Corporate and Financial Markets Law

The 2016 Italian Consolidated Law on Public Entities Owned Companies: Towards a More Consistent Private Law Approach

Miriam Allena* and Francesco Goisis**

Abstract

This article aims to analyze the model of company emerging from the new Italian consolidated law on public entities owned companies of 2016, coming to the conclusion that, especially given the principles of the legislative delegation and the European Union law requirements, such companies are characterized as fully for profit and private. Public interest represents therefore an external interest, which is secondary to the common economic interest of the shareholders. In this understanding, norms apparently bearing a 'public law mark' can be understood in light of a correct perception of the notion of 'pursuit of profit' and of the principal agency theory, elaborated by the economic analysis of law.

I. Introduction and Scope of the Inquiry

This paper contributes to the currently widely debated issue of the nature of public entities owned companies (PEOCs) in Italy, in light of the new legislative framework introduced by the Consolidated Law approved with decreto legislativo 19 August 2016 no 175.

In particular, this paper will shed light on how the new Consolidated Law, going far beyond a mere restyling and rationalization of the existing legislative framework, enacts a precise choice in favour of a private nature of PEOCs. Accordingly, a rule already codified in the Italian Civil Code of 1942, but in a number of cases questioned by public law scholarship and jurisprudence, seems to have been re-affirmed and strengthened.

The Consolidated Law's choice appears corroborated by a coherent systemic scheme, ultimately grounded in the acknowledgement of profit as the underlying typical, and thus binding, corporate cause (ie the purpose that the company is by law called to pursue) for any company, whether owned by private or public entities.

As we will show, under Italian law (and in particular pursuant to Art 98 of the Constitution, which provides that the public administration is at the exclusive

* Assistant Professor of Administrative Law, Bocconi University, Milan.

** Full Professor of Administrative Law, University of Milan.

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service of the Nation) a public entity is called to necessarily and primarily pursue the public-collective interest assigned to it by the law. Therefore, a clear incompatibility exists between a public nature and a profit-making purpose of a given entity.

However, in our view, what really matters in order to classify PEOCs as public or private entities, is not the applicability of public law provisions, but the question of whether these provisions are intended to make the entity public, ie to impose on the entity a public-collective interest purpose replacing (or prevailing over) the profit-making purpose established by the Civil Code.

The following paragraphs will outline the evolving trajectory of the legislative regime governing PEOCs. In particular, the paper will first analyse the historical-legal context in which the comprehensive 2016 intervention of the legislator takes place. It will then highlight how this system-wide scheme is extended from the Italian delegated law reforming the public administration (legge delega 7 August 2015 no 124) to encompass the Consolidated Law, leading to the elaboration of a comprehensive regulation fully in line with constitutional and European requirements. In this perspective, as we will explain, the new provision of the Consolidated Law on bankruptcy of PEOCs assumes a particular systemic significance.

Against this backdrop the paper will argue how norms apparently bearing a 'public law mark', are justified in light of a correct perception of the pursuit of profit and perfectly coherent with renewed stances embraced by the economic analysis of law.

II. The Historical-Legal Context of the Consolidated Law

It is well known that the recourse to the private law company model is far from a recent trend in Italian administrative law. In fact, as early as the aftermath of the crisis in 1929, in order to save private companies operating in several economic sectors, the State favoured a wide acquisition of their shares and units. During those years, public economic bodies, such as the *Istituto per la Ricostruzione Industriale* (IRI) and the *Ente Nazionale Idrocarburi* (ENI), were created to manage the State's shares, in order to ease the management of public ownership. These bodies controlled a number of operating companies and, in 1956, an ad hoc Ministry for State's shareholdings was incorporated.

However, a massive increase in the use of the company model for carrying out public services and functions, both locally and nationally, has occurred since the 1990s.

In the first instance, companies have been used in particular for the management of local public services,[1] as a remedy for the inefficient public

[1] In particular, starting as of the provision of Art 22, para 3, of legge 8 June 1990 no 142,

management of the 1980s. This inefficient public management required a constant recourse to state aid (in turn financed by public debt), while proving incapable of ensuring modernising and quality of services.

In the second instance, the dissemination of the company model was furthered by the dismantling – and subsequent privatization – of State shareholding management bodies;[2] the process of dissemination then continued with the incorporation of a multitude of companies entrusted, *inter alia*, with assets and infrastructure management (for instance, *Patrimonio S.p.A.* or *Infrastrutture S.p.A.*), as well as the dismantling of real estate public assets (by means of financial companies, the so-called *SCIP*, *Società per la Cartolarizzazione di Immobili Pubblici*).[3]

However, in a number of cases the companies incorporated were not actually needed. This trend grew to the point that the phenomenon of PEOCs in Italy in the 1990s reached a magnitude that, as recently noted, was unprecedented and unparalleled even in the socialist economies of the twentieth century.[4]

The enthusiasm for the company model was driven by the idea that its use would allow greater efficiency and flexibility, solving a substantial part of the problems affecting the Italian public administration.[5]

However, the choice of this model was not clear-cut and sharp. On the contrary, a partly public and partly private 'mixed law' developed out of it (especially due to creative jurisprudential interpretations): the underlying idea was that, to some extent, this was the natural and inevitable consequence of the combined presence of different interests in a public company.[6] In fact, due to a

on the organisation of local authorities, that provided the possibility for municipalities and provinces to make use of companies in which they held the majority of shares. See G.F. Campobasso, 'La costituzione delle società miste per la gestione dei servizi pubblici locali: profili societari' *Rivista della società*, 390 (1998). More recently R. Ursi, *Società ad evidenza pubblica. La* governance *delle imprese partecipate da Regioni ed Enti locali* (Napoli: Editoriale Scientifica, 2012); S. Valaguzza, *Società miste a partecipazione comunale* (Milano: Giuffrè, 2012).

[2] See, for all, 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 dello Stato* (Torino: Giappichelli, 1997).

[3] For an overview see M. Camelli and 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 and M. Dugato eds, *Studi in tema di società a partecipazione pubblica* (Torino: Giappichelli, 2008), 1.

[4] See M. Dugato, 'Le società a partecipazione pubblica tra efficienza e responsabilità' *Munus*, 521-548 (2016).

[5] See, ibid; G. Napolitano, *Pubblico e privato nel diritto amministrativo* (Milano: Giuffrè, 2003).

[6] For an analysis of the unsatisfying outcomes brought by this approach see F. Merusi, *Sentieri interrotti della legalità. La decostruzione del diritto amministrativo* (Bologna: il Mulino, 2007), 31. On the issue see also M. Clarich, 'Le società partecipate dallo Stato e dagli enti locali fra diritto pubblico e diritto privato', in F. Guerrera ed, *Le società a partecipazione pubblica* (Torino: Giappichelli, 2010), 1, who differentiates between public companies regulated by private law, and 'semi-administrations', but admits that the boundary line between the two models may not be drawn in a clear-cut way.

legislative intervention, combined with a development in the case-law (especially of the Council of State – *Consiglio di Stato* – and of the Court of Auditors – *Corte dei conti*), the legislation on PEOCs has become increasingly distinct from private law rules, to the extent that we witnessed what has been described as a 'nationalisation of the company module'.[7]

This aspect will be analysed in the sections below. Herein, it is sufficient to highlight that in this 'mixed law' regime, and in the confusion that it created, inefficiencies, sometimes intentionally perpetrated, proliferated. Synthesising to the maximum possible extent a highly complex phenomenon, we could argue that PEOCs served in many cases to elude or circumvent financial controls and constraints imposed on public administrations by European law (controls and constraints that could not apply to said legal entities because they were, allegedly, 'private'). At the same time, PEOCs, unlike other private legal entities, had no obligation to comply with the European law on public procurement. As a consequence, the use of the company model became synonymous for avoidance of European public procurement law, out-of-control public expenditure, and, in general, waste of public money.

For this reason, since the mid-2000s, and, especially since the 2008 financial crisis, the traditional favour that the Italian legislator displayed to the PEOC model turned into an attitude of caution, if not plain aversion.[8] In particular, in recent years a multitude of *ad hoc* regimes have proliferated – not always in a coherent manner – in the pursuit of two main goals: (1) rationalising and reducing public shareholdings, mostly in order to contain public expenditure; and (2) minimizing the market presence of PEOCs resulting in an alteration of the normal functioning of the market.

By way of example, in the pursuit of the first goal, the legislator enacted regulations that intervened in a number of aspects: preventing public administrations from covering the losses of companies in which they owned shares by means of capital increases;[9] imposing the transfer of shares 'not strictly necessary to the pursuit of the institutional activities of the body';[10] preventing small municipalities from incorporating new companies or else mandating the termination of existing ones.[11] In addition, in an attempt at 'moralisation', these regulations elaborated thresholds related to the number of corporate bodies'

[7] See M. Cammelli, 'Le società per azioni a partecipazione pubblica locale', in Id et al, *Servizi pubblici locali e nuove forme di amministrazione. Atti del XLI Convegno di Studi di Scienza dell'Amministrazione* (Milano: Giuffrè, 1997), 147, 152.

[8] A. Mazzoni, 'Limiti legali alle partecipazioni societarie di enti pubblici e obblighi correlati di dismissione: misure contingenti o scelte di sistema?', in C. Ibba, M.C. Malaguti and A. Mazzoni eds, *Le società pubbliche* (Torino: Giappichelli, 2011), 57.

[9] Art 6, para 19, decreto legge 31 May 2010 no 78.

[10] As expressly provided for under Art 3, paras 27-28, of legge 24 December 2007 no 244.

[11] See Art 14, para 32, of decreto legge 31 May 2010 no 78, converted into legge 30 July 2010 no 122.

directors and to remuneration,[12] or else limitations and bans related to staff recruitment.[13]

Art 13 of decreto legge 4 July 2006 no 223 (the so-called '*decreto Bersani*') provides an emblematic illustration with regard to the second goal. Pursuant to said article, companies incorporated to supply goods or provide services to the public administration owning them (so-called instrumental companies), if directly awarded the contract, may not operate also *vis-à-vis* third party entities. In particular,

> 'companies whose shares are totally or partially owned by a public entity or are constituted or participated in by regional and local entities, as instruments of their ordinary action to produce goods and services, should act only with the entities which created or participated in them and they should not provide any service for other bodies, either private or public'.[14]

In other words, in order 'to avoid alterations or abuses regarding market competition and to guarantee equality between operators in the national territory', the legislator restricted these companies' legal capacity to act.

Something similar happened to the so-called 'in house companies' model, ie the possibility, recognized by the European Court of Justice (ECJ) starting from the famous Teckal case, for public entities to set up a fully owned company, instead of issuing a public tender, as a form of 'self-production' of goods and services by public administrations. Initially, such companies were recognised by the Italian legislation as general instrument for the organization of private services. Subsequently, a more prudential approach was established: indeed, various voices arose claiming that an excessive and disproportional recourse to in house production could sacrifice the role of private enterprise too significantly.

As a consequence, some restrictions were introduced in addition to the limits coming from the ECJ jurisprudence. In particular, the Italian legislation basically established that the use of the in house model needed to be grounded on objective financial reasons that made it more effective than the recourse to private enterprise. However, in 2011, this restrictive approach was rejected by a popular referendum.[15]

[12] Art 1, paras 725-730, legge 27 December 2006 no 296 ('legge finanziaria 2007'), currently repealed by Art 28 of decreto legislativo 19 August 2016 no 175.

[13] Art 4, paras 1, 2 and 3 of decreto legge 6 July 2012 no 95, converted into legge 7 August 2012 no 135, subsequently repealed by Art 1, para 562, legge 27 December 2013 no 147 ('*legge finanziaria* 2014'). For an overview of the phenomenon, see C. Ibba, 'Le società a partecipazione pubblica: tipologia e discipline', in C. Ibba, C. Malaguti and A. Mazzoni eds, *Le società "pubbliche"* n 8 above, 1.

[14] The so-called 'instrumental companies', incorporated in order to provide specific services to the controlling public administration: for instance, computer services or maintenance and heating services related to public real estates, etc.

[15] In particular, Art 23-*bis* of decreto legislativo 31 March 1998 no 112 allowed the management of public services through an in house company only if grounded in an economic

The Consolidated Law on PEOCs,[16] promulgated in the context of the wider public administration reform in Italy (the so-called *riforma Madia*, named after the Minister of the simplification and public administration),[17] is to be enacted against this highly heterogeneous and fragmented legal background.

It is no coincidence that the Consolidated Law, first and foremost, attempts to bring some order to the system, simplifying and coordinating the multitude of existing norms on PEOCs in a comprehensive text. The intervention was not limited to mere normative restyling, which in itself would have been commendable. The most interesting aspect of the legislation lies in the fact that the legislator blatantly seems to have opted (once again) for a private law regime, inaugurating an innovative (even though, actually in line with original provisions of the Italian Civil Code of 1942) path for PEOCs.

III. Centrality of the Pursuit of Profit (Also) for PEOCs

As outlined above, the 'mixed' public-private regime for PEOCs was the outcome of the difficulties of reconciling the needs of administrative action *vis-à-vis* private rules of company law.[18] The underlying flaw in this architecture became clearly evident in the 1990s, yet it dated back to the origins of the PEOC phenomenon in Italy.

In this regard, a 1938 judgement of the *Consiglio di Stato* is well known. In that ruling, the Italian administrative judge assessed the nature of the public body of the *Azienda Generale Italiana Petroli* (AGIP), even though it was incorporated as a limited liability company.[19] In particular, the judge argued that the legal form chosen for the company did not impact the substance and

and factual analysis, related to the conditions of the particular local service and to the geographical features of the area in which the in house company was due to operate. Art 23-*bis* was repealed by a 2011 referendum. Also in 2011, Art 4 of decreto legislativo 13 August 2011 no 138, introduced new restrictions to the in house model. However, in 2012, the Italian Constitutional Court annulled this provision arguing that it had basically introduced the same legislative framework rejected by the referendum. Currently, Italian public administration can use the in house model as long as it is compliant with the principles elaborated by the European Court of Justice. On this issue see F. Cintioli, 'The in house providing companies in the Italian legal system. The goal of privatisation and the effects of people's will' *Italian Antitrust Review*, 26-36 (2014).

[16] Already amended as under decreto legislativo 16 June 2017 no 10.

[17] The reform encompassed different sectors, ranging from the administrative procedure, restructuring of State administration, management, civil service employment, and, of utmost relevance herein, PEOCs and public services. For an overview see G. Corso, 'La riorganizzazione della P.A. nella legge Madia: *a survey*' *federalismi.it*, 28 October 2015, 1-9; also see B.G. Mattarella, 'La riforma della pubblica amministrazione. Il contesto e gli obiettivi della riforma' *Giornale di diritto amministrativo*, 621 (2015).

[18] On this issue see G. Oppo, 'Pubblico e privato nelle società partecipate' *Rivista di diritto civile*, II, 157 (2005).

[19] See Consiglio di Stato 19 January 1938 no 33, currently published in G. Pasquini and A. Sandulli eds, *Le grandi decisioni del Consiglio di Stato* (Milano: Giuffrè, 2001), 235.

objectives of the legal entity: namely, the primary pursuit of general public interest. In other words, the company should be considered as a 'substantially public entity disguised as a private one'.[20]

This judgement was overruled a few years later by the *Sezioni Unite* of *Corte di Cassazione*, on jurisdictional grounds: the case is an exemplar of the conflict over the nature of PEOCs (and, thus, over the allocation of competencies between the ordinary and administrative courts) that would eventually resurface following the privatizations that occurred in the 1990s. Above all, the case shed light upon the misconception in the vision of PEOCs that was perpetrated up until recent years: namely, the idea that when public entities act throughout a company, profit-making – ie the essence of the company model pursuant to Art 2247 of the Italian Civil Code[21] – may be validly replaced by the pursuit of public interest towards which the administrative action should tend to. Or, rather, the idea that profit-making may be of secondary importance with regard to the pursuit of public interest. The claim is grounded on a presumed 'neutrality of the corporate form'.[22]

In reality, since the pursuit of profit has as its goal the maximisation of economic growth of the entity and its members, and, on the other hand, that public interest tends, by definition, to the maximisation of collective interests, the pursuit of profit and the pursuit of public interest are not always reconcilable. On the contrary, it is almost inevitable that at some point they will clash, and a choice is imposed. This irreconcilable conflict is explained by the essential element of the company model in our legal system, namely the self-allocation of the 'final output' to members. This element is inevitably in conflict with the external-allocation we observe in other legal entities regulated under private law and, even more in public entities (especially considering constitutional requirements).[23]

It is not a coincidence that various administrative scholars, investigating the phenomenon, highlighted how PEOCs, if regarded as substantially public entities, actually enacted a 'neutralisation of the pursuit of profit'. As a matter of fact, these administrative scholars argued that in such cases the company resolved itself in a mere 'organisational scheme' on the ground that the combined presence of a public and a private regime regularly lead, in case of conflict, to the clear prevalence of the former to the detriment of the latter.[24]

[20] See R. Ravà, 'L'azionariato dello Stato e degli enti pubblici' *Rivista di diritto commerciale*, I, 324 (1933).

[21] According to which 'by stipulating a company contract, two or more persons confer goods or services for jointly carrying out an economic activity with a view to share profits'.

[22] See recently Consiglio di Stato 19 April 2011 no 2434, available at www.giustizia-amministrativa.it.

[23] In this sense P. Spada, *La tipicità delle società* (Padova: CEDAM, 1974), 182.

[24] See, for all, G.P. Rossi, *Gli enti pubblici* (Bologna: il Mulino, 1991), 171, who significantly writes about a 'sunset of the lucrative cause' and M. Renna, n 2 above. With specific regard to PEOCs incorporated *ex lege*, see G. Grüner, *Enti pubblici a struttura di S.p.A.: contributo allo studio delle società "legali" in mano pubblica di rilievo nazionale* (Torino: Giappichelli, 2009).

If we consider a practical example, a company incorporated for the management of a public service (for instance a local transportation authority) could (or should) continue its activity even if imbalanced or unsound from an economic standpoint. Considering a well-known example, under this theory the company should have aimed at the effectiveness of the public transport service, instead of the economic profitability generated by the service provision.[25]

However, in this context, the companies' agreement schemes elaborated under Art 2247 of the Italian Civil Code emerged as completely distorted, and they essentially lost their typical traits. It is therefore no surprise that the use of the company model did not result in an improvement in terms of efficiency of public activity management.

Among other things, this approach clashed with the legislative choice of the 1942 Italian Civil Code. The latter, in the provisions dedicated to PEOCs, by no means disregarded the lucrative cause. In other words, in the 1942 Code, the ownership of a public entity did not exclude the production of wealth as the purpose of the company (profit-making purpose), rather than wealth's consumption. Moreover, the subsequent use of such wealth to the financial advantage of the shareholders (subjective profit) remained necessary.

Eloquently, according to a well-known paragraph of the Report of the Ministry of Justice illustrating the Italian Civil Code, in the event of public ownership of a company

> 'it is precisely the State that is to be subject to the limited companies law, in order to streamline its management and give rise to new creative possibilities';

the Report goes on to add that

> 'the common regime of limited companies shall (...) apply also to companies in which the State and public entities hold shares, with no exception whatsoever, as long as ad hoc particular norms do not provide otherwise'.[26]

This approach was later corroborated in the last Italian comprehensive reform of company law (decreto legislativo 17 January 2003 no 6); the reform expressly aimed to enhance the entrepreneurial and lucrative nature of companies (whether owned by public entities or not), specifically by enabling the 'profitable carrying out of the common enterprise'.[27] In this context, Art 2497 of the Civil

[25] See A. Asquini, 'I battelli del Reno' *Rivista delle società*, 617 (1959), who wondered if the purpose of an inland navigation undertaking, managing ferries on the Rhine, should be distributing dividends or else transporting people.

[26] *Relazione del Ministro Guardasigilli*, no 998.

[27] Art 1, para 4, letter a), legge delega 3 October 2001 no 366 (*Legge delega sulla riforma del diritto societario*). On this topic see F. Galgano et al, *Società per azioni*, in F. Galgano ed,

Code embeds a safeguard for members external to the control group and creditors. This protection is elaborated *vis-à-vis* parent 'companies and entities' which, in carrying out management and coordination activities, 'acting in their own or someone else's entrepreneurial interest, infringing upon the principles of sound corporate and entrepreneurial management of companies', cause harm to 'the profitability and value of the corporate ownership', or else to the 'integrity of the company's assets'. The term entities may well encompass public entities, upon the condition that they are different from the State, according to a subsequent clarification of the law providing the definitive interpretation.[28]

Later, in 2012, the legislator enhanced and reinforced the choice of the Civil Code in favour of a unified regime for publicly owned companies and private ones, by making this choice more explicit. In fact, law makers, drawing upon the coherent and repeated lesson of the *Corte di Cassazione*, provided, under Art 4, para13, of decreto legge 6 July 2012 no 95 (so-called 'Spending Review'), the following:

> 'provisions of this article, along with other provisions, including particular and *ad hoc* provisions, dealing with companies in a regime of complete or partial public entities ownership, are to be interpreted as follows: except when otherwise provided, and without prejudice to express derogations, the regime of the Civil Code for capital companies shall apply'.

This approach (Art 2247 of the Italian Civil Code, ie the idea that the lucrative corporate cause fully applies also to PEOCs) has fundamental systemic consequences: if we assume a public entity is always required, especially by Art 98 of Constitution, to pursue the public-collective interest, it is impossible to define as public a legal entity that, on the contrary, is appointed with a task that is strictly selfish, namely its own (and its members') maximum economic growth.[29]

In this context, the new Consolidated Law on PEOCs emerges as highly aware of the outlined incompatibility between the principle of pursuit of profit and public interest: significantly, as the rest of this paper will argue, the entire regulation embedded in the Consolidated Law is in line with this fundamental assumption.

Commentario del codice civile Scialoja-Branca (Bologna-Roma: Zanichelli-Foro Italiano, 2006); V. Santoro and M. Sandulli eds, *La riforma delle società – Opera omnia (commentario del d.leg. 17 gennaio 2003 n. 6)* (Torino: Giappichelli, 2003).

[28] Art 19, decreto legge 1 July 2009 no 78, provides that Art 2497 shall be interpreted as follows: 'the word 'entities' shall refer to collective legal entities, other than the State, that hold corporate ownership as part of their entrepreneurial activity, or else for economic or financial purposes'. *A contrario*, it confirms that the compensation provision fully applies to public entities. On the issue see F. Goisis, 'Il problema della natura e della lucratività delle società in mano pubblica alla luce dei più recenti sviluppi dell'ordinamento nazionale ed europeo' *Il diritto dell'economia*, 41, 57 (2013). For wider considerations on the issue of PEOCs see Id, *Contributo allo studio delle società in mano pubblica* (Milano: Giuffrè), 2004.

[29] N. Irti, *L'ordine giuridico del mercato* (Roma: Laterza, 2003), 162, argues in favour of an 'ontological contrast' between lucrative purpose and public nature.

IV. The Contribution of the Delegation Law No 124 of 2015: The Criterion of the Private Investor Operating Under Normal Market Conditions and Its Coherence with Constitutional and European Principles on PEOCs

For an in-depth understanding of the meaning of the legislative choices, it is first necessary to step back and analyse the legge delega no 124 of 2015, which reformed the public administration and provided a key basis for the Consolidated Law on PEOCs.

This section intends to outline the extent towards which the above mentioned goal of the pursuit of profit is fully coherent with the constraints imposed by constitutional and European law on the regime for PEOCs. Two principles under the delegation law of 2015 are, in our opinion, of major relevance for this discussion. First, under Art 18, para 1, letter *a*), eventual derogations to the private law regime are acceptable only in so far as they are consistent with the 'proportionality principle'. Moreover, and above all, Art 18, para 1, letter *l*), mandates as necessary:

> 'a regulation of financial flows between the public administration and PEOCs according to the criteria of equal treatment between public and private companies and market operators'.

As it emerged from the parliamentary *travaux préparatoires*, this provision appears to be strictly connected to the principles of the European competition law. The aim is to prevent dominant positions and unlawful state aid.[30]

This legislation provides the core criteria to assess whether public ownership of companies is compatible with the European regulatory framework: the criterion at stake is that of the 'profitability of the investment'. In particular, this criterion was elaborated under the Commission Communication dated 1984 on ownership interests by public entities in companies:[31] according to this document, any form of public shareholding (including complete ownership) shall comply with the requirement of the 'private investor, operating in normal market-economy conditions',[32] namely with the criterion of a 'market-economy investor intending to maximize the profitability of his investment'.[33] The Court of Justice later clarified the following:

> 'in order to determine whether an aid may be regarded as State aid

[30] See Camera dei Deputati, reading sheet related to legge 7 August 2015 no 124, 167.

[31] 'Comunicazione relativa all'applicazione della disciplina degli aiuti di Stato alla partecipazione delle autorità pubbliche nei capitali delle imprese' *Bulletin EC* 9/1984, 92.

[32] ibid.

[33] This is the wording generally used in Community documents. See for instance European Commission Decision 92/318/EEC of 25 March 1992 on state aids granted to Spain at '*Industrias Mediterráneas de la Piel SA*' *(Imepiel)*, in Gazzetta Ufficiale 27 June 1992 no 172, 76-85.

within the meaning of Art 92(1) of the Treaty, it is necessary to consider whether in similar circumstances a private investor of a size comparable to that of the bodies administering the public sector might have provided capital of such an amount'.[34]

On the other hand, the Court of First Instance clarified that

> 'the test based on the conduct of a private investor operating in normal market-economy conditions ensues from the principle that the public and private sectors are to be treated equally, pursuant to which capital placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions cannot be regarded as State aid'.[35]

In other words, the European jurisprudence is well aware (along with, apparently, the Italian legge delega no 124 of 2015) that the criterion of the rational private investor naturally tends to subsume PEOCs under the umbrella of private law, in accordance with a vision of parity of regime between PEOCs and privately owned enterprises.

It is worth noting that the Court of Justice recently had the chance to reiterate that

> 'in order to assess whether the same measure would have been adopted in normal market conditions by a private investor in a situation as close as possible to that of the State, only the benefits and obligations linked to the situation of the State as shareholder – to the exclusion of those linked to its situation as a public entity – are to be taken into account'.

As a consequence 'the roles of the State as shareholder of an undertaking, on the one hand, and of the State acting as a public entity, on the other, must be distinguished'.[36]

In this perspective, the underlying idea emerging from European law is the following: it is not acceptable to sacrifice profitability on the grounds of the pursuit of public purposes that, despite being non-lucrative, are beneficial to the collective interests that the public shareholder is institutionally representing. Similarly, as expressly specified by the Court of First Instance, eventual public purposes of a social or employment nature cannot justify an anti-lucrative involvement of the

[34] Case C-305/89 *Italian Republic* v *Commission of the European Communities*, [1991] ECR I-1603, para 19.

[35] Case T-296/97 *Alitalia* v *Commission of the European Communities*, [2000] ECR II-3871, para 80.

[36] Case C-124/10 *European Commission* v *Électricité de France (EDF)*, [2012] ECLI:EU:C:2012:318, paras 79-80.

public member, or else state aid rules would be infringed.[37]

Thanks to its inclusion in the legge delega no 124 of 2015, the model of the private rational investor aiming at the maximisation of profit became a general principle of delegation, and thus at the same time it amounted to a criterion for the interpretation of the Consolidated Law on PEOCs as a whole. In addition, this criterion assumes herein a wider breath of scope: it is not merely limited to prevention of state aid; on the contrary, it goes as far as to align economic relations between public entities and PEOCs more in general.

In this perspective, a common thread clearly emerges between the criteria of the legge delega no 124 of 2015 (proportionality of derogations to private law, profitability of the investment), and other relevant constitutional and European principles, in particular to the cost-effectiveness principle provided for Art 97 of the Constitution, and the relative ban on golden share, arising out of the European jurisprudence on freedom of investment. In fact, Art 97, para 1, of the Constitution has been newly formulated as follows:

> 'the public administration, in coherence with the legal system of the European Union, ensures the balance of budget and sustainability of public debt'.[38]

It goes without saying that PEOCs represent a privileged field of application of the principle at issue, since, regrettably, they have often created a messy consumption of public resources.

Therefore, the typical corporate cause (the pursuit of profit) may well be regarded as a direct tool to enact and implement Art 97, para 1, of the Constitution. In fact, the corporate cause requires the company to coherently pursue the improvement of public finances by means of wealth production.

Further, the European principle of freedom of investment, as interpreted by the Luxembourg judges in the wide and consolidated jurisprudence on golden shares, normally forbids modifications of company law in favour of the shareholders of a public nature, on grounds that said modifications could act as a deterrent towards private investments.

In this regard, it is well-known that in the AEM judgement of 2007, the European Court of Justice claimed that the Italian regime as under Art 2449 of the Civil Code, dealing with out-of-assembly appointment of directors on behalf of public entities, was in contrast with freedom of movement of capital. According to the underlying reasoning, this Italian regime provided to the public entity 'an instrument which gives them the possibility of exercising influence which exceeds their levels of investment'. In addition, 'as a corollary, the influence of other shareholders may be reduced below a level commensurate with their own levels

[37] Case T-20/03 *Kahla/Thüringen Porzellan GmbH* v *Commission of the European Communities*, [2008] ECR II-2305, para 242.

[38] Said paragraph is an *addendum* of the Constitutional reform Bill 20 April 2012 no 1.

of investment'.[39]

V. The Choice of the Consolidated Law on PEOCs in Favour of Private Law and the Systemic Significance of the Provision on Bankruptcy of PEOCs

From a cursory review of the provisions of the Consolidated Law no 175 of 2016, it emerges as early as the opening article that the legislator expressly stated its intention to comply with the delegated criteria of cost-effectiveness and with competition principles, as outlined above. In fact, Art 1, para 2, provides:

> 'provisions embedded in this Decree are applied taking into consideration the efficient management of public shareholdings, the protection and promotion of competition and the market, as well as the rationalisation and reduction of public expenditure'.

The same Art 1, under para 3, provides that,

> 'where not expressly derogated by the provisions of this Decree, provisions on companies embedded in the Civil Code and general norms of private Law apply to PEOCs'.

Assuming that the Consolidated law no 175 of 2016 said nothing on the lucrative cause, we may argue that the legislator did not intend to derogate the company law: the latter shall thus be regarded as fully applicable. This is true respectively for Art 2247 of the Civil Code, as well as for Art 2497: the latter, as mentioned, provides for compensation in connection to the breach of legitimate expectation to receive profit from the controlling entity.

[39] Joined cases C-463/04 and C-464/04 *Federconsumatori*, [2007] ECR I-10419, para 24. Further to said judgement, Art 2249 of the Italian Civil Code was modified: in particular, according to the article as amended, in share companies that do not resort to the risk capital market, the by-laws may grant the State or public entities the possibility to appoint 'a number of directors and statutory auditors, or members of the supervisory board, in proportion to the ownership held in the corporate capital'. On this provision, see, *ex multis*, F. Fracchia and M. Occhiena, 'Società pubbliche tra *golden share* e 2449: non è tutto oro quello che luccica' *Giustizia amministrativa*, 1225 (2007); F. Ghezzi and M. Ventoruzzo, 'La nuova disciplina delle partecipazioni dello Stato e degli enti pubblici nel capitale delle società per azioni: fine di un privilegio?' *Rivista delle società*, 668 (2008); C. Pecoraro, 'Privatizzazione dei diritti speciali di controllo dello Stato e dell'ente pubblico nelle s.p.a.: il nuovo art. 2449 c.c.' *Rivista delle società*, 962 (2009). With reference to subsequent developments, see M. Allena, 'Un nuovo ambito di giurisdizione del giudice amministrativo nel diritto dell'economia: la competenza esclusiva in materia di esercizio dei *golden powers*' *Il diritto dell'economia*, 639, 642 (2012); L. Ardizzone and M.L. Vitali, 'I poteri speciali dello Stato nei settori di pubblica utilità' *Giurisprudenza commerciale*, I, 919, 924 (2013); A. Sacco Ginevri and F.M. Sbarbaro, 'La transizione dalla *golden share* nelle società privatizzate ai poteri speciali dello Stato nei settori strategici: spunti per una ricerca' *Nuove leggi civili commentate*, 147 (2013).

Lastly, the *Corte di Cassazione* issued a judgement coherent with this view: the case concerned an in house company that, commonly, is considered the closest structure to a public entity. The Court clarified that, in the wake of an express legislative provision, private law is fully applicable and, as a consequence, as regard to PEOCs'

> 'public is not the entity in which the shares are held, but it is the entity, or some of the entities, holding shares. While it is true that the public entity in principle may hold shares in the company only in so far as the lucrative cause is compatible with the accomplishment of its own interest (in accordance with norms and constraints made more stringent by the Consolidated Law no 175 of 2016), once the company is incorporated, the interest of the public shareholder is relevant exclusively as an extra-corporate interest; as a consequence, companies owned by a public administration have nonetheless a private nature'.[40]

This approach has the merit of safeguarding the legitimate expectations of third parties that come into contact with the company: these latter can legitimately expect that the legal regime applicable to a given entity matches the *nomen juris* claimed by the entity itself. In other words, if a legal entity is qualified as a 'company' (and it is registered as such in the companies registry), its regulation shall be that of the Civil Code.[41]

Concluding, it is worth noting that the Consolidated Law, under Art 2, para 1, letter *f)*, defines the companies it regulates as 'entities as under Title V, Book V of the Civil Code'. This consideration amounts to an additional evidence suggesting that the legislator of the Consolidated Law no 175 of 2016 did not intend to differentiate from the 'type' of company identified and addressed by the Civil Code.

In this context, Art 14 of decreto legislativo no 175 of 2016 acquires a particular significance in a systemic perspective: according to the wording of the article

> 'provisions on bankruptcy and agreement with creditors apply to PEOCs and, should the conditions arise, the rules on extraordinary management for defaulted large scale undertakings apply as well'.[42]

Significantly, in house companies are not exempted from the bankruptcy

[40] Corte di Cassazione 7 February 2017 no 3196, available at www.dejure.it.

[41] On the issue C. Ibba insists with considerations that may be shared, 'L'impresa pubblica in forma societaria fra diritto privato e diritto pubblico' *Analisi giuridica dell'economia*, 409, 411 (2015).

[42] See G. D'Attorre, 'La fallibilità delle società in mano pubblica' *Il Fallimento*, 493 (2014); E. Codazzi, 'Società in mano pubblica e fallimento' *Giurisprudenza commentata*, I, 74 (2015); C. Ibba, 'Il falso problema della fallibilità delle società a partecipazione pubblica' *Rivista di diritto civile*, 511 (2015); I. Demuro, 'La crisi delle società a partecipazione pubblica' *Analisi giuridica dell'economia*, 557 (2015).

regime either. According to the governmental Report (*Relazione governativa*) of July 2016, attached to the draft Consolidated Law on publicly owned companies, the refusal to discriminate between the general regime and the regime applicable to in house and instrumental companies is justified by reference to the 'private law approach for crisis regulation' that characterised the Consolidated Law.

The norm herein reviewed appears relevant if we recognize that, in the past, PEOCs have been sometimes assimilated to public entities, precisely with a view to exempt them from bankruptcy. One of the traits that has always differentiated public entities from legal entities under private law is, in fact, according to the Italian legal system, their exemption from bankruptcy.[43] This regime also encompasses economic public entities, namely, those carrying out entrepreneurial activity.

This privilege is grounded on a twofold argument: (1) bankruptcy procedures may create an undue interference of the judicial authority in fields reserved to administrative action; and (2) may cause a disruption of a public service or any other functions performed by the public entity. The exemption from bankruptcy thus reflects the idea that public interest, amounting to the typical and legally assigned purpose of public entities, is not renounceable.[44] Therefore, in principle, the activity of public entities shall not be disrupted, otherwise the principles of effectiveness in pursuing public goals informing administrative action as under Art 97 of the Constitution would be infringed.[45]

By expressly extending the bankruptcy regime to PEOCs (and thus complying with an approach adopted by the *Corte di Cassazione* back in 2013),[46] the law-

[43] See Art 2221 of the Civil Code and Art 1 of regio decreto 16 March 1942 no 267 ('legge fallimentare'). According to these pieces of legislation, the provisions entailing bankruptcy and arrangement with creditors do not apply to public entities. On the issue see F. Goisis, 'Ente pubblico' *Annali dell'Enciclopedia del diritto* (Milano: Giuffrè, 2014), VII, 411, 427. On the issue of management of crisis in PEOCs before the Consolidated Law no 175 of 2016, see A. Crismani, 'Le società partecipate tra crisi e insolvenza' *Diritto e società*, 317 (2015). Please note that, on the contrary, particular public procedures for the management of crisis other than bankruptcy apply to public entities. In general, we may argue that, while bankruptcy is essentially aimed at winding up the company's assets in favour of the creditors, these procedures are aimed at terminating the debtor entity when it corresponds to public interest (in the name of public interest, for instance, functions carried out by a specified entity may be transferred to another entity, in order to ensure its continuity). On the issue, see G. Bavetta, 'Liquidazione coatta amministrativa' *Enciclopedia del diritto* (Milano: Giuffrè, 1974), XXIV, 322.

[44] The argument is reiterated by Consiglio di Stato 21 April 2016 no 968, available at https://tinyurl.com/ycfswmus (last visited 25 November 2017), concerning the Draft Legislative Decree of the Consolidated Law on publicly owned companies, section II, 12.

[45] In this sense, see for instance Constitutional Court 20 May 2008 no 161, *Foro italiano*, 1331 (2009). Art 97, para 2, of Italian Constitution provides that 'Public offices are organised according to provisions of law, so as to ensure the efficiency and impartiality of the administration'.

[46] Corte di Cassazione 27 September 2013 no 22209, Foro italiano, 113 (2014). Lastly, the stance was reiterated by Corte di Cassazione 7 February 2017 no 3196 n 40 above. The thesis was previously supported by a portion of commercial law scholars: see, for all, M. Ventoruzzo, 'L'esenzione dal fallimento in ragione delle dimensioni dell'impresa' Rivista delle società, 1040

maker is arguing that PEOCs do not directly and by law pursue public interest, otherwise, logically speaking, they could not be subject to bankruptcy. This implies that the public activity actually carried out by the entity is solely the 'occasion' for the accomplishment of specific economic goals. Thus, the latter does not represent the purpose of the company itself, namely its corporate cause, which remains lucrative.

Concluding, the delegated legislator, consistent with the opinion of some influential scholars,[47] seems well aware of the distinction between the corporate area of activity and, respectively, corporate cause: hence, traditional grounds shielding real public entities from bankruptcy do not apply to PEOCs.

VI. Public Law Provisions in the Consolidated Law on PEOCs: Implementation of the Cost-Effectiveness Principle for Administrative Action and the Agency Theory

The above remarks trigger the question of how provisions bearing a 'public mark' that still find place in the Consolidated Law are to be interpreted systemically.

First of all, reference is made to those norms that limit public ownership in companies. These norms, in general, recall the ban on incorporating companies having as corporate activity provided for bylaws the production of goods and services which are not strictly necessary to pursue the institutional goals of the entity; more specifically, expressly identify activities that public administrations may carry out by resorting to the company model (Art 4).

Thus, public administrations are not free to resort to corporations unrestrictedly, unlike private legal entities. On the contrary, they are strictly required to justify 'also from economic profitability and financial sustainability standpoints' their choice to incorporate a company or acquire shares in existing companies. In particular, they shall justify the 'compatibility of said choice with the principles of efficiency, effectiveness and cost-effectiveness applicable to the administrative action', as well as the compatibility of the financial intervention *vis-à-vis* European Union regulation and State aid provisions (Art 5).

In this perspective, the provision under Art 14, para 5, aims at reducing the scope of possibilities, for the public entity, to remedy crisis or default situations. The provision, broadly speaking, bans the implementation of 'capital increases, extraordinary transfers, credit line openings' or any issuance of guarantee in favour of affiliated companies that registered 'for three consecutive financial years (…) operating losses, or used available reserves to cover losses including interim

(2009), and G. Romagnoli, 'Le società degli enti pubblici; problemi e giurisdizioni nel tempo delle riforme' Giurisprudenza commerciale, I, 478 (2006).

[47] F. Cammeo, *Società commerciale ed ente pubblico* (Firenze: Universitaria Editrice, 1947), 28-29.

ones'. Should a capital transfer be instrumental for the provision of services bearing a public relevance, exceptions to this rule may apply, upon the condition that the adopted measures are coherent with a recovery plan, approved by the regulatory Authority of the sector and duly reported to the Corte dei conti.

Undoubtedly, this provision (although bearing a 'public mark') intends to protect the profit-making purpose of PEOCs: in other terms, it is a 'public law provision' but, at the same time, directed to strengthen the intrinsic private nature of PEOCs.

Exceptions may also apply when the issue entails the safeguard of continuity in the provision of services of public interest threatened by 'serious dangers for public safety, order and health'. Nonetheless, in this event, the derogation shall be authorised further to a complex proceeding, resulting in a Decree of the President of the Council of the Ministries, adopted on the basis of a proposal of the Ministry of Economics and Finance, jointly with other competent Ministries, and subject to registration within the Corte dei conti.

Thus, the public shareholder, unlike the private one, does not have fully-fledged freedom to conduct business, and is not free to enact the bail out of companies that chronically displayed their inability to comply with the principle of cost-effectiveness.

Art 21, para 3-bis of the Consolidated Law (introduced by the amending decreto legislativo 10 February 2017 no 100) further corroborated said stance: the provision poses limitations to the covering of losses incurred by companies in which local entities hold shares. The provision specifies, inter alia, that this operation is possible only 'in compliance with the principles of European Union legislation on State aid'.

In conclusion, it is also worth mentioning the provisions limiting the remuneration that can be paid to members of the board and supervisory bodies within the company in proportion to the complexity of the undertaking; or defining the maximum possible number of members appointed within the corporate bodies, and preventing, for instance, employees of the public entity owning shares from being appointed as directors of the subsidiary company (Art 11). Moreover, under specific conditions, the administrative liability in front of the Corte dei conti is provided for the members of the board and supervisory bodies of affiliated companies; said liability is combined with the ordinary civil liability claim envisaged under the capital companies' regulation (Art 12). More generally, the Consolidated Law acknowledges a highly significant role for the Corte dei conti, namely the judge entrusted with treasury liability: it addressed it as the Court responsible for the monitoring of companies' incorporation, effective rationalisation of public entities' ownership, and undertakings in crisis.

This set of provisions mostly is a repetition of sparse provisions embedded in pre-existing legislation, yet they currently acquire a higher systemic significance to the extent they are coordinated in a single corpus legis; they are explained with the particular significance conferred to treasury interest for PEOCs. The relevance of the State treasury interest currently has grown, further to the modification of the first paragraph of Art 97 of the Constitution, that codifies at a constitutional level the principle of cost-effectiveness for the administrative action ('public administrations ensure (...) balance of budgets and public debt's sustainability').

Actually, these 'special' provisions envisaged for PEOCs are not in contrast with the lucrative purpose. On the contrary, they add to the lucrative cause of PEOCs, already in itself binding, strengthening it with regard to some critical aspects.

Thus, we see a phenomenon that, in certain aspects (at least in light of the aforementioned administrative scholarship debate on PEOCs) may seem paradoxical: public entities' ownership of companies is far from attenuating the principle of necessary profitability by means of its subordination to the public interest as connected to and inferred from the corporate activity; on the contrary, it actually results in an increased number of provisions envisaged as a safeguard for the principle of profitability, and, as a result, for the State treasury.

On the other hand, the special system applicable to PEOCs (ie the public law norms intended to preserve their profit nature such as, for instance, Art 14, para 5) seems also justifiable in light of the theory of the so called principal-agency dilemma or agency problem, elaborated by the economic analysis of law.

The principal-agent dilemma occurs when

> 'one or more persons (the principal/s) engage another person (the agent) to perform a certain service on their behalf, which involves delegating some decision-making authority to the agent'.

In such case,

> 'if both parties in the relationship are utility maximizers, there is good reason to believe that the agent will not always act in the best interests of the principal'.[48]

This problem, originally investigated with reference to large-scale American corporations, is deeply connected to the issue of ownership structures, and it arises any time ownership and control do not coincide. However, the problem is also particularly evident with regard to PEOCs: in the latter, the classic issue of

[48] M.C. Jensen and W.H. Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' 3 *The Journal of Financial Economics*, 305 (1976). The problem was already captured by A. Smith, *The Wealth of the Nations* (London: Ward Lock, 1838) when he highlighted the following: 'The directors of such companies [joint stock companies] however being the managers rather of other people's money than of their own, it cannot well be expected that they should watch over it with the same anxious vigilance (as if it were their own)'. The quote is from C.A. Mallin, *Corporate Governance* (Oxford: Oxford University Press, 2007), 13.

separation between directors of the company and shareholders acquires traits that are even more 'dramatic'. In this case even the public shareholder manages and spends money that is not its own, and that rather belongs to the community, or, if you prefer, the State treasury. In other words, the public shareholder is at the same time 'principal' (*vis-à-vis* the directors of the company) and 'agent' (*vis-à-vis* taxpayers).

Therefore, it seems natural that the legislator is concerned with 'curbing', or however keeping under control the activity of the public entities in their capacity as shareholders:[49] in fact, in historical reality, such entities have often been demonstrated to be driven more by political and client-oriented logic, rather than effective entrepreneurial considerations.

VII. Concluding Remarks

In conclusion, the Consolidated Law no 175 of 2016 draws a model of PEOCs firmly loyal to the essential elements of capital companies as designed under the Italian Civil Code, with consequent 'ontological' reference to private law (without prejudice to unequivocal derogations).

The legislator has thus overcome all the problems caused by the impossible, or according to a well-known definition, 'insincere',[50] attempt to reconcile things that cannot be reconciled, namely the pursuit of profit and public interest.

Hence, the assumption that it is possible to differentiate between companies governed by the Civil Code and companies that, on the contrary, have lost this connotation by becoming a neutral tool for the direct pursuit of public interest, shall be deemed as overcome.

In fact, the path traced by the legislator is that of a single essential company model for each and every entity, disregarding its private or public ownership. In this perspective, public bodies, should they intend to avail themselves of such a legal instrument (a PEOC), shall do so by complying with and adhering to the typical traits of the model. Furthermore, they shall not be entitled to elaborate an '*à la carte*' model, which may inevitably lead to inefficiencies and, ultimately, denote an unjustified privilege. In particular, said privilege would not be in line with the current characterisation of administrative action, today increasingly more democratic and less authoritarian,[51] and is currently widely rejected by

[49] In fact, according to the agency theory, the growth of 'agency costs' is directly proportional to the growth of the separation between ownership and control; note that agency costs are the result of 'the sum of: 1. the monitoring expenditures by the principal; 2. the bonding expenditures by the agent; 3. the residual loss' (see, again, M.C. Jensen and W.H. Meckling, n 48 above, 307).

[50] T. Ascarelli, 'Tipologia delle società per azioni e disciplina giuridica' *Rivista delle società*, 995, 1013 (1959).

[51] On this point see, for all, F. Benvenuti, 'Per un diritto amministrativo paritario', in Id, *Scritti giuridici, IV, Articoli e altri scritti (1970/1983)* (Milano: Vita e Pensiero, 2006), 322; G. Pastori, 'Introduzione generale', in Id, *La procedura amministrativa* (Vicenza: Neri Pozza Editore,

European Union law.

If interpreted in light of the clear-cut legislative choice in favour of private law, the provisions of the Consolidated Law of 2016 that seemingly refer to a special nature of the public shareholder, are in fact subsumed under a coherent design: they arguably implement the cost-effectiveness principle for administrative action (along with the rational investor principle) and, as such, are actually perfectly coherent with the lucrative purpose, which in turn emerges as strengthened.

The same reasoning could also apply with regard to major controls and limitations imposed on public entities that use the company model: these are explained by the agency theory, mentioned above, and elaborated by scholars of economic analysis of law.

Ultimately, the Consolidated Law provides an answer to the suggestive question about whether a public transport company carrying passengers on the river Rhine should be concerned with carrying passengers or with producing profit: undoubtedly, the Italian Consolidated Law no 175 of 2016 chooses the second option.[52]

There is no need to say, however, this reasoning does not imply that specific public activities, notably the management of selected public services, per se structurally loss making, currently may not be carried out through the use of the company model. In these instances, European Union law simply recommends enacting a transparent and objective system of compensation for public service charges. Said compensation system would allow the State, inter alia, to stimulate competition between the public and the private undertakings, as they would both be potentially interested in managing a service that, even though per se loss-making, would obtain an entrepreneurial interest precisely thanks to the public service's compensation.

1964); Id, 'The Origins of Law No 241/1990 and Foreign Models' *Italian Journal of Public Law*, 259 (2010).

[52] See A. Asquini, n 25 above.