “companies – enterprises in public hands” and “companies - public entities” is important also for these purposes.

8. Financial control.

Article 100, paragraph 2, of the Constitution provides that “The Court of Accounts exercises preventative control on the legitimacy of government measures, and also subsequent control on the management of the State Budget. It participates, in those cases and in ways established by law, in control of the financial management of those bodies to which the State contributes in the ordinary way. It reports directly to the Houses on the results of audits performed”.

This places the Court of Accounts, which according to the Constitution is an independent body, at the service of the interests of the “State as a community”¹⁰⁴, thereby

¹⁰² Cass. United Sections, 22 December 2009 no. 27092, in *Foro amm.* – *CdS*, 2010, 1, 67.

¹⁰³ Cass. United Sections, 22 December 2009 no. 27092, cit.

¹⁰⁴ For this definition, among others: Constitutional Court, 24 February 2010 no. 57, in *Foro amm.* – *CdS*, 2010, 5, 974

closing the democratic loop, to the extent that the Court of Accounts reports to Parliament.¹⁰⁵

This provision was implemented by law no. 259/1958 which, by establishing a specific chamber of the Court in question, provides for two types of control: that over the financial management of the public bodies that receive State funds as a matter of course; that over the financial management of the public bodies that receive – from the State or a State-owned autonomous company – capital contributions in the form of funds, services or property or guarantees. For the purposes of the first type of control, the bodies “must submit to the Court of Accounts their final accounts and financial statements, including profit and loss accounts and the report on operations by the relevant boards of directors and statutory auditors (...)”¹⁰⁶.

On the other hand, control over “public bodies” is exercised by a judge of the Court of Accounts, as appointed by the Chairman, who attends the meetings of the boards of directors and statutory auditors (article 12).¹⁰⁷

¹⁰⁵For the control system in general and the controls performed by the Court of Accounts in particular: G. D’AURIA, *I controlli*, in S. Cassese (edited by), *Trattato di diritto amministrativo*, 2003,II, 1343 et seq.

¹⁰⁶ “If the Court of Accounts regards as insufficient, for control purposes, the package submitted in accordance with articles 4 and 5, it may request the bodies in question and the competent Ministries information, news, acts and documents concerning financial management activities” (article 6).

¹⁰⁷ The rules on controls over government operations by the Court of Accounts were further reinforced by law no. 20 of 14 January 1994, which provides for ex-post audits of public authorities’ accounts and assets, to determine their compliance with the law, and to ascertain, on the basis of additional audits, that the results of government activities are in keeping with the targets set by law. As stressed by the Constitutional Court, which upheld the lawfulness of these provisions, this Law “by acting on the traditional configuration of the Courts of Accounts’ duties and responsibilities (...) changed its scope and content, with the triple effect of subjecting to it all government authorities, of reducing, in the meantime, the area for ex-ante reviews for lawfulness and to emphasize operations control, though not over the individual actions but on the process of government operations as a whole”. The basis of the new duties and responsibilities is not article 100 of the Constitution but articles 97 of the

If this last provision has been applied without problems to public economic entities, doubts have been raised on the proper manner of performing control activities following the relevant formal privatizations that have originated “anomalous” companies.¹⁰⁸

This gave the Constitutional Court the chance to issue a ruling on the issue, in terms of attributional conflict, with the well-known decision no. 466/1993, on the type of control to be exercised over IRI, ENI, INA, and ENEL, i.e. the companies that came into being as a result of a transformation, by operation of law, of the eponymous economic entities.

This marked a watershed in the Italian legal order, in the sense that it was finally accepted that an entity organized as a company limited by shares is not necessarily private¹⁰⁹ to the extent that it is recognized that the mere transformation of the legal form of the entities is not enough to change their nature and to exempt them from the obligation to undergo traditional forms of financial controls – taking into account the share ownership of said companies limited by shares; the continuing performance, by operation of law, the tasks carried out by the transformed public entities; the particular regime under which the State exercised its rights as a shareholder (attributable to the Ministry of the treasury, though based on agreements with the other Ministries, pursuant to article 15, third

Constitution (efficiency of government activities); 28 of the Constitution (liability of civil servants); 81 of the Constitution (sound budget management); and 119 of the Constitution (coordination of public finances). See Constitutional Court, 30 December 1997 no. 470, in *Giur. cost.*, 1997, f. 6.

¹⁰⁸ See for all: M. RENNA, *Le società per azioni in mano pubblica*, cit.

¹⁰⁹ For some early comments, see R. ARRIGONI, *Privatizzazione degli enti di gestione e controllo della Corte dei Conti: le ragioni di un conflitto*, in *Riv. amm. rep. It.*, 452 et seq., R. PERNA, *Privatizzazione formale/sostanziale e controllo della Corte dei Conti*, in *Foro it.*, III, 1993, III, 285 et seq., M. RAMAJOLI, *Il controllo della Corte dei Conti sugli enti pubblici economici trasformati in società per azioni*, in *Dir. amm.*, 1995, 2, 203.

paragraph, law decree no. 333 of 1992); the provisions of shareholder agreements; special powers; consent clauses; amendments to articles; voting majorities in general meetings; limits to the ability of third parties to acquire equity interests; the obligation to use proceeds from asset disposals to reduce the public debt. It is important also the recognition by the Constitutional Court that the traditional line between public body and private-law company has been increasingly blurring, in the presence of a growing use of companies limited by shares in the pursuit of public interest purposes (...) as well as by the necessary consideration of the “substantive” aspects of EU mandated rules.

Thus, for the purposes of the control in question, a distinction has been determined between State-owned company and “special” “companies”, which are largely similar to public entities, considering that, in the latter case, a judge of the Court of Accounts presides over the meetings of their governance bodies.

Thus, while the Court of Accounts should progressively dismiss the control under article 12 of the cited law over private or privatized companies, “substantively” as well, by replacing such control instead with a “documentary review”, on the other hand it maintains its control responsibilities over that multitude of companies which – in terms of their “existence” and their clear “instrumental” role in performing public duties – qualify as “public entities”¹¹⁰, though only rarely on the basis of laws or articles of association¹¹¹, and more often, in fact, on the basis of the nature of the controlled entity.

¹¹⁰ For some cases of control pursuant to the mentioned article 12 over entities organized as companies, see, among others, Court of Accounts, Section entity control, determination no. 120/2012, on *www.corteconti.it.*, on MEFOP s.p.a., a company for the development of the market for pension funds; determination no. 92/2012, *ibidem*, on Arcus s.p.a., a company for the development of art, culture and show business; determination no. 103/2012, on Coni Servizi s.p.a.; determination no. 104/2012, *ibidem*, on Ente Nazionale di Assistenza al Volo, ENAV s.p.a.; determination no. 60/2013, *ibidem*, on Expo 2015 s.p.a.; determination no. 67/2013, *ibidem*, on società Sace s.p.a.; determination no. 71/2013, *ibidem*, on società Ferrovie dello Stato Italiane s.p.a.; determination no. 44/2013, *ibidem*, on Gestore dei Servizi Energetici s.p.a.; determination no. 20/2013, on SIMEST, Società Italiana per le Imprese all’Estero, s.p.a.; determination no. 36/2013, *ibidem*, on ANAS s.p.a.; determination no.

9. Access to employment and the competitive-examination rule

The proliferation of types of companies in public hands and, most of all, the companies designed to carry out public functions by operation of law brought into sharp relief – given the risk that the constitutional safeguards related to the “public administration” might be circumvented – the need to select their employees by means of competitive examinations, as required by article 97, paragraph 3, of the Constitution.

At first glance, this did not seem to be an issue, given that case-law has traditionally dispensed economic public entities from launching competitive examinations to recruit their employees. On the other hand, whenever these entities chose to select their employees on a comparative basis, the relevant procedures were regarded as “private competitive examinations”, whose proceedings would be subject to the jurisdiction of ordinary courts.¹¹²

33/2013, *ibidem*, on CONSAP - Concessionaria Servizi Assicurativi Pubblici s.p.a., determination no. 31/2013, *ibidem*, on Cinecittà Luce s.p.a.; determination no. 21/2013, *ibidem*, on Società Gestione Impianti Nucleari (S.O.G.I.N. S.p.A.); determination no. 19/2013, *ibidem*, on Poste Italiane s.p.a.; determination no. 15/2013, *ibidem*, on INVITALIA - Agenzia nazionale per l’attrazione degli investimenti e lo sviluppo d’impresa s.p.a.; determination no. 11/2013, *ibidem*, on SOGESID s.p.a.; determination no. 1/2013, *ibidem*, on FINTECNA s.p.a.; as to companies other than companies limited by shares, see, e.g., determination no. 40/2013, *ibidem*, on CIRA - Centro Italiano Ricerche Aerospaziali S.C.p.A.; determination no. 51/2013, *ibidem*, on Sicot “Sistemi di cononenza per il Tesoro” s.r.l.

¹¹¹ As an example, reference is made to article 2 of law no. 291 of 16 October 2003, whereby Arcus s.p.a. was subjected to the control of the Court of Accounts under the cited article 12, and article 8, paragraph 10 of law decree no. 138 of 8 July 2002, converted as amended into Law 8 August 2002, no. 178, which subjected Coni s.p.a. to the same type of control.

¹¹² See, among others, Cass. United Sections, 2 November 1979 no. 5688, in *Foro it.*, 1979, I, 2548 et seq., Cass. United Sections, 29 March 1989 no. 1538, in *Giust. civ.*, Mass., 1989, fasc. 3, Id., 29 May 1990 no. 4989, in *Giust. civ.*, Mass. 1990, fasc. 5, Id., 6 May 1996 v. 4187, in *Giust. civ.*, Mass., 1996, 671, and, recently, Id., 17 April 2007

If the extension of a similar solution to private-law companies held in whole or in part by the State or local authorities did not give rise to any problem – since they were private companies operating as autonomous entities and exposed to business risks – the conclusion is not so straightforward for those companies recognized by case law as “instrumental public corporations”.

Against this backdrop, the last few years have witnessed the involvement in the debate of article 18 of law decree no. 112 of 25 June 2008, converted into law no. 133 of 6 August 2008, under the title “Urgent provisions for economic development, simplification, competitiveness and the stabilization of public finance and tax equalization”. The cited article 18 lays down rules about “Staff recruiting by State-owned companies”, and provides that (para. 1) companies wholly-owned by the State or local authorities, engaged in the provision of local utility services, implement “through own measures, the criteria and procedures to hire their employees and to appoint their officers in accordance with the principles under paragraph 3 of article 35 of legislative decree no. 165 of 30 March 2001.”¹¹³

no. 9095, in *Giust. civ.*, Mass., 2007, 4, as mentioned also by G. GRUNER, *Enti pubblici a struttura di S.p.A. Contributo allo studio delle società «legali» in mano pubblica di rilievo nazionale*, Torino, 2009, 286 no. 93.

¹¹³ This paragraph reads as follows: “Recruitment procedures by government authorities comply with the following principles: a) adequate publicity to the selection and procedures that guarantee impartiality and ensure cost-effective and expedite processes using, where necessary, automated systems, also to carry out pre-selection activities (1); b) adoption of objective and transparent mechanisms, suited to determine whether a candidate fulfils the aptitude and professional requirements of the position to be filled; c) compliance with the principle of equal opportunity for men and women; d) decentralization of the recruiting procedures; e) composition of the commissions solely of experts with a proven track record in the subjects of the examination, as selected from among civil servants, professors and external people, who are not members of the governing body of the authority, who do not hold political office and are not representatives of trade unions or are designated by trade union confederations and organizations or professional associations”.

“The other companies, whether wholly-owned or controlled by the State” have been called upon, instead, to adopt “through own measures, the criteria and procedures to hire their employees and to appoint their officers in accordance with the principles of transparency, publicity and impartiality, as advanced also by the EU” (para. 2).

These “special provisions” do not apply to companies in public hands listed on regulated exchanges.¹¹⁴

The letter of the law is not clear as to whether all the companies contemplated should launch “public competitive examinations” to hire staff, whether they should implement private selection procedures or whether procedures should vary from one company to the other. In particular, it is not clear whether there should be a distinction for the companies contemplated by paragraph 1 and paragraph 2 of article 18 cited or whether it is possible to make distinctions among the companies under paragraph 2.

After some initial uncertainties, case law seems to have taken a firm stance in considering entities organized as companies as private or, in any case, in making a distinction with respect to the application of public law to these types of organization. Thus, in keeping with a strict interpretation of the letter of the Law, while the traditional

¹¹⁴ With reference to State companies, it is also provided that (paragraph 2 bis) “The provisions that prohibit or limit the ability of the authorities under article 1, paragraph 2, of legislative decree no. 165 of 30 March 2001, as amended, to recruit staff apply – in relation to the regime contemplated for the controlling authority – also to companies that pursue non-industrial and non-commercial general-interest purposes or that perform activities to support State administrative functions accounted for in the general government’s consolidated statement of operations by the national statistics institute (ISTAT), pursuant to paragraph 5 of article 1 of law no. 311 of 30 December 2004. These companies adapt their personnel policies to the provisions in force for the controlling authorities on cost-curbing for contractual and other salary, benefit and consulting expenses (...)”. On the rationale for public expenditure curbing of the provisions in question: Court of Milan, 30 July 2010, in *Riv. critica dir. lav.*, 2010, 3, 786.

solution applies to public economic entities¹¹⁵, article 18 cited is attributed solely a substantive nature, without prejudice to jurisdictional issues.¹¹⁶

Therefore, while the public nature of personnel selection for local public utilities and the consequent jurisdiction of administrative courts are clear, the solution is complex for all the other companies in public hands, depending on how the relevant activities are carried out.

Competitive examinations are mandatory only for companies limited by shares with authoritative powers, in relation to which subjective “legitimate interest” situations might arise. Obviously, the jurisdiction of the administrative courts over staff recruiting would follow, but only with reference to these cases.¹¹⁷

Actually, in light of these stances, it appears that a “special regime” has been introduced – albeit governed by private law – for most of the companies in public hands, apparently in marked contrast with their progressive “despecialization”, due first of all to the pre-eminence of EU laws. On the other hand, the distinction between companies in public hands and “companies as quasi-governmental bodies” (State companies for all intents and purposes) is being blurred for the purposes of rules and regulations on personnel selection, while such distinction is becoming increasingly sharper in the general legal order.

¹¹⁵ See TAR Calabria - Reggio Calabria, Section I, 17 April 2012 no. 282, in *Foro amm. - TAR*, 2012, 4, 1417.

¹¹⁶ Cass., United Sections, 22 December 2011 no. 28330, in *Foro amm. - CdS*, 2012, 1, 31.

¹¹⁷ See, Cass. United Sections, 22 December 2011 no. 28330, cit; State Council, Section V, 4 December 2012 no. 6178, in *Foro amm. - CdS*, 2012, 3241. For an application of article 18 of law decree 112/08 cit., for the purposes of the merits of the dispute, see *Cass. Civ.*, Section VI, 9 March no. 3831, in *Giust. civ. Mass.*, 2012, 3, 311, See also, Constitutional Court, 3 March 2011 no. 68, in *Giur. cost.*, 2011, 2, 1053.

10. The State as shareholder between “privileges” and limits to the creation of, and investment in, companies limited by shares.

If the process described so far indicates, in principle, the trend toward a progressive “despecialization” of the rules on companies in State hands and a sharper distinction – albeit not always delineated in an organic and systematic manner – between “companies – business enterprises” and “companies limited by shares – public entities”, recent legislation saw the mushrooming of provisions covering specifically companies in public hands. However, these provisions were not intended, except for some rare cases, to create privileged regimes for the State in its capacity as shareholder. In fact, they were more often designed to curtail and condition the presence of the State in the market, with a view to fostering competition, but, most of all, to curbing the costs related to the unfettered use of corporate organization and to introduce measures of “moralization” in the governance of State-owned companies limited by shares.¹¹⁸

In the first sense, attention is called to article 19, paragraph 4 of law decree no. 78/2009, which expressly excluded the State (though not the other public entities) from the scope of article 2497 of the civil code which, following the reform of company law, contemplated for “groups” the liability of the parent company for its “direction and coordination” activities.¹¹⁹

¹¹⁸ On this aspect, see G. URBANO, *Le società a partecipazione pubblica tra tutela della concorrenza, moralizzazione e amministrativizzazione*, on www.amministrazioneincammino.it, 2012, 9.

¹¹⁹ Article 2497 of the civil code provides that: “1. The company or the entities which, exercising coordination and direction activities of the company operate in their own or in others’ business interests in breach of the principles of sound company and business management are directly liable towards the equity holders of said companies for the loss caused to the profitability and the value of the investment in the company as well as towards the creditors of the company for the loss inflicted on the value of the company’s assets. There is no liability when there is no loss in light of the overall results of direction and coordination or entirely eliminated also as a consequence of transactions executed for such purposes. 2. The person who contributed to the loss is jointly

In the second sense, emphasis is placed on the provisions of article 3, paragraph 27 of law no. 244/2007, “Limits to the establishment and investments by the State in companies”, whereby: “To protect competition and the market, the authorities under article 1, paragraph 2, of legislative decree no. 165 of 30 March 2001 cannot establish companies designed to produce goods and services that are not strictly necessary for the pursuit of their own institutional purposes, nor can they take and hold directly equity interests, including minority interests, in these companies”.¹²⁰ According to a common provision in the recent “restrictive” rules on State-owned companies, article 3, paragraph 27, does not apply to companies issuing financial instruments listed on regulated exchanges.¹²¹

and severally liable, as is jointly and severally liable, to the extent of the benefit received, the person who was fully aware of the benefits obtained. 3. The equity holder and the creditor of the company may take legal action against the company or the entity which exercises direction and coordination activities only if they have not been satisfied by the company subject to direction and coordination activities. 4. In the event of bankruptcy, forced administrative liquidation and extraordinary administration of a company subject to the direction and coordination activities of others, any legal action that can be brought by creditors against said company is initiated by the liquidating commissioner or by the extraordinary commissioner”. According to article 19 of law decree no. 78 of 1 July 2009, as converted into law no. 102 of 3 August 2009, the paragraph is understood to mean “entities include collective legal persons, *other than the State*, which hold the equity interest in connection with their business activities or for economic or financial purposes”.

¹²⁰ On the other hand, “The authorities under article 1, paragraph 2, of legislative decree no. 165 of 30 March 2001 are always permitted, within the scope of their responsibilities, to create companies that produce general interest services and provide services – directly or through centralized purchasing bodies – at regional level to support non-profit entities or contracting authorities under article 3, paragraph 25, of the code of public contracts related to works, services and supplies, under legislative decree no. 163 of 12 April 2006, as well as to take equity interests in such companies”. For the necessary restrictive interpretation, in the sense of excluding organizations other than companies, such as associations or foundations: Court of Accounts reg. Friuli Venezia Giulia, Section contr., 23 December 2011, no. 344, in *Riv. Corte Conti*, 2010, 6, 81. Article 13 of law decree 223/2007 – so-called “Bersani decree” – has a different scope, as it set strict limits to the establishment of, and investments in companies by regional and local authorities.

¹²¹ Art. 3, co. 32-ter, cited law

New investments, or maintaining existing ones, require specific authorizations by the competent body (for the State, by the President of the Council of Ministers upon proposal of the competent Ministry, in agreement with the Ministry of the economy and finances) with “a resolution specifying the legal basis”¹²²; such resolution must be submitted to the Court of Accounts.

These rules raise significant issues of a systematic nature, questioning solutions that had been finally settled.

The creation of, or investment in, ordinary companies is widely recognized as the expression of the general ability of the “State – administration” to be a private-law actor.¹²³

Actually, the view that the Public Administration has a “limited legal capacity”, to be expressed only through specific legal provisions and only for public interest purposes, has long been abandoned. In fact, public entities are attributed general legal capacity¹²⁴.

¹²² See the current versions of paragraphs 28 and 28 bis of article 3 cit. Para. 29 provides for the disposal of prohibited investments. On the non-finality of the term, see, among others: TAR Sardegna - Cagliari, Section I, 5 April 2013 no. 269, in *Foro amm. - TAR*, 2013, 4, 1403.

¹²³ On this aspect, attention is called to the key writing of G. PERICU, *Note in tema di attività di diritto privato della pubblica amministrazione*, Milano, 1966, particularly 189

¹²⁴ On these profiles, recent writings include: S. VALAGUZZA, *Società miste a partecipazione comunale. Ammissibilità e ambiti*, Milano, 2012, particularly 60 et seq. The problem of the incidence of the purposes on the State's private activities is solved in terms of “autonomy” but with different positions by the authors. For a summary of them: M. DUGATO, *Atipicità e funzionalizzazione nell'attività amministrativa per contratti*, Milano, 1996, particularly 26 et seq. and related footnotes. On the concept of “autonomy” of the Public Administration: ALB. ROMANO, *Autonomia nel diritto pubblico*, in *Dig. disc. pubbl.*, II, 1987, 30 et seq. and see ID., *Relazione di sintesi*, in S. Raimondi, R. Ursi (edited by), *Fondazioni e attività amministrativa*, Proceedings of Convegno - Palermo, 13 May 2005, Torino, 2006.

No theoretical limits are placed on the ability of public entities to invest in corporations, particularly companies limited by shares¹²⁵, also in the absence of express authorization laws, according to an approach adopted not only by past laws¹²⁶ but also by the Italian civil code.¹²⁷

Thus, case law commonly recognizes the contractual capacity of State and local authorities, including the legal capacity of establishing a company limited by shares, as general in nature.¹²⁸

If some are led to believe that the cited provision entails a return to the idea of “limited or special capacity” for public entities, at least with reference to the ability to hold equity investments¹²⁹, while others, more cautiously, acknowledge that the idea of “general capacity” is rather “suffocated” by the many recent prohibitions on State-owned companies¹³⁰, the Law does not, actually, lead to any alteration of the solutions commonly accepted on the capacity of the public entity. The violation of the rules in question seems unable of resulting in a breach in the contract where a company is established or shares are purchased, as rather than rules pertaining to the general legal order or “relationship

¹²⁵ See e.g. S. D’ALBERGO, *Le partecipazioni statali*, Milano, 1957, 22

¹²⁶ See article 149 of royal decree no. 383/1934, Consolidated law of municipal and provincial laws, where it was commonly accepted the principle that local authorities could buy and sell shares of industrial companies.

¹²⁷ See, e.g., article 2449 of the civil code, of which more hereinbelow.

¹²⁸ See State Council, Section V, 14 December 1988 no. 818, in *Foro Amm.*, 1988, fasc. 12.

¹²⁹ See, e.g., A MAZZONI, *Limiti legali alle partecipazioni societarie di enti pubblici e obblighi correlati di dismissione: misure contingenti o scelta di sistema?* in various authors, *Le società “pubbliche”*, edited by C. Ibba, M. C. Malaguti, A. Mazzoni, cit., 57 et seq., particularly 98 et seq.

¹³⁰ F. LUCIANI, *“Pubblico” e “privato” nella gestione dei servizi economici locali in forma societaria*, cit.

provisions”, they are obligations for public entities to adapt their conduct to the principles and direction criteria laid down therein¹³¹.

Thus, such rules can be regarded as part of the rules and regulations governing the public administration’s activities¹³² as they are addressed to public authorities and intended to pursue the general interest. More properly, as highlighted by recent case law, article 3 cit. is designed – more than to protect market competition “*which the State-owned enterprise cannot, in and of itself, undermine*”, “*to guarantee, in keeping with the need to comply with the principle of lawfulness, the pursuit of the public interest, with a clear limit to the exercise of public-enterprise activities represented by the functionality, also, to the pursuit of public interest*”.¹³³

¹³¹ For this distinction between different categories of legal rules relating to the P. A.: ALB. ROMANO, *Giurisdizione amministrativa e limiti della giurisdizione ordinaria*, Milano, 1975, 134 ss., ID., *Amministrazione, principio di legalità e ordinamenti giuridici*, in *Dir. amm.*, 1999, 1, 111 set seq.

¹³² Concerning in particular, the rules on the creation of, and investments in, companies limited by shares by local authorities: R. CAVALLO PERIN, *Comuni e province nella gestione dei servizi pubblici*, cit., in partic. 112 et seq. and, in general terms, among others: TAR Umbria – Perugia, Section I, 28 August 2012 no. 335, in *Foro amm. - TAR*, 2012, 7-8, 2305.

¹³³ State Council, Section VI, 20 March 2012 no. 1574, in www.giustizia-amministrativa.it; similarly: TAR Cagliari Sardegna, Section I, 5 April 2013 no. 269, in *Foro amm. - TAR*, 2013, 4, 1403, Court of Accounts, Reg. Lombardia, Section contr., 17 June 2010 no. 675, in *Riv. Corte Conti*, 2010, 3, 98. See also State Council, Section III, 11 March 2011 no. 1572, on www.giustizia-amministrativa.it, and State Council, plenary conference, 3 June 2011 no. 10, in *Foro amm. - CdS*, 2011, 6, 1842, which seems to rule out the possibility for the public body to invest in private-public companies/business enterprises operating in a free competition regime, thus bringing to the extreme consequences the commonly accepted distinction between “market companies” and “quasi-governmental” companies. For the possibility of third parties to act against the inertia of the public administration pursuant to article 117 of the code of administrative procedure, see again TAR Cagliari Sardegna, Section I, 5 April 2013 no. 269, in *Foro amm. - TAR*, 2013, 4, 1403, according to which, in any case, “there is no obligation, in the presence of a generic request, for the public administration to dispose of equity investments as no third parties can initiate

Case law recognizes the administrative nature of “preliminary unilateral acts whereby the public entity adopts the resolution to establish a company, or to invest in one, or to change or wind-up a company”, which causes such acts to fall within the administrative jurisdiction: “general jurisdiction” over the lawfulness of public authorities’ acts in cases that do not fall specifically within the “exclusive jurisdiction” of the administrative courts. To this end, the rules on public contracts are taken as a general model for the authorities’ contractual activities.¹³⁴

The choice of a public entity to create or invest in a company is qualified as a “discretionary organizational choice” which is logically and chronologically distinct from the contracts that implement it, with such choice falling under a jurisdiction other than the one competent over contracts.¹³⁵

Article 3, paragraph 27 et seq. of law no. 244/2007 cit. seems to refer to considerations of a public nature, whose annulment would invalidate the related private-law contract, which falls under the ordinary jurisdiction.

It is clear how these restrictions do not apply to companies established or transformed by operation of law, thus to the companies limited by shares established as instrumental companies to carry out public functions, considering that any choice related to the appropriateness or the need for their existence has been made by Parliament and not by the administrative authority.

proceedings such as those provided for by paragraphs 27-28-29 of article 3, Law no. 244 of 24 December 2007, unless there is a specific legitimating situation (...).”

¹³⁴ State Council, plenary conference, 3 June 2011 no. 10, in *Foro amm.* – *CdS*, 2011, 6, 1842.

¹³⁵ State Council, plenary conference, 3 June 2011 no. 10, cit. To analyse the mentioned rules in light of the allocation between State and regions more than the “subject-matter” of “administrative organization”: Constitutional Court, 8 May 2009 no. 148, cit.; in a similar vein: TAR Puglia, Bari, Section I, 17 May 2010 no. 1898, on www.giustizia-amministrativa.it.

11. Additional “asymmetric” provisions for the State as shareholder: restrictions for the protection of “public finances” and “moralization” rules

There are many other special provisions that, in more recent enactments, refer to companies in public hands including, among these, State companies.

The scope of these provisions is different, even though they typically do not concern listed companies and are intended primarily, as noted repeatedly in the previous pages, to curb public spending related to the proliferation of the relevant figures, toughening governance rules and increasing transparency in their management.

Very briefly, there are provisions intended to rationalize governing bodies, thereby reducing the relevant memberships and the relevant fees¹³⁶, requiring a decrease of internal

¹³⁶ Concerning corporate governance, in particular, among the many provisions enacted in the last few years, attention is called to para. 465 of the single article of law no. 296 of 27 December 2006, which tasked the Ministry of the economy and finances, in agreement with the competent ministries, to enact a policy “designed, where necessary, to limit the number of members of the boards of directors of unlisted companies held, in whole or in part, by the Ministry of the economy and finances and their respective subsidiaries and parent companies, so as to make the composition of said boards of directors consistent with the companies’ corporate purposes”. Also, article 3 of law no. 244/2007, para. 12 – titled “Reduction of members of the governance bodies of companies controlled by public authorities” - contains an express set of rules on internal governance for State-owned companies, for the stated purpose to reduce their operating costs. In addition, “without prejudice to other legal provisions”, this article sets – for articles of association of unlisted companies directly or indirectly controlled by the State pursuant to article 2359, first paragraph, sub-paragraph 1), of the civil code - specific restrictions related to the maximum number of members of the boards of directors and the reduction of the relevant fees; to the decision-making authority of the Chairman and the tendency to remove the figure of the deputy chairman (save as substitute for the Chairman, without additional compensation); to the general rules on the allocation of decision-making authority; to the internal control system; and otherwise with the prohibition to pay attendance fees to members of the governing bodies.

Therefore, article 6, paragraph 5 of law decree no. 78/2010 - but only with reference to public entities, including economic entities, and public bodies, also with legal personality under private law – provided that these “shall

consultative and proposal bodies¹³⁷, or staving off conflicts of interest through express prohibition to serve as directors in subsidiaries and in parent companies.¹³⁸

In terms of “moralization” of the way State-owned companies are managed, and the required adaptation to free market and competition principles as well as the adoption by the “State – entrepreneur” of a conduct that befits a common market player, the rules on governance bodies refer to the results achieved in previous fiscal years.¹³⁹

upgrade their articles of association” to ensure that, as of the first renewal following the date of entry into force of the decree “the governing and control bodies, where they have not been already established as a single body, and the board of statutory auditors be composed of no more than five and three members, respectively”, under penalty, in the case of failure to comply, of liability for loss inflicted to the State. In addition, reference is made to law decree no. 95 of 6 July 2012, converted into law no. 135 of 7 August 2012 – “Urgent provisions for the review of public spending without any change in services to the citizens”, the so-called “spending review” - with the main objective to cut substantially the number of State-owned companies performing operations on behalf of the public administration and to limit so-called in-house providing; moreover, the spending review sets certain general rules for companies wholly owned by the public authorities, or otherwise by the State, with the objective to reduce the number of members of governing bodies, to rationalize the relevant composition and to curtail their operating costs, tightening the legislative framework.

¹³⁷ See para. 12-*bis* of article 3 law no. 244/2007 which, in fact, limited the creation of committees with consultative and proposal functions

¹³⁸ See art.3, para. 14 law no. 244/2007, cit.

¹³⁹ See para. 734 of article 1 of law no. 296 of 27 December 2006, whereby “Directorships in entities, institutions, public enterprises, companies owned in whole or in part by the State are precluded to anyone who, in the preceding five years, served in a similar position in a company that reported losses for three consecutive years”. For an “authentic” interpretation, see article 3, para 32 bis, of law no. 244 of 24 December 2007.

Furthermore, there is no shortage of rules that affect the activities – essentially contractual activities – of State-owned companies, establishing procurement systems that guarantee limited expenditure levels.¹⁴⁰

Lastly, one should definitely appreciate those rules addressed specifically to public shareholders which – in the spirit of transparency for the creation, investment in and management of companies limited by shares by public authorities – require public entities and bodies to publish on their web sites detailed information on the equity interests held,

¹⁴⁰ To this end, attention is called, e.g., to para. 15 of article 3 of law no. 244/2007, which set for State-owned companies – in connection with the procurement of goods and services - quality and price standards consistent with those made available to public authorities by Consip s.p.a., providing adequate explanations for any deviation from these standards, with special emphasis to the cases where the companies are subject to EU laws on public contracts. Lastly, worthy of note is article 2 of law decree no. 52 of 7 May 2012, as converted into law no. 94 of 16 July 2012 whereby – to rationalize and coordinate public finance, and to protect competition – the President of the Council of Ministers, upon proposal of the Ministry of the economy and finances and the Minister for relations with Parliament, can appoint a special Commissioner tasked with the “definition of the level of expenditure for the purchase of goods and services, by item, by government authorities. “Government authorities comprise all the administrations, authorities, including independent ones, bodies, offices, agencies or public entities regardless of their name and local entities, as well as companies wholly owned, directly and indirectly, by the State and all unlisted companies controlled by public authorities and, within the scope of healthcare spending, the regional authorities under administration for the preparation and implementation of a turnaround of the healthcare deficit. These rules apply to companies wholly owned by the State and their subsidiaries providing general interest services throughout the country which have reported losses for the previous three fiscal years”. For rules “providing for penalties” for loss-making operations, see also, e.g., article 6, para. 19. law decree no. 78 of 19 May 2010, converted into law no. 122 of 30 July 2010 – Urgent provisions on financial stabilization and economic competitiveness (“economic adjustment – anti-crisis decree), whereby “to improve the efficiency of State-owned companies, considering the national and EU principles of cost-effectiveness and competitiveness, the authorities under article 1, paragraph 3, of law no. 196 of 31 December 2009 cannot – save as otherwise provided under article 2447 of the civil code - carry out capital increases, extraordinary transfers, or provide credit or guarantees in favour of unlisted companies owned, in whole or in part, by the State that have reported losses for three consecutive fiscal years or that have used their reserves to make up for losses incurred, including interim losses”.

including indirect and minority interests, and on the connections existing between investors and investees.¹⁴¹

It is a variety of rules that can be hardly placed within a systematic whole, which have been passed one after the other in a short time frame and certainly in need to be properly ordered. Nevertheless, this “special law” seems to be constantly justified, as indicated repeatedly, by matters of economic policy but also in the name of democracy and, more generally, accountability of the complex system of State-owned enterprises. Moreover, “further regulations”, in addition to the codes, for companies in public hands do not appear, in and of themselves, inconsistent with the private nature of companies limited by shares, provided that the essential traits of these companies are not altered; nor are they inconsistent with the European and global laws, whose intent is not to undermine “special cases” but to remove situations of “privilege” enjoyed by the State in its role as shareholder.

In any case, it is clear that these are rules designed for “companies in public hands” other than companies established by operation of law to carry out public functions.

12. State-owned companies and administrative activity.

It is to companies created to carry out public functions that those special provisions included in the general rules on “public administrative activities” apply. Such provisions adopt and fuel change in the overall legal order, which in turn is witnessing an

¹⁴¹ See article 8 of law decree no. 98/2011.

increasingly extensive use of private-law organizations by public authorities. These organizations, and the frequent use of “outsourcing”, put on centre stage the objective performance of a “public function”, instead of the traditional administrative activity in a “subjective sense”.¹⁴²

There is no doubt that these developments were affected primarily by the “substantive” concepts of “body governed by public law” and “public undertaking” originated at supranational level, to the extent that such concepts are conducive to the definition of the scope of European rules on public contracts, regardless of the legal forms and the traditional laws of the member States.¹⁴³

On the other hand, in Italy’s legal order these regulations are regarded as conducive not only to the direct protection of companies’ right to operate in an actually

¹⁴² ALB. ROMANO, *Relazione di sintesi*, cit., see CERULLI IRELLI, *Pubblico e privato nell’organizzazione amministrativa*, in S. Raimondi, R. Ursi (edited by), *Fondazioni e attività amministrativa*, cit., *passim*.

¹⁴³ On the extent of the concepts and the impacts on the Italian legal order see, among others: V. Caputi Jambrenghi, *L’organismo di diritto pubblico*, in *Dir. amm.*, 2000, 1, 13 et seq., R. Caranta, *Organismo di diritto pubblico e impresa pubblica*, in *Giur. it.*, 2004, 12, 2415 et seq., D. Casalini, *L’organismo di diritto pubblico e l’organizzazione in house*, Napoli, 2003, M. P. Chiti, *L’organismo di diritto pubblico e la nozione comunitaria di pubblica amministrazione*, Bologna, 2000, R. Garofoli, *Organismo di diritto pubblico, criteri di identificazione e problemi di giurisdizione*, in *Urb. e app.*, 1997, 960; G. Greco, *Ente pubblico, impresa pubblica, organismo di diritto pubblico*, in *Riv. it. dir. pubbl. com.*, 2000, 83, *La privatizzazione per fondazioni tra pubblico e privato*, in *Dir. amm.*, 2004, 3, 447-512, B. Mameli, *L’organismo di diritto pubblico. Profili sostanziali e processuali*, Milano, 2003, G. P. Rossi, *Le gradazioni della natura giuridica pubblica*, in *Dir. amm.*, 2007, 3, 685 et seq., D. Sorace, *L’ente pubblico tra diritto comunitario e diritto nazionale*, in various authors, *Ente pubblico ed enti pubblici*, Torino, 1994, 62 et seq., M. A. Sandulli, *Imprese pubbliche e attività estranee ai settori esclusi: problemi e spunti di riflessione*, in *Serv. pubbl. app.*, 2004, 4, 5 et seq.; Id., *Impresa pubblica e regole di affidamento dei contratti*, in *www. giustamm. it.*, 2008, Id., *L’ambito soggettivo: gli enti aggiudicatori*, in various authors, *Trattato sui contratti pubblici*, Milano, 2008, 3145 et seq.

competitive market¹⁴⁴ but also, in any case, to the general interest pursued by the “contracting entities”¹⁴⁵. Public tenders are seen as an instance of the intention of the “public awarding entity” which takes shape as a set of procedures and actions of an administrative nature. Hence the admission that the body governed by public law, for instance, is nothing more than an entity, often private, which performs a public function, with the application of all inherent institutes and principles.

In this way, both substantive and procedural rules¹⁴⁶ disregard, consistently, the necessary connection with a traditional administration, as they apply merely to “administration” as an “activity” in an objective and “substantive” sense, performed also through acts governed by private law.¹⁴⁷

To this end, worthy of note is also the provision under article 22, paragraph 1, subparagraph e) of law 241/1990¹⁴⁸ which, in connection with access to administrative

¹⁴⁴ See Alb. Romano, *Sulla pretesa risarcibilità degli interessi legittimi: se sono risarcibili, sono diritti soggettivi*, in *Dir. amm.*, 1998, 1 et seq., G. M. Racca, *La responsabilità precontrattuale dell'amministrazione tra autonomia e correttezza*, Napoli, 2000, 333, R. Cavallo Perin, G. M. Racca, *La concorrenza nell'esecuzione dei contratti pubblici*, in *Dir. amm.*, 2010, 2, 325.

¹⁴⁵ See, for all, State Council, Section VI, 28 October 1998 no. 1478, in *Foro it.*, 1999, III, 178. For scholarly work, see A. Amorth, *Osservazioni sui limiti dell'attività amministrativa di diritto privato*, in *Arch. dir. pubbl.*, 1938, 455 et seq., 512.

¹⁴⁶ See, e.g., article 7, para. 2, of legislative decree no. 104/2010, on the rules of the administrative procedure, whereby “For the purposes of this code, public administrations are understood to mean also equivalent entities or otherwise entities required to comply with the principles of the administrative procedure”.

¹⁴⁷ State Council, plenary conference, 22 April 1999 no. 4, in *Giorn. dir. amm.*, 1999, 946.

¹⁴⁸ This formulation derives from the new developments introduced by aw no. 15 of 11 February 2005. Previously, law 241/1990 provided that: “The right of access under article 22 is exercised with public

documents, defines as “public administration” all the public-law entities and private-law entities within the scope of their public-interest activities as governed by national or EU law. This formulation seems to have a narrower scope for fully private entities that exercise public functions on the basis of “outsourcing” arrangements, and a broader scope for formally private entities, such as “special” or “singular law” companies specifically designed to pursue the general interest.¹⁴⁹

Thus, while article 1, paragraph 1 ter of the same general law on public administration activities provides that “Private entities responsible for conducting public administration activities guarantee compliance with the criteria and principles under paragraph 1¹⁵⁰, with a level of guarantee not lower than that required of public authorities

administrations, special and autonomous companies, public entities and operators of public utilities. The right of access in respect of supervisory Authorities is exercised within the scope of the respective legal orders, in accordance with article 24”. In the original version, instead of “operators” use was made of the word “concessionaires” for public utilities.

¹⁴⁹ See for these views - as formulated before law no. 15/2005 re-wrote article 22 law no. 241/1990 with the meaning referred to in the text - among others: State Council, Section V, 1 October 1999 no. 1248, in *Cons. Stato*, 1999, I, 1594; on public entities organized as private companies, see, e.g., State Council, Section VI, 5 March 2002 no. 1303, in *Foro amm. - CdS*, 2002, 705, with reference to the actions of Poste Italiane s.p.a, State Council, Section VI, 15 May 2002 no. 2618, in *Foro amm. - CdS*, 2002, 1307, on the actions of Ferrovie dello Stato s.p.a., State Council, Section VI, no. 24 May 2002 no. 2855, in *Foro amm. - CdS*, 2002, 1325, more on Poste Italiane s.p.a.; similarly: State Council, VI, 7 August 2002 no. 4152, in *Foro amm. - CdS*, 2003, 246 et seq., State Council, Section VI, 16 September 2002 no. 4660, in *Foro amm. - CdS*, 2002, 2143, State Council, Section V, 19 September 2006 no. 5467, in *Foro amm. - CdS*, 2006, 9, 2536, on actions by Acquedotto Pugliese s.p.a.; more recently, among others: State Council, Section VI, 19 April 2011 no. 2434, in *Foro amm. - CdS*, 2011, 4,1311, on the actions of SEL s.p.a., TAR Trentino Alto Adige – Trento, Section I, 12 October 2012 no. 305, in *Diritto & Giustizia* 2012, 5 November, on Autobrennero s.p.a.

¹⁵⁰ Secondo cui: «Administrative activities pursue the objectives set out by law and are inspired by the principles of cost-effectiveness, effectiveness, impartiality, publicity and transparency, in accordance with the provisions of this law and other provisions governing individual procedures, as well as by the principles set out by EU laws”.

operating under these provisions”¹⁵¹, article 29, para. 1 of the same law is more radical in clarifying that (all) the provisions of law 242 cit. apply, in addition to government authorities and national public entities, “*to companies owned, in whole or in part, by the State in connection with their public administration functions*”.

The public administration functions performed by companies wholly owned or majority owned by the State are placed entirely on an equal footing with those of traditional government authorities, for the purposes of the application of the basic rules and the main principles of administrative law.

These rules cannot, obviously, be extended to enterprises in public hands engaging solely in private business activities.

¹⁵¹ F. DE LEONARDIS, *Atti (e regole) dei soggetti concessionari*, paper presented at the Conference “*L’impugnabilità degli atti amministrativi*”, Siena, Certosa di Pontignano 13 – 14 June 2008, on www.giustizia-amministrativa.it.