Corporate and Financial Markets Law

State-Appointed Directors, Related-Party Transactions and Corporate Opportunities in 'Open' State-Owned Companies

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Abstract

State shareholding in Italy has features which are linked both to the quantitative significance of the phenomenon and to the fact that special powers of appointment and removal of directors and members of the board of statutory auditors may be entrusted to the state as well as other public entities, such as municipalities, by means of the articles of association. These special powers have no equal in other legal systems. Among these powers, the power of appointment of directors is the most significant because the particular relationship between the nominating public authority and the director appointed by it may result in a significant influence on the company's interests. In 'closed' public limited companies special powers of direct appointment may be entrusted to the state-shareholder in a proportional manner to the size of its shareholding. In state-owned companies listed on the stock exchange, who resort to the risk capital market (so-called 'open companies'), the powers of appointment must be incorporated into non-equity financial instruments or in a 'particular class of shares'.

However, Art 2380-*bis* of the Italian Civil Code binds all directors to pursue the lucrative interests as the only 'company's interests' common to all shareholders, and confines the public interest among the 'extra-social interests'; therefore state-appointed directors cannot pursue them.

This complex plot of relationships cannot be solely entrusted to the regulation of the conflict of interests, which is designed to govern occasional disagreements between the company's interests and the interests of its directors.

For this reason, as in all European countries, Italian law regulates the particular relationship that some parties called 'related parties' (such as executive directors and the majority shareholder who has the power to appoint directors) maintain with the company (with the particularity that Italian law provides for specific rules on related parties transactions only for listed companies and companies that resort to the risk capital market).

This essay is a first consideration on the topic of the state and other public entities which have the power to appoint directors as the main and most authoritative 'related parties' of the 'open' state-owned companies, which would require a more in-depth investigation.

I. Introduction

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It is universally recognized that Italy has, together with France,[1] the highest number of state-owned enterprises.

The figure was particularly conspicuous before the privatization process that dismantled the state shareholding system, but even, at this point, where public economic entities have been converted into public limited companies, the phenomenon remains impressive in the context of state-owned enterprises, and even more in municipally-owned enterprises.

The features of the state shareholding in Italy, however, are linked not only to the singular quantitative significance of the phenomenon, but also to the special powers of appointment and removal of directors and members of the board of statutory auditors that have been always granted to public authorities - primarily the state.

As we will see in para II, according to Italian law, special powers of appointment are differently regulated in 'closed' state-owned companies and in state-owned companies which are listed on the stock exchange, or which resort to the risk capital market (hereinafter 'open' state-owned companies).[2]

More precisely, in the 'closed' state-owned companies, special powers of direct appointment and removal may be entrusted to the state shareholder, in a manner proportional to the size of its shareholding. Conversely, in the 'open' state-owned companies, special powers of appointment must be incorporated into non-equity financial instruments (so-called financial instruments that include administrative rights) pursuant to Art 2346, para 6, Civil Code, or in a 'particular class of shares'.[3]

But before examining Italian rules in detail we have to verify if other states also provide for similar rights.

1. Special Powers of Appointment

With regards to special powers of direct appointment and removal, there are strong similarities among state appointment powers in public limited companies provided for in Art 2449 Civil Code,[4] and those provided for in Art

[1] It is well known that France holds, among the liberal western democracies, the supremacy of the largest number of state-owned enterprises, and that the combination of these two elements – that is the existence of a vast sector of public enterprise along with a traditional political system – has had a deep impact on the control organization of state-owned enterprises: see, among others, G. Ripert, *Les aspects juridiques du capitalisme moderne* (Paris: Librairie Générale de Droit de Jurisprudence, 1951), 322-324; C.A. Colliard, 'Il controllo delle imprese pubbliche in Francia' *Rivista internazionale di scienze sociali*, 199 (1959); Id, *Le régime des entreprises publiques* (Bruxelles: Bruylant, 1969), 27-29; C. Ducouloux-Favard, *Les sociétés d'economie mixte en France et en Italie. Etude comparative* (Paris: Librairie générale de droit et de jurisprudence, 1963), 67.

[2] On 'closed' and 'open' joint stock companies see below, para II.

[3] Although the regulation suggests an alternative between one and the other, nothing actually prevents you from using both options.

[4] On this topic see V. Donativi, 'Esperienze applicative in tema di nomina pubblica "diretta" alle cariche sociali (artt. 2458-2459 c.c.)' *Rivista delle società*, 1258-1259 (1998); Id, 'La nomina pubblica alle cariche sociali nella società per azioni', in R. Costi ed, *Trattato di diritto commerciale*

762[5] of the Swiss *Bundesgesetz über das Obligationenrecht* (OR).

More precisely, Art 762, paras 1 and 2[6] grants powers of direct appointment and removal of directors and statutory auditors in companies owned by the federal government to cantons, districts and communities.

Apart from the Swiss legal system, there are only two other legal systems that include special direct appointment powers reserved to the state, which are however rather marginal.

The first is Russian federal legislation, in which the line ministry may appoint the chief executive officer in state-owned companies without the board of directors' approval.[7] In spite of the fact that the state and municipality shareholding in companies was significantly reduced as a result of the privatisation, this is however a model in which the government influence over the nomination process is still so strong that[8] special appointing powers are in fact unnecessary.

The second is the Egyptian model, in which Art 89, legge 16 January 1954 no 26, regarding public limited companies, partnerships partly limited by shares and limited liability companies, provides for direct non-shareholding powers[9] and states that public officials cannot be nominated as state-appointed directors, allowing the council of ministers to grant exemptions (not generally but on a case-by-case basis) to this prohibition.[10]

However, these cases are rather marginal, so that this is evidence that with reference to special appointment rights the Swiss legal system is the most similar to the Italian system.

(Torino: Giappichelli, 2010), IV, 4-5, 82-83.

[5] More specifically, book V of the federal law, which amends the Swiss Civil Code that sets out the *Bundesgesetz über das Obligationenrecht vom 30 März 1911/18. Dezember 1936* (OR). Regarding Arts 762, 926, see T. Jaag, 'Der Staat als Aktionär', in H.C. Von Der Crone et al eds, *Neuere Tendenzen im Gesellschaftsrecht. Festschrift für Peter Forstmoser* (Zürich: Schulthess, 2003), 379, 394-395; P. Forstmoser and T. Jaag, *Der Staat als Aktionär: Haftungsrechtliche Risiken der Vertretung des Staates im Verwaltungsrat von Aktiengesellschaften* (Zürich: Schulthess, 2000), 13-14; M. Stämpfli, *Die gemischtwirtschaftliche Aktiengesellschaft ihre Willensbildung und Organisation* (Bern: Stämpfli Verlag, 1991), 106-107; P. Böckli, *Schweizer Aktienrecht, 4 Auflage* (Zürich: Schulthess, 2009), para 13, no 49 and no 86-87; P. Forstmoser, A. Meier-Hayoz and P. Nobel, *Schweizerisches Aktienrecht* (Bern: Schulthess, 1996), § 27, no 17-18 and § 63, no 14-15; H. Honsell et al eds, *Basler Kommentar zum Schweizerischen Privatrecht, Obligationenrecht II, Articles 530-964, 5-6 Auflage* (Basel: Helbing Lichtenhahn Verlag, 2016), no 1-2.

[6] See Art 762, abs 1, book V, OR, as amended by the federal law 4 October 1991.

[7] See A. Filatov, V. Tutkevich and D. Cherkaev, 'Board of Directors and State-Owned Enterprises (SOE) in Russia' *OECD Paper*, 18 (2005), available at https://tinyurl.com/y9nmnn7m (last visited 27 December 2018).

[8] ibid 18; I. Iwasaki, 'The Determinants of Board Composition in a transforming economy: Evidence from Russia' 5 *Journal of Corporate Finance*, 532-533 (2008); M. Prokofieva and B. Muniandy, 'Board composition and audit fee. Evidence from Russia' 8 *Corporate Ownership & Control*, 511 (2011).

[9] See Art 89, para 1, legge 16 January 1954 no 26, French text published in *Rivista delle società*, 601-602 (1960).

[10] See Art 95, para 1, legge 16 January 1954 no 26.

2. Appointment Rights Included in Non-Equity Financial Instruments

The second option mentioned above, appointment rights included in non-equity financial instruments, is innovative on the European scene.

Although Art 656, letter e) OR[11] grants rights of directors' appointment to holders of non-equity financial instrument[12] and several north American state legislations entrust holders of debt securities and venture capital with corporate rights, by means of a very loose formula that certainly also includes reserved appointment rights in corporate bodies[13] and provide for preferred shares that include rights of appointment and convertible preferred shares with the deciding voting right (or a right to veto) and the right to appoint one or more directors[14] these financial instruments are not reserved to the state and public entities.

Generally, in no other legal system except Italy, the subscription of non-equity financial instruments with special rights to appoint directors are reserved to – in other words intended exclusively for – the state or other public entities.

3. Appointment Rights Embedded in 'Particular Classes of Shares'

[11] Art 656, letter e) *OR*, with reference to representation in the board of directors ('*Vertretung im Verwaltungsrat*'), with a formula that clearly limits the range of the entitled persons to hold '*Partizipationsscheine*' – a sort of ordinary shareholders without voting rights – provides that '*die Statuten können den Partizipanten einen Anspruch auf einen Vertreter im Verwaltungsrat einräumen*'. And according to Art 656, letter c), para 1, in principle the '*Partizipationsscheine*' do not have the voting right, unless bylaws explicitly grant it to them.

[12] The German '*Genussscheininhaber*' does not have administrative and, in particular, voting rights, and even '*the Genußrecht mit Eigenkapitalcharakter*' – typical expression of '*Mezzanine-Kapital*' – does not grant the voting right: T. Ernst, *Der Genussschein im deutschen und schweizerischen Aktienrecht* (Zürich: Schulthess, 1963), 184-186; H. Hirte, 'Genussscheine mit Eigenkapitalcharakter in der Aktiengesellschaft' *Zeitschrift für Wirtschaftsrecht*, 486-488 (1988); Id, *Kapitalgesellschaftsrecht, 8 Auflage* (Köln: RWS Vlg Kommunikationsforum, 2015), 336-337; U. Hüffer and J. Koch, *Aktiengesetz, 12 Auflage*, (München: Beck, 2016), *§* 221, 1475-1477. Neither the French '*titres participatifs*' have the voting right pursuant to Arts 228-36 and 228-37 *Code de Commerce*, which are primarily issued by state-owned enterprises. The Belgian '*parts bénéficiaires*' have instead the voting right, with the exclusion of reserved appointment rights, pursuant to Art 542 *Code des Sociétés*, even if the wide freedom to conform the bylaws does not exclude that appointment rights may also be conferred on them: on this last aspect see C. Cincotti, 'L'esperienza delle *part bénéficiaires* belghe e gli strumenti finanziari partecipativi di cui all'art. 2346 c.c.' *Banca, borsa, titoli di credito*, 227, (2004).

[13] See, for example, how wide the range of rights that may be granted to bondholders and debenture holders in accordance with Art 221 Delaware General Corporation Law. Among these powers, the rights of reserved appointment in the corporate bodies can certainly be included; similarly Art 703, letter a) New York Business Corporation Law.

[14] Especially with regard to companies where it is necessary to exercise a strong control over the entrepreneurial production process in order to monitor the financial return of the investment see, among many, see W.A. Sahlman, 'The Structure and Governance of Venture-Capital Organisations' *Journal of Financial Economics*, 473, 504-506, (1990); W.W. Bratton, 'Venture Capital on the down-side: Preferred Stock and Corporate Control' 100 *Michigan Law Review*, 914-916, (2002).

In the case of the third above-mentioned option, appointment rights embedded in 'particular classes of shares', the law in several jurisdictions authorizes articles of association to issue special classes of shares with special powers of appointment and removal.

For example, Art L228-11 of the French *Code de Commerce* provides that the company may issue '*actions de préférence*'. The content of the rights of these shares is indefinite, and both shares without voting rights[15] and double voting shares are permitted.[16] Moreover, among the rights that the '*actions de préférence*' may confer are certainly included the rights of appointment and removal of corporate bodies members.

In the German legal system, according to § 101, para 2, *Aktiengesetz* (AktG), the articles of association may grant one or more individual shareholders, or holders of specific registered shares, the right to appoint one or more supervisory board members.[17] The shares thus allocated do not constitute a different class[18] and must not exceed one third of the total share capital.[19] According to § 103, para 2, *AktG,* the right to remove these directors is not necessarily related to the right of appointment and may therefore be granted by the articles of association to a different person,[20] by specifying that if the right is not exercised shareholders may remove this member by simple majority.[21]

This right of appointment lies outside the shareholders' approval,[22] and

[15] See Art L228-11 *Code de Commerce*, in the text amended by the *ordonnance* 6 November 2008 no 2008-1145, '*relative aux actions de préférence, consolidée au 7 septembre 2017*'.

[16] See Artt L225-123 *Code de Commerce*.

[17] According to § 101, para 2, AktG. The right was already provided for by § 88, para 3, AktG 1937.

[18] This is specified in § 101, para 2, satz 1, *AktG*, which identifies two different sub-classes of the right of appointment, the first of which is directly granted to the shareholder ('*aktionärsbezogenen Entsendungsrecht*') the second is granted to the share ('*inhaberbezogenes or Aktienbezogenes Entsendungsrecht*'). However even in the latter case, the right is not included in a special class: T. Drygala, '§ 101. Bestellung der Aufsichtsratsmitglieder', in K. Schmidt and M. Lutter eds, *AktG Kommentar, I. band, §§ 1 - 149, 3 Auflage* (Köln: Schmidt, 2015), 1576. The latter case instead involves '*vinkulierte Namensaktien*'.

[19] As specified in § 101, para 2, satz 4, AktG.

[20] The list of defaults is obviously open: M. Habersack, '§ 103. Abberufung der Aufsichtsratsmitglieder', in W. Goette and M. Habersack eds, *Münchener Kommentar zum Aktiengesetz: AktGBand 2: §§ 76-117, MitbestG, DrittelbG, 4 Auflage* (München: Beck, 2014), 1046-1048; G. Spindler, '§ 103', in G. Spindler and E. Stilz eds, *AktienGesetz, Band I, 3 Auflage* (München: Beck, 2015), 36.

[21] As for § 103, para 2, AktG, recorded '*Abberufung der Aufsichtsratsmitglieder*'.

[22] R. Ludwig and J. Zeising, 'Kapitel 13', in R. Büchel and W.G. von Rechenberg eds, *Kölner Handbuch Handels- und Gesellschaftsrecht, 3 Auflage* (Köln: Heymanns, 2015), 1210; M. Habersak, '§ 101. Bestellung der Aufsichtsratsmitglieder', in W. Goette and M. Habersack eds, n 20 above, 984-986; T. Drygala, '§ 100. Persönliche Voraussetzungen für Aufsichtsratsmitglieder', in K. Schmidt and M. Lutter eds, n 18 above, 1553; K.J. Hopt and M. Roth, '§ 100. Persönliche Voraussetzungen für Aufsichtsratsmitglieder', in H. Hirte et al eds, *GrossKommentar zum AktienGesetz, Band 5 §§ 95-116, 5 Auflage* (Berlin: De Gruyter, 2017), rz 147.

according to the § 100, para 4, *AktG*, the same requirements and professional qualifications provided for by the articles of association for members appointed by shareholders[23] are not required for the person thus elected. This obviously does not prevent the articles of association to provide for them, or to request more specific requirements for members appointed by shareholders, or to establish a different duration of the term of office for some directors (and in particular a shorter term).[24]

The right of appointment may also be granted to groups of shares or shareholders,[25] but also in this latter case a special class of shares is not involved, because according to § 35 *BGB* the '*Entsendungsrecht*' is not a class right but a '*Sonderrecht*'.[26]

Supervisory board members thus nominated and appointed are bound to take care of the company's interests and are not subject to any orders of the appointing person,[27] although a duty to consult the said appointing person may be provided for.[28]

Under Dutch law, articles of association may provide for special classes of shares including the right to appoint one or more directors and one or more members of the supervisory board.[29] Moreover, the Spanish legal system provides for a special power to remove the board of statutory auditors' members of state-owned enterprises for just cause.[30]

Any analysis of the British law should begin from the premise that the law does not reserve the right to appoint directors either to shareholders or to any other specific classes of stakeholders,[31] even though it is common that the articles of association grant that right to shareholders or holders of a certain class of financial instruments, including bondholders. Moreover, the Companies Act states an almost identical rule with reference to the appointment and removal

[23] T. Drygala, '§ 100' n 22 above, 1553; K.J. Hopt and M. Roth, n 22 above, rz 105; M. Habersack, '§ 100. Persönliche Voraussetzungen für Aufsichtsratsmitglieder', in W. Goette and M. Habersack eds, n 20 above, rz 41; M. Lutter, G. Krieger and D.A. Verse, *Rechte und Pflichten des Aufsichtsrats, 6 Auflage* (Köln: Schmidt, 2014), rz 24.

[24] K.J. Hopt and M. Roth, n 22 above, rz 104; M. Habersack, '§ 100' n 23 above, rz 54; T. Drygala, '§ 100' n 22 above, 1553-1554.

[25] See T. Drygala, '§ 101' n 18 above, 1577.

[26] ibid 1574; R. Ludwig and J. Zeising, n 22 above, 1210.

[27] See K.J. Hopt and M. Roth, '§ 101. Bestellung der Aufsichtsratsmitglieder', in H. Hirte et al eds, n 22 above, rz 147.

[28] S. Kalls, '§ 101. Bestellung der Aufsichtsratsmitglieder', in W. Goette and M. Habersack eds, n 20 above, rz 291.

[29] Thus, respectively pursuant to Arts 2:133 and 2:243 *Burgerlijk Wetboek* with reference to the appointment of management board members and Arts 2:142 and 2:252 *Burgerlijk Wetboek* regarding the appointment of supervisory board members.

[30] See Art 266, section 3, *LSA*, with regard to '*revocación del auditor*'.

[31] Arts 154-161 with reference to 'appointment of directors', the Companies Act 6 november 2006 does not contain any information concerning persons entitled to vote for the election of directors, and also Art 168, with regard to their removal. And so it was also in the section 73 of the Companies Act 1985.

of members of the board of statutory auditors, with the difference – suitable to guarantee their stability – that, unlike directors, they may be removed before the end of their office only by means of a shareholders' resolution.[32] The powers of appointment and removal may be therefore conferred on entire classes of shares or on a single shareholding,[33] as well as directly on a single shareholder,[34] or granted by contract to any third party.[35] However, regardless of the appointment and removal procedures, the principle according to which all nominee directors are required to pursue the common interest and therefore to abide by the independent judgment principle,[36] ignoring the interest of the appointing person,[37] is a general rule, even though the doctrine highlights the difficulty to obey this rule in practice.[38]

In some north American state legislation, the incorporation of appointment rights into special classes of shares is allowed. Examples of this incorporation are seen in Art 703, letter a) of New York Business Corporation Law (NYBCL),[39] and in Art 151, letter a) of Delaware General Corporation Law (DGCL), according to which articles of association may provide for the issuance of classes and series of shares[40] whose voting power is freely classifiable and may include designation[41]

[32] With reference to the removal see Art 510, section 4, Companies Act.

[33] See *Eley v Positive Life Assurance co ltd* [1875] 1 Ex D 88.

[34] See *Eley v Positive Life Assurance co ltd* [1875] n 33 above; *Bushell v Faith* [1970] AC 1099, [1970]; *Cumbrian newspapers group ltd v Cumberland & Westmorland Herald newspaper & printing co ltd* [1986] BCLC 286.

[35] See n 23 above.

[36] As well as the director appointed by a particular class of shares or debt instruments: P. Davies and S. Worthington, *Gowers and Davies' Principles of Modern Company Law* (London: Sweet and Maxwell, 2012), 539.

[37] In this respect, *Boulting* v *Association of Cinematograph, Television and Allied Technicians (act)* [1963] 2 QB 606; *Kuwait Asia bank EC* v *National Mutual Life Nominees ltd* [1991] 1 AC 187 PC (NZ). With reference to the second of the two decisions, P. Davies and S. Worthington, n 36 above, 539, fn 140. These authors clarify that the principle for which the nominee must ignore the interest of the appointing person is needed to exclude the liability of this latter in case of a breach of nominee director's duties.

[38] As noted by P. Davies and S. Worthington, *Gowers* n 36 above, 539. This characteristic is common to all western legislations, and in fact the Authors, in order to find a legal rule sufficiently 'realistic' for them, must resort to the Ghana Company Code 1963, no 33 (Act 179), where in section 203, Art 3, with regard to the directors' duties, it is said that 'in considering whether a particular transaction or course of action is in the best interests of the company as a whole a director may have regard to the interests of the employees, as well as the members, of the company, and, when appointed by, or as representative of, a special class of members, employees, or creditors may give special, but not exclusive, consideration to the interests of that class'. The authors also note that this formula 'would not permit the mandating of directors and thus the creation of a fettering problem'.

[39] Art 703, letter a) NYBCL provides, also in favor of debt security holders with voting rights, that 'at each annual meeting of shareholders, directors shall be elected to hold office until the next annual meeting except as authorized by section 704 (Classification of directors). The certificate of incorporation may provide for the election of one or more directors by the holders of the shares of any class or series, or by the holders of bonds entitled to vote in the election of directors pursuant to section 518 (corporate bonds), voting as a class'.

[40] The special right must result from the title, as stated in Art 151, letter f) DGCL.

and preference special rights.[42] Section 141, letter d), DGCL allowed classes and series of shares that grant the right of separate appointment of one or more directors, who generally have the same rights and obligations as other members, unless the articles of association establish otherwise.[43]

However, in no other legal system except Italy special classes of shares with special rights to appoint and remove directors are reserved to – in other words intended exclusively for – the state or other public entities.

4. Features of the 'Italian Case'

This brief analysis confirms that the Italian legal system is a unique and atypical case in today's European and international scene, both for the presence of appointing rights reserved to public shareholders and for the legislator's choice to separate rules for 'open' and 'closed' state-owned companies.

These features are evident, bearing in mind that in the European and international context, there is a high attention to and a very unfavourable opinion on the issue of appointing powers held by the state and other public entities such as municipalities; as well as in the issuance the public golden shares, a harmonisation of regulations has been desired for a very long time.[44]

Particular attention is paid on selection procedures of corporate offices in state-owned enterprises, as already shown in the OECD 2012 report on appointments, which recommends a high level of transparency in the process,[45] and the OECD Report 2015 on corporate governance, which does not hide a certain mistrust towards powers of direct appointment and removal.[46]

Recurring topics include the need to limit the influence of politics on the

[41] See Art 151 DGCL, 85.

[42] Generally, the non-proportional allocation of voting and appointment rights to corporate functions is frequent: S.N. Kaplan and P. Strömberg, 'Financial Contracting Theory Meets the Real World: an Empirical Analysis of Venture Capital Contracts' 70 *Review of Economic Studies*, 281 (2003).

[43] Thus Art 141, letter d) DGCL. And according to Art 141, letter k), a special power of separate removal is normally connected to the special power of separate appointment even without just cause: See Delaware Court of Chancery in re *Vaalco energy stockholder litigation*, CA no 11775-VCL, 21 December 2015.

[44] Obviously, this topic cannot even be touched here, but for some considerations in this perspective, which start from the Italian case as a paradigmatic case also on golden shares regulation, see M. Lamandini, 'Golden share and free movement of capital in Europe and in Italy' *Giurisprudenza commerciale*, 683-689, (2015).

[45] There are many legal systems in which the appointment is not left to the free will of the competent ministry but is accompanied by an inter-ministerial scrutiny, and sometimes by an open and spontaneous competitive candidacy process in which professional pre-requisites are assessed (in particular in Sweden and Finland). On this topic see Oecd, Directorate for Financial and Enterprise Affairs Corporate Governance Committee, *Working Party on State Ownership and Privatisation Practices. Board of Directors of State-Owned Enterprises: An Overview of National Practices* (Paris: Oecd, 2012), 10.

[46] *OECD Guidelines on Corporate Governance of the State-Owned Enterprises* (Paris: Oecd, 2015), 80.

appointment procedure of administrative and supervisory offices in state-owned enterprises,[47] and to ensure that the procedures for election, renewal and removal of directors are previously defined.[48]

In the following pages we will try to highlight how the power to appoint directors conferred on the state and other public entities according to Italian law, deeply influences both the relationship between the company's interests and the public interests, as well as the relationship between state-appointed directors and other directors. We will also try to underline as in listed companies that resort to the risk capital market (so-called 'open'), the relationship between the appointing public entities and the company may be a source of corporate opportunities for both parties.

II. State-Appointed Directors and Directors' Duties under the Italian Company Law Reform

Italian Company Law reform, put into effect by decreto legge 17 January 2003 no 5[49] and no 6,[50] introduced in Art 2325-*bis* Civil Code the distinction between 'closed' public limited company and 'open' public limited company that has financial instruments listed on regulated markets or that resorts to the risk capital market (hereinafter 'open').

Art 2449 Civil Code refers to this distinction with regard to companies owned by the state or other public entities such as municipalities (hereinafter

[47] Iss Europe, Ecg, Shearman & Sterling, 'Report on the Proportionality Principle in the European Union', available at https://tinyurl.com/y92l687c (last visited 27 December 2017); OECD, n 46 above, 18, where among the guiding principles to which the state-shareholder must comply with are mentioned 'well-structured, merit-based and transparent board nominations processes in fully-or majority-owned SOEs, actively participating in the nomination of all SOEs' boards and contributing to board diversity'; OECD, 'White Paper on Corporate Governance in Russia', available at https://tinyurl.com/y8jgtwl4, 29, (last visited 27 December 2018), where it is asserted that 'special concerns are raised in large companies with significant state ownership, in which board members nominated by the state may prefer the broader state interest – including political concerns – over the interests of the company and its shareholders. Direct conflicts of interest may arise where the state nominates as board members officials whose other responsibilities include regulation or oversight of the company or management of a related sphere of the economy, and for this reason such officials should not be nominated as board members'.

[48] See OECD, Directorate for Financial and Enterprise Affairs Corporate Governance Committee, *Working Party* n 45 above, 6, where best practice in relation to the appointment provides that 'board appointments, even in wholly-owned SOEs, should be entrusted to the annual general meeting of shareholder'; OECD, n 46 above, 71, where a recurring re-evaluation of the candidacies and the limit to appointment renewals is promoted as best practice.

[49] See decreto legislativo 17 January 2003 no 5, on the arbitration of disputes in the company and financial intermediation law, pursuant to Art 12 of legge 3 October 2001 no 366, for the corporate law reform (see below n 51).

[50] See decreto legislativo 17 January 2003 no 6, afterwards amended and supplemented, which has introduced into the Civil Code a new organic regulation of joint stock companies and cooperatives pursuant to the legge 3 October 2001 no 366. Art 1, para 1, decreto legislativo 6/2003 introduced Art 2380-*bis* in the Civil Code.

the 'state-owned companies' for brevity). Para 1 of the said article, with reference to the 'closed' state-owned companies provides that, if the state or other public entities have shareholdings in a public limited company, the articles of association may confer on them the power to appoint directors and statutory auditors, or members of the supervisory board proportionally to their shareholding.[51] Furthermore, para 2 of the same article provides for a right of removal reserved to the holder of the power of appointment. Obviously, this is not an obligation but a power; accordingly, powers of direct appointment and removal are potestative rights conferred on the state-shareholder by the articles of association.[52]

On the other hand, with regard to the state-owned companies which resort to the risk capital market ('open' state-owned companies), Art 2449, para 4[53] provides, as described above,[54] that the appointment right must be incorporated into financial instruments that include administrative rights pursuant to Art 2346, para 6, Civil Code, or in a 'particular class of shares'.

Furthermore – unlike para 1 – Art 2449, para 4 does not grant the state and other public entities (which hold the power of direct and reserved appointment of some directors) a further power of direct and reserved removal of those same members. Certainly, the articles of association might provide for this omission, and confer on the holder of financial instruments and shares bearing a right of reserved appointment a further right of removal, but the fact remains that this right is not conferred by law. Therefore in 'open' state-owned companies, there is not the same symmetry between the power of appointment and the power of removal established by law for 'closed' state-owned companies.[55]

[51] Precisely, Art 2449, para 1, Civil Code, amended by Art 13, para 1, legge 25 february 2008 no 34, (the so-called '*legge comunitaria 2007*'), provides that 'if the state or public bodies have shareholdings in a public limited company that makes recourse to the risk capital market (so-called 'open'), the bylaws may confer on them the power to appoint directors and statutory auditors, or supervisory board members, proportionally to their shareholding'. See n 53 below.

[52] On this topic see A. Pericu, 'Gli organi sociali nelle società "pubbliche" ', in S. Ambrosini ed, *Il nuovo diritto societario. Profili civilistici, processuali, fiscali e penali* (Torino: Giappichelli, 2005), 295; V. Donativi, 'La nomina' n 4 above, 124.

[53] As amended by Art 13, para 1, legge no 34/2008, following the decision of joined cases C-463/04 and C-464/04 *Federconsumatori, adiconsum, adoc, Zucca, associazione azionariato diffuso dell'aem e altri* v *the municipality of Milan*, [2007] ECR I – 10419, (case 'aem spa'), on the compatibility of the bylaws of 'aem' with Art 56 TEU, in *Giustizia amministrativa*, 1225-1227 (2007), with a note by F. Fracchia and M. Occhiena, 'Società pubbliche tra *golden shares* e 2449: non è tutto oro ciò che luccica'; in *Giurisprudenza commerciale,* 576-578 (2008), with a note by I. Demuro, 'L'incompatibilità con il diritto comunitario della nomina diretta ex art. 2449 c.c.'; in *Giurisprudenza commerciale*, 925-927 (2008), with a note by C. Corradi, 'La proporzionalità tra partecipazione e "potere di controllo" nell'art. 2449 c.c.'; in *Giornale di diritto amministrativo*, 521-523, (2008), with a note by C. Vitale, 'La Corte di Giustizia "boccia" l'art. 2449 del codice civile'.

[54] See above paras 2-3.

[55] The power of removal is not related to the power of appointment pursuant to the law, while this relation is present in 'closed' state-owned companies, as shown in Art 2449, paras 1-2, Civil Code: that is noted – among others – by M. Notari and A. Giannelli, 'Art. 2346, comma

The special rules dedicated to the appointment of directors in state-owned companies must however confront Art 2380-*bis*, para 1, Civil Code, introduced by the Italian Company Law reform, which even more decisively than in the past attributes the actions of directors to the lucrative company's interests.

Asserting that 'the management of the company is exclusively entitled to directors, who carry out the necessary actions for the implementation of the corporate purpose', Art 2380-*bis*, para 1 actually binds all directors – regardless of their background – to pursue the lucrative company's interests and not the public interest,[56] unless a provision of law provides otherwise.[57] The authority in management matters is as exclusive as the liability,[58] established by the new

6', in M. Notari ed, *Azioni. Artt. 2346-2362 c.c.*, in M. Marchetti et al eds, *Commentario alla riforma delle società* (Milano: Egea, 2008), 124-125; to the same extent, A. Abu Awwad, 'La "revoca riservata" ', in P. Abbadessa et al eds, *Amministrazione e controllo nel diritto delle società.* Liber Amicorum *Antonio Piras* (Torino: Giappichelli, 2010), 144; U. Tombari, 'Strumenti finanziari "partecipativi" (art. 2346, ultimo comma, c.c.) e diritti amministrativi nella società per azioni', in *Consiglio nazionale del Notariato. Studio 25 febbraio 2005 no 5571/I*, 10, instead, believes that holders of financial instruments including economic or administrative rights – pursuant to Art 2346, para 6, Civil Code – have the right of reserved removal. See M. Cian, *Strumenti finanziari partecipativi e poteri di* voice (Milano: Giuffrè, 2006), 121, who holds an intermediate position; and Id, 'Investitori non azionisti e diritti amministrativi nella "nuova" s.p.a.', in P. Abbadessa and G. Portale eds, *Il nuovo diritto delle società*. Liber Amicorum *Gian Franco Campobasso. Profili generali – Costituzione – Conferimenti – Azioni – Obbligazioni – Patrimoni destinati* (Torino: UTET, 2007), I, 754, who admits that shareholders hold a concurrent authority, but only with respect to the removal for just cause.

[56] On the meaning of Art 2380-*bis* Civil Code, with regard to the relationship between the company's interests and public interest, see A. Guaccero, 'Alcuni spunti in tema di governance delle società pubbliche dopo la riforma del diritto societario' *Rivista delle società*, 845-847 (2004), who emphasises the primacy of the profit-making also for the state-owned companies; A. Pericu, 'Artt. 2449-2451', in G. Niccolini and A. Stagno D'Alcontres eds, *Società di capitali*: *commentario* (Napoli: Edizioni Scientifiche Italiane, 2004), 1300, where the conclusion that directors appointed by public entities and directors appointed by shareholders are not subject to two distinct duties and two autonomous sources of liability governed by different systems; F. Goisis, *Contributo allo studio delle società in mano pubblica come persone giuridiche* (Milano: Giuffrè, 2004*),* 117, shows that even state-owned companies pursue the profit-making, and the public interest is nonetheless an extra-social interest, and as such it is legally irrelevant; C. Ibba, 'Azioni ordinarie di responsabilità e azione di responsabilità amministrativa nelle società in mano pubblica. Il rilievo della disciplina privatistica' *Rivista di diritto civile,* 151 (2006); N. Abriani*,* 'Assetti proprietari, modelli di governance e operazioni straordinarie nelle società a partecipazione pubblica: profili di danno erariale?' *Rivista di diritto dell'impresa,* 544 (2009); K. Martucci*, Profili di diritto singolare dell'"impresa"* (Milano: Giuffrè, 2013), 163; G. Racugno*,* 'La responsabilità degli amministratori di società pubbliche', in C. Brescia Morra et al eds, *Le imprese pubbliche. A volte ritornano,* in *Analisi giuridica dell'economia*, 487 (2015). A different opinion seems to be held by C. Di Nanni, 'La crisi delle società in mano pubblica tra privilegi normativi e limitazioni dell'autonomia privata', in *Scritti in onore di Ermanno Bocchini* (Padova: CEDAM, 2016), I, 397, starting from the unacceptable premise that the director of state-owned companies, compared to other directors, holds a special position considering that in addition to the 'ordinary duties', he would have the obligation towards the appointing body to pursue the public interest.

[57] See below, para III.1.

[58] On the link between collegiality and liability see, among others, A. Borgioli, 'La responsabilità solidale degli amministratori di società per azioni' *Rivista delle società*, 1075 (1978); G. Grippo,

relationship between shareholders and directors, set forth in Art 2364, para 1, no 5, and Art 2380-*bis*, para 1, Civil Code.

Even the director coming from the public sector is therefore bound to the care of the lucrative company's interests as sole common interests, and his special status is limited to particular procedures of appointment and removal provided for in Art 2449, as well as in Art 2451 Civil Code for the particular category of companies (limited by shares) of 'national interest'.[59]

It must be admitted, however, that, as the weight and importance of directors increase in the balance of corporate powers, the weight and importance of the special rules that confer powers of appointment and removal of directors on the state or other public entities also increase.[60] In consequence, the company law reform, emphasizing the centrality of the board of directors in the architecture of corporate powers,[61] has also increased the influence of these special powers on the corporate governance.

III. The State Shareholder

1. The State Shareholder and its Interest

Without a doubt, the state shareholder is a complex shareholder, whose weight, regardless of the size of its shareholding,[62] is able to cause imbalances

Deliberazione e collegialità nella società per azioni (Milano: Giuffrè, 1979), 146-149. After the company law reform the following author highlights that Art 2392, para 1, Civil Code reveals the clear legislative option for a joint and several liability system whose foundation, as in the mandate with a plurality of agents, is the assignment of the management appointment and the resulting *res eadem debita*, F. Barachini, *La gestione delegata nella società per azioni* (Torino: Giappichelli, 2008), 184-187, 192.

[59] Art 2451 Civil Code establishes that the provisions concerning state-owned companies also apply to companies (limited by shares) of 'national interest', in accordance with the provisions of laws that establish special rules for these companies with regard to company management, transferability of shares, right to vote and appoint directors, statutory auditors and managers. It should be noted that companies of national interest often, although not necessarily, are state-owned companies.

[60] R. Rordorf, 'Le società "pubbliche" nel codice civile' *Società*, 425 (2005).

[61] The fact is undisputed in the post-company law reform doctrine. With regard to state-owned companies specifically, see, for all, A. Guaccero, n 56 above, 845-847; C. Ibba, 'Società pubbliche e riforma del diritto societario' *Rivista delle società*, 5, text and fn 11 (2005).

[62] On this topic, for all, G.L. Pellizzi, 'Sui poteri indisponibili della maggioranza assembleare' *Rivista di diritto civile*, 190-193 (1967); D. Preite, 'Abuso di maggioranza e conflitto di interessi del socio nelle società per azioni', in G.E. Colombo and G.B. Portale eds, *Trattato delle società per azioni, III, L'assemblea* (Torino: UTET, 1991), 3-6; Id, *L' "abuso" della regola della maggioranza nelle deliberazioni assembleari delle società per azioni* (Milano: Giuffrè, 1992), 30-33; M. Cassottana, *L'abuso di potere a danno della minoranza assembleare* (Milano: Giuffrè, 1991), 110-113. More recently, she returns to the topic describing a typological analysis of shareholders who hold certain corporate 'positions', such as the controlling shareholder or the state-shareholder in the privatisation processes, and analyses the relevance of this position, moving from an investigation perspective which is independent from the abuse of powers, C. Tedeschi, *"Potere di orientamento" dei soci nelle società per azioni* (Milano: Giuffrè, 2005), 41-44.

inside the company without necessarily becoming an abusive behavior.

As an institutional investor,[63] the shareholder-public entity, especially if it is the state, contributes to the company by authority[64] and social relevance,[65] and therefore may be defined not as an ordinary but as a featured member.[66]

The public interest, however remains an extra-social interest[67] (unless a special law provides otherwise)[68] and, like other extra-social interests which influence the decision-making process of any shareholder,[69] may 'only' result

[63] In companies with listed financial instruments, the state lawfully holds the position of 'public professional shareholder': see Art 2, para 1, letter a), decreto ministeriale 11 November 2011 no 236, which defines and identifies professional public clients, and other public entities that, upon request, may be treated as professional clients, pursuant to Art 6, para 2-*sexies*, of consolidated law on financial intermediation provided for in decreto legislativo 24 Februray 1998 no 58 (TUF), as subsequently amended and supplemented.

[64] L. Enriques, 'Una figura anomala (e transitoria?) di investitore istituzionale: il Ministero del Tesoro' *Rivista di diritto dell'impresa*, 47-49 (1998), observes the peculiar powers of control over directors' actions that the public shareholder may exercise.

[65] On the corporate significance of the shareholder's public nature and on its particular extra-social position see C. Tedeschi, n 62 above, 65-67, with particular reference to its ability to influence the state-owned companies.

[66] ibid 69: 'featured shareholders' are parties that 'with their behaviour, sometimes imposed by law, act towards the company in terms that we may define no longer anonymous'. The shareholder 'show himself to the company through the accomplishment of actions such as to place himself in a position suitable to affect the corporate interests. This consideration leads to attribute relevance to interests of these shareholders and regulate their impact on the corporate interests'.

[67] On this topic see above, text and authors cited in n 57.

[68] On this topic see G. Oppo, 'Pubblico e privato nelle società partecipate', in G. Oppo ed, *Scritti giuridici, VII, Vario diritto* (Padova: CEDAM, 2005), 349, who stated that 'the lucrative nature can (…) be combined with other purposes however, in case of its absence, there is no corporation but associations. Furthermore, not only the problem of compatibility with the corporate regulation but also the problem of avoiding the mandatory regulation of associations arises'. On the relevance of the lucrative purpose see also G. Marasà, 'La s.p.a. nel quadro dei fenomeni associativi e i limiti legali alla sua utilizzazione', in O. Cagnasso and L. Panzani eds, *Le nuove s.p.a.* (Bologna: Zanichelli, 2010), I, 150, who highlights that the regulation of heterogeneous conversion moves from a premise which is opposite to neutrality and thus confirms the relevance of the causal factor; to the same extent A. Laudonio, *La trasformazione delle associazioni* (Padova: CEDAM, 2013), 36. Contrariwise G.C.M. Rivolta, 'Diritto delle società. Profili generali', in R. Costi ed, *Trattato di diritto commerciale* (Torino: Giappichelli, 2015), 9 notes that the presence of state shareholding may determine a corporate interest structure that includes general interest purposes concurrent with lucrative or exclusive interests (and not only in companies wholly owned by public entities but also in other enterprises). The case of '*società consortile*' is different. According to Art 2615-*ter* Civil Code, the heterogenesis of the lucrative purpose may be set forth by a bylaws provision that establishes to honour the consortium purpose (while if there is not this 'exemption' clause in bylaws, the '*società consortile*' is bound to the lucrative purpose): see E. Cusa, 'Le società consortili con personalità giuridica: fattispecie e frammenti di disciplina', in P. Benazzo et al eds, *Il diritto delle società per azioni oggi. Innovazioni e persistenze* (Torino: UTET, 2011), 134.

[69] G. De Ferra, 'In margine alla riforma della società per azioni: delle società con partecipazione dello Stato o di enti pubblici' *Rivista delle società*, 801 (1967), the author noted that 'the counter-argument that the public entity is not allowed to vote in order to pursue a purpose which is different from the common aim and therefore that the public entity is not allowed, for example, to impose, with its majority vote, the construction of a plant in an economically distressed

into informal and confidential instructions,[70] not unlike the special interests of private shareholders, especially if these special interests concern the controlling shareholder and also remain outside the company's interests.

Both the state and the private shareholder may exert pressure on corporate bodies in the name of personal or otherwise extra-social interests. In both cases, however, these 'instructions' are not binding,[71] and a liability of the public body towards directors for the exercise of the power to give instruction can be applied only if its management and coordination activities of companies (in other words its role as a parent company) have been formalized or otherwise result in fact, according to Arts 2497 and 2497-*sexies*[72] Civil Code.

area, making prevailing the socio-economic benefit on the profit-making perspective of an investment in another location, remains academically theoretical, since it is anchored to an exclusively dogmatic consideration of the phenomenon'. And also G. Sena, 'Problemi del cosiddetto azionariato di Stato: l'interesse pubblico come interesse extrasociale' *Rivista delle società,* 58 (1958), who highlighted the problem of the exclusively private approach, with reference to the enterprises wholly or partly owned by public entities. And on the influence that the shareholder's individual and extra-social interests may exercise on the 'collective' interests see G. Ascarelli, 'Interesse sociale e interesse comune nel voto' *Rivista trimestrale di diritto e procedura civile*, 1145-1147 (1951), also in Id, *Studi in tema di società* (Milano: Giuffrè, 1952), 147-149; P.G. Jaeger, *L'interesse sociale* (Milano: Giuffrè, 1964), 190-192; D. Preite, 'Abuso' n 62 above, 23; A. Cerrai and A. Mazzoni, 'La tutela del socio e delle minoranze' *Rivista delle società*, 32-35 (1993); P.G. Jaeger, 'L'interesse sociale rivisitato (quarant'anni dopo)' *Giurisprudenza commerciale*, 804 (2000).

[70] On this topic see P. Schlesinger, 'I poteri extra-assembleari dell'azionista di controllo' *Rivista di diritto privato*, 445-447 (1996), who notes in a particularly incisive way that the shareholder may provide directors with 'advice, suggestions, invitations and even, if he considers them to be qualified as such, 'orders', 'instructions', 'directives' *et similia*: but in no case directors shall have the burden, at least on a legal/formal level, to reply or to account to them in relation to their work, or a duty of obedience'. The author wrote prior to the corporate law reform, and prior to the new regulation of the management and coordination activities of companies provided for in Arts 2497 - 2497-*septies* Civil Code; on this topic see also F. Bonelli, *La responsabilità degli amministratori di società per azioni* (Milano: Giuffrè, 1992), 131-134; Id, *La responsabilità degli amministratori*, in G.E. Colombo and G.B. Portale eds, *Trattato delle società per azioni, IV, Amministratori. Direttore generale* (Torino: UTET, 1991), 372; P.G. Jaeger, 'Gli azionisti: spunti per una discussione' *Giurisprudenza commerciale*, 23-25 (1993). They highlight the controlling shareholder's preference for informal channels G. Scognamiglio, *Autonomia e coordinamento nella disciplina dei gruppi di società* (Torino: Giappichelli, 1996), 222-224; F. Guerrera, *La responsabilità "deliberativa" nelle società di capitali* (Torino: Giappichelli, 2004), 130-132.

[71] P. Abbadessa, 'La nomina diretta di amministratori di società da parte dello Stato e di enti pubblici (problemi ed ipotesi)' *Impresa ambiente e pubblica amministrazione*, 383 (1975); P. Schlesinger, n 70 above, 445-447; C. Ibba, 'Azioni ordinarie' n 56 above, 151 (2006); F. Galgano and R. Genghini, 'Il nuovo diritto societario', in F. Galgano ed, *Trattato di diritto commerciale e di diritto pubblico dell'economia* (Padova: CEDAM, 2006), 745.

[72] Art 2497, para 1, Civil Code provides that 'companies or legal persons that, exercising management and coordination activities of companies, act in their own entrepreneurial interest or in the interest of others in breach of correct corporate and business management principles (...) are directly liable towards the shareholders for the damage caused to the profitability and the value of the shareholding, as well as towards the corporate creditors for the damage caused to the integrity of the corporate assets. There is no liability when no damage is caused in the light of the total results of management and coordination activities or when the damage is completely eliminated also through specific transactions carried out for this purpose'. According to Art

On the other hand, the public shareholder is required to actively collaborate in the implementation of the company's interests and not simply to refrain from influencing it with extra-social interests, as unequivocally stated by the fact that in mixed state-owned companies the state shareholder, if it reaches the legitimacy threshold for the exercise of the right, is also entrusted with the task of preserving the interests and the corporate assets by means of a liability action brought by the minority shareholders, pursuant to Art 2393-*bis*, (which also benefits private shareholders).[73]

Conversely, the thesis according to which the disagreement between company's interests and public interests in state-owned companies might be resolved by exempting the state shareholder from the lucrative purpose and by recognizing the 'potential ambivalence of the functional corporate paradigm'[74] as well as the diversity between corporate structure and corporate function organization[75] has not been embraced.

The lucrative common interest is still not denied today, not even in business models in which the lucrative common interest's reconstruction is more complex and well-structured, such as the 'open' companies,[76] the wholly state-owned companies[77] and the municipally-owned companies,[78] the in-house providing

2497-*sexies*, para 1, Civil Code it is assumed that the management and coordination activities of companies are exercised by the company or entity required to draft the consolidated financial statements or by the company which exercises control pursuant to Art 2359 Civil Code.

[73] A. Guaccero, n 56 above, 860.

[74] P. Spada, 'Dalla nozione al tipo della società per azioni' *Rivista di diritto civile*, 132 (1985).

[75] With reference to the heterogeneity between the public interest and the lucrative purpose see, among others, G. Sena, n 69 above, 58. Others believe that, even in case of access of the public interest in the company's interests, there would not be a transformation but rather an extension of the corporate purpose: R. Bolaffi, *La società semplice* (Milano: Giuffrè, 1952), 128-130; G. Oppo, 'L'essenza della società cooperativa e gli studi recenti' *Rivista di diritto civile*, 384-385 (1959), and also Id, 'Pubblico' n 68 above, 349; G. Marasà, *Le «società» senza scopo di lucro* (Milano: Giuffrè, 1974), 87-89, 390; F. Fracchia, 'La costituzione delle società pubbliche e i modelli societari' *Diritto dell'economia*, 614 (2004); as meaning that state-owned companies are subject to the lucrative purpose C. Ibba, 'Società pubbliche' n 61 above, 5; and with reference to 'instrumental companies' set up to provide certain municipal services established in Art 6, para 1, decreto legislativo 17 May 1999 no 153, see G.B. Portale, 'Fondazioni «bancarie» e diritto societario' *Rivista delle società*, 34 (2005); with reference to the associative phenomena in general see A. Laudonio, n 68 above, passim. Others, without adhering to the thesis of the functional neutrality of the company vehicle, believe that the link between corporate function and corporate organisation may be differently 'binding' depending on the quality of the shareholders: P. Spada, n 74 above, 132. Finally others admit the partial release of the state-owned companies from the lucrative purpose: G. Santini, 'Tramonto dello scopo lucrativo nelle società di capitali' *Rivista di diritto civile*, 151-153 (1973); A. Rossi, *Profili giuridici della società a partecipazione statale* (Milano: Giuffrè, 1977), 252-254; G. Rossi, 'La società per azioni con partecipazione pubblica', in G. Rotondi ed, *Inchieste di diritto comparato. II. I grandi problemi della società per azioni nelle legislazioni vigenti* (Padova: CEDAM, 1976), 1632.

[76] M. Cossu, *Società "aperte" e interesse sociale* (Torino: Giappichelli, 2006), 282-285.

[77] P. Abbadessa, 'La nomina' n 71 above, 369-371 believes that the public interest remains relegated to the status of shareholder's personal interest; see also Id, 'Le società miste per i servizi locali: profili organizzativi speciali', in G. Ragusa Maggiore ed, *Studi in onore di Giuseppe*

companies,[79] or the sole-shareholder companies. This is the case in spite of the strong institutional feature that the last ones reveal[80] especially when the sole shareholder is the state or another public entity.[81]

Some different, partially conflicting conclusions might be reached with reference to the '*società benefit* model' and the '*società-impresa sociale* model', but, indeed, in both cases a special law recognize (and ask for) a different synthesis between the lucrative company's interest and other interests.[82]

It is a fact that the position of the controlling shareholder is quite unusual. That position gives rise to a particularly strong contractual relationship and consequently, the voting rights included in his shareholding must be considered,[83]

Ragusa Maggiore (Padova: CEDAM, 1997), I, 3-4; M. Miola, 'Le società miste come società di «diritto speciale»', in G. Di Giandomenico et al eds, *Le società miste locali per la gestione dei pubblici servizi* (Napoli: Edizioni Scientifiche Italiane, 1997), 181-182; G. Oppo, 'Pubblico' n 68 above, 346, where it is noted that 'not even the company law reform has put the lucrative purpose into question. The sunset of the lucrative purpose, of which so much has been spoken, may not relate to the companies provided for in the civil code but only to entities in which the corporate structure split from the typical purpose'; R. Rordorf, n 60 above, 427. To same extent, R. Carlizzi, 'La direzione unitaria e le società partecipate dagli enti pubblici' *Rivista di diritto commerciale*, 1210 (2010). But see instead F. Galgano and R. Genghini, n 71 above, 741-742, according to whom, in the wholly state-owned companies, the 'public shareholding will be the undisputed arbiter of the company and will be able to manage it as he wishes'; G.C.M. Rivolta, n 68 above, 9-10, who believes that even in mixed state-owned companies, where state shareholding is – at least in theory – compatible with the lucrative purpose, the bylaws might foresee the public interest as an interest to be exclusively or concurrently pursued with the lucrative interest.

[78] See G. Ferrarini and M. Filippelli, 'Independent Directors and controlling Shareholders' *Orizzonti del Diritto Commerciale*, 9 (2013), about considerations on the greater inclination of directors of public utilities towards the stakeholders' view, or at least towards a greater consideration of the enterprise value, as well as the shareholders' wealth.

[79] On the 'in-house providing company' model see M. Cossu, 'Le società *in house providing* nell'evoluzione legislativa e giurisprudenziale', in C. Ibba et al eds, *Le società pubbliche* (Torino: Giappichelli, 2011), 243-246.

[80] On this topic, after the Italian Company Law reform, see G. Oppo, 'Le grandi opzioni della riforma e la società per azioni' *Rivista di diritto civile,* 471 (2003); G. Scognamiglio, 'Tutela del socio e ragioni dell'impresa nel pensiero di Giorgio Oppo', in *Atti dei Convegni Lincei, 271. Giornate di studio in ricordo di Giorgio Oppo: "uomo persona e diritto"* (Roma: Scienze e lettere, 2013), 283.

[81] G. Oppo, 'Le grandi opzioni della riforma e la società per azioni' n 80 above, 288-289.

[82] See in particular legge 28 December 2015 no 208 on '*società-benefit*' and decreto legislativo 3 July 2017 no 112, on '*società-impresa sociale*'. Obviously both models will not be discussed here. Recently in argument see U. Tombari, 'L'organo amministrativo di S.p.a. tra 'interessi dei soci' ed 'altri interessi' *Rivista delle società*, 22-24 (2018).

[83] The homogeneous '*Mitverwaltungsrecht*', by K. Schmidt, *Gesellschaftsrecht* (Köln-Berlin-Bonn-München: K. Heymanns, 2016), 496-498; and to this extent, among many, B. Libonati, 'Responsabilità nel e del gruppo (responsabilità della capogruppo, degli amministratori, delle varie società)', in P. Balzarini et al eds, *I gruppi di società. Atti del convegno internazionale di studi, Venezia, 16-18 Novembre 1995* (Milano: Giuffrè, 1996), II, 1489-1491; and in the huge amount of literature v. E. Gliozzi, 'Holding e attività imprenditoriale' *Giurisprudenza commerciale*, 522-524 (1995); G. Scognamiglio, *Autonomia e coordinamento* n 70 above, 138-140; G. Guizzi, 'Partecipazioni qualificate e gruppi di società', in N. Abriani et al eds, *Diritto delle società. Manuale breve* (Milano: Giuffrè, 2008), 325-326; F. Guerrera, n 70 above, 129.

when this controlling position is expressed through non-institutional acts and shareholder meeting resolutions.[84]

Unlike what happens in mixed state-owned companies governed by the general law (and not by special rules), where the appointment of directors takes place simply according to the majority principle and the state shareholder has a power of influence that is directly proportional to its shareholding, in the wholly state-owned companies the public shareholder's power to appoint directors is greater. This is the case not only where directors are directly appointed by it according to Art 2449 Civil Code, but also when the public shareholder appoints directors at an ordinary shareholders' meeting.

Nevertheless, even when the state or other public entities are the controlling shareholders, it is admitted that they have an interest in the corporate activity or in the shareholding,[85] while it is not admitted that the public interest is part of the corporate purpose or that directors to be required to achieve it.[86]

2. State-Appointed Directors and the Company's Interests

The lucrative company's interests bind therefore directors appointed by the state or other public entities and, in state-owned enterprises, no employment relationship exists between the state and the director appointed by it.[87]

Accordingly, if previously the state-appointed director might have been discharged from liability for an act carried out in the public interest or in the extra-social interests, (even in contempt of the common lucrative interests) by means of a shareholders' resolution pursuant to Art 2364, para 1, no 4, today the possible assignment of a management act to the deliberative powers of shareholders – a possibility that is not prevented or forbidden –[88] does not discharge the state-appointed director (as well as other directors) from liability.

[84] G. Scognamiglio, *Autonomia e coordinamento* n 70 above, 222-224; F. Guerrera, n 70 above, 134.

[85] For all, see P. Abbadessa, 'La nomina' n 71 above, 372.

[86] It is even obvious that the 'reasons' for what a state or a public entity decide to acquire companies' stocks may be countless: lastly on this topic C. Angelici, 'In tema di 'socio pubblico' *Rivista di diritto commerciale*, 177 (2015).

[87] In the absence of an explicit authoritative intervention, in fact, the state shareholding is not connected to the exercise of a public function: see A. Guaccero, n 56 above, 854; G. Di Gaspare, 'La responsabilità amministrativa degli amministratori di società di capitale partecipate da enti pubblici o società dagli stessi controllate (art. 16 bis legge n. 31/2008) e la giurisdizione della Corte dei Conti', in G. Alpa et al eds, *Scritti in onore di Francesco Capriglione* (Padova: CEDAM, 2010), II, 1021.

[88] In general on the topic V. Calandra Buonaura, 'I modelli di amministrazione e controllo nella riforma del diritto societario' *Giurisprudenza commerciale*, 543 (2003); C. Montagnani, 'Artt. 2364-2364 *bis*', in G. Niccolini and A. Stagno D'Alcontres eds, n 57 above, 455. In particular with reference to state-owned companies see A. Guaccero, n 56 above, 846; N. Abriani, 'Le società a partecipazione pubblica nell'osmosi tra diritto societario e diritto amministrativo: assetti proprietari, modelli di governance, operazioni straordinarie', in C.L. Appio et al eds, *Studi in onore di Umberto Belviso* (Bari: Cacucci, 2011), 198.

The state-appointed director is therefore required to achieve the corporate purpose respecting the common lucrative purpose.[89] Moreover, the public interest, as any potentially conflicting extra-social interests, must be revealed, as well as the reasons for any transaction influenced by it.[90] However, as a result of Art 2380-*bis* and its impact on Arts 2373, 2391, 2392, para 1, 2397-*bis*, today it is even more difficult than in the past to pursue the public interest inside the companies.[91]

This set of rules primarily involves negative obligations, in particular: the obligation to refrain from competitive activities,[92] the obligation not to exert an undue influence on the corporation,[93] and the obligation to disclose significant interests.

In companies listed on regulated markets and those that participate in the risk capital market, there is a further obligation to guarantee the transparency of related-parties' transactions pursuant to Art 2391-*bis*.[94]

Moreover, the state-appointed director has also positive obligations. He must actively contribute to the correct performance of the business activity on a par with other directors,[95] share organizational risks,[96] evaluate the suitability of the organizational, administrative and accounting structure of the company in accordance with art 2381, para 5,[97] be jointly and severally liable with other directors for these tasks, (depending on their actual role in the company

[89] A. Guaccero, n 56 above, 847; E. Codazzi, 'Le "nuove" società *in house*: controllo cd. analogo e assetti organizzativi tra specialità della disciplina e "proporzionalità delle deroghe" ', 23, available at https://tinyurl.com/yafyt8ao (last visited 27 December 2018), the authors noted that since the state-appointed directors have '*the same rights and obligations*' of directors appointed by shareholders, 'the trust relationship between directors and the state is not suitable to compromise the respect for the typically lucrative or the corporate purpose'.

[90] E. Codazzi, n 89 above, 23.

[91] To this extent M.T. Cirenei, '*Riforma delle società, legislazione speciale e ordinamento comunitario: brevi riflessioni sulla disciplina italiana delle società per azioni a partecipazione pubblica*', in G. Horsman ed, *Liber Amicorum* Guy Horsmans (Bruxelles: Bruylant, 2004), 184, and in *Diritto commerciale internazionale*, 52 (2005).

[92] It should be highlighted that Art 2390 of the civil code grants relevance only to the competitive activity as a whole and not also to an isolated competitive act: R. Weigmann, 'Lo storno di affari da una società' *Foro italiano*, 235, I, 2 (1992), while the new Art 2391, para 5, also grants significance to the single competitive act, which as such would not be punishable pursuant to Art 2390: S. Corso, *Gli interessi "per conto di terzi" degli amministratori di società per azioni* (Torino: Giappichelli, 2015), 58-59. On Art 2391, para 5, see below para IV, 2.

[93] On the state shareholder as an *influencing shareholder* able to exercise 'direction powers' see S. Corso, *Gli interessi* n 92 above, 164.

[94] See below, para IV.

[95] For these topics see among others M. Rabitti, *Rischio organizzativo e responsabilità degli amministratori* (Milano: Giuffrè, 2004), 38; M. Irrera, *Assetti organizzativi adeguati e governo delle società di capitali* (Milano: Zanichelli, 2005), 76-78.

[96] On the link between principles of corporate organisation and rules of a correct corporate management, see in particular M. Rabitti, n 95 above, 57-59.

[97] In this perspective N. Abriani, 'Le società a partecipazione pubblica' n 88 above, 202; S. Corso, *Gli interessi* n 92 above, 226.

organization chart),[98] act in an informed manner pursuant to Art 2381, para 6[99] (the latter obligation *naturally* arises from the professional duties of their office also for non-executive directors)[100] (and without prejudice to the specific situations that might justify a different behavior).[101] Finally, the state-appointed director is subject to a general obligation of supervision that still survives, even though the new Art 2392, para 2, of the civil code has considerably reduced the joint and several liability of directors.[102]

Furthermore, the board of directors, which is an increasingly heterogeneous body with regard to the background and the interests of its members,[103] is entitled to measure and resolve possible conflicts between the company's interests[104] in

[98] N. Abriani, 'Le società a partecipazione pubblica' n 88 above, 202, where the author notes that the perimeter of the correct corporate management, according to Art 2391, para 2, includes adequate information and adequate corporate organisation, and is different for the '*plenum*' members, the executive directors and the chief executive officer.

[99] Art 2381, para 6, states that 'directors are required to act in an informed manner; each director may request the delegated bodies to provide the board with information on the management of the company during the board of directors' meeting'.

[100] In this respect D. Regoli, 'La funzione di controllo nel sistema monistico', in P. Abbadessa et al eds, *Amministrazione e controllo* n 55 above, 605.

[101] The obligation to act in an informed manner does not apply in case the director's lack of information is rational and justified, due to his lack of knowledge (inexperience) in a certain subject, or in the case in which a specific function has been delegated to other directors, or when the lack of information (also in this case rational) is due to the fact that entrepreneurial choices are determined by a third party, for example the holding when the company belongs to a corporate group: E. Marchisio, 'L'agire consapevolmente disinformato dell'amministratore di s.p.a.' *Rivista di diritto commerciale*, I, 113 (2017).

[102] Art 2392, para 2, provides that, a part from a delegation of powers (according to Art 2381) directors are jointly and severally liable if, being aware of detrimental facts, they have not done what they could to prevent them, eliminate or mitigate their harmful consequences. On the limitation of joint and several liability of non-executive directors see F. Bonelli, *Gli amministratori di s.p.a. a dieci anni dalla riforma del 2003* (Milano: Giuffrè, 2013), 109-111; F. Bonelli, 'Presidente del consiglio di amministrazione di s.p.a.: doveri e responsabilità' *Giurisprudenza comm*erciale, I, 223 (2013).

[103] P. Sanfilippo, 'Riforma delle società e interpreti in controtendenza: il caso della delega amministrativa 'obbligatoria" *Banca, borsa, titoli di credito*, I, 329-331 (2007); F. Barachini, *La gestione* n 58 above, 226.

[104] On the function of weighting and settlement of the board of directors on a collegial-style management basis see N. Salanitro, *L'invalidità delle deliberazioni del consiglio di amministrazione di società per azioni* (Milano: Giuffrè, 1965), 177-179; R. Weigmann, *Responsabilità e potere legittimo degli amministratori* (Torino: Giappichelli, 1974), 93; P. Abbadessa, *La gestione dell'impresa nella società per azioni* (Milano: Giuffrè; 1975), 103; K.J. Hopt, 'Aktionärskreis und Vorstandsneutralitat' *Zeitschrift für Unternehmens-und Gesellschaftsrecht*, 536-538 (1993); M. Stella Richter Jr and C. Salomão-Filho, 'Note in tema di offerte pubbliche d'acquisto, ruolo degli amministratori ed interesse sociale' *Rivista di diritto commerciale*, I, 146-149 (1993); M. Stella Richter Jr, 'La collegialità del consiglio di amministrazione tra ponderazione dell'interesse sociale e composizione degli interessi sociali', in B. Libonati ed, *Amministrazione e amministratori di società per azioni* (Milano: Giuffré, 1995), 310-312, where the consideration, with reference to the composition of the board of directors, that the complexity of the company's interests arises 'when the company becomes the meeting point of diversified positions'; M. Blair and L.A. Stout, 'A Team production Theory of corporate law' *Virginia Law Review*, 85, 319-321 (1999); N. Salanitro, 'Nozione e disciplina degli amministratori indipendenti', in P. Abbadessa et al eds,

the name of the sole common interest[105] that pre-exists their appointment,[106] that is, the lucrative interest. This increasingly requires a high ability to manage conflicts[107] and to mediate between opposing expectations.[108]

Nevertheless, the complexity of the role contrasts with the regulation of the board of directors' activity which is based instead on a *supposed harmony of interests* and it is not meant to govern diversity, or regulate cases in which its action can damage one or the other.[109] The problem is more evident for special classes of shares, and especially for shares carrying financial rights linked to the results of the company's activity in a specified division in which the probability of discordance between the common interests and the interests of the business unit is particularly high.[110] Moreover, a the 'particular classes of shares' and the financial instruments that incorporate rights of appointment in favor of the state shareholder in 'open state-owned companies' (Art 2449, para 4) share this *ostensible disintegration* of the common interest.[111]

The problem of the relationship between the interests of directors appointed by holders of non-equity financial instruments (Art 2346, para 6) and the interests

Amministrazione e controllo n 55 above, 381-384; M. Stella Richter Jr, 'Sulla composizione e sulla elezione dell'organo amministrativo di una società quotata' *Rivista di diritto comm*erciale, I, 53 (2012); M. Stella Richter Jr, 'Art. 147 *ter*. Elezione e composizione del consiglio di amministrazione', in M. Campobasso et al eds, *Le società per azioni. Commentario* (Milano: Giuffré, 2016), II, 4195; taken up by S. Corso, 'La possibile composizione di interessi nel consiglio di amministrazione di s.p.a.', 19, available at https://tinyurl.com/yahb8mr2 (last visited 27 December 2018).

[105] In the absence of different legal provisions, the only unitary company's interests must remain the lucrative interests as stated in Art 2247 of the civil code. That is highlighted in particular by P. Sanfilippo, *Funzione amministrativa e autonomia statutaria nelle società per azioni* (Torino: Giappichelli, 2000), 109; P. Sanfilippo, 'Il presidente del consiglio di amministrazione nelle società per azioni', in P. Abbadessa and G. Portale eds, *Il nuovo diritto delle società*. Liber Amicorum *Gian Franco Campobasso. Assemblea – Amministrazione* (Torino: UTET, 2007), II, 448, fn 24; M. Cossu, *Società "aperte"* n 76 above, 305-307.

[106] P. Sanfilippo, 'Il presidente del consiglio' n 105 above, 448, text and fn 24.

[107] A. Mazzoni, 'L'impresa tra diritto ed economia' *Rivista delle Società*, 666 (2008), notes that from the perspective of company law the 'directors' duty to manage, mediating among all different interests of which various categories of those who provide long-term share capital (shareholders, bondholders or holders of hybrid financial instruments)' stand out as a right to finance the company that the corporate law reform seems to favour.

[108] And see S. Corso, 'La possibile composizione' n 104 above, 3; S. Corso, *Gli interessi* n 92 above, 2009.

[109] P. Sanfilippo, *Funzione amministrativa* n 105 above, 98; F. Mondini, *Le azioni correlate* (Milano: Giuffré, 2009), 151.

[110] On this topic, F. Mondini, n 109 above, 150-152; F. Mancuso, *Le società emittenti azioni correlate* (Torino: Giappichelli, 2015), 21-25.

[111] On the topic of the 'fragmentariness' of the unitary idea of company's interests see especially R. Weigmann, 'Luci ed ombre del nuovo diritto azionario' *Società*, 277 (2003); R. Weigmann, 'Dalla società per azioni alla società per carati', in P. Benazzo et al eds, *Il nuovo diritto societario fra società aperte e società private* (Milano: Giuffré, 2003), 171-174. On the common interest in this scenario see M. Cossu, *Società "aperte"* n 76 above, 167-170; M. Porzio, '...Allo scopo di dividerne gli utili', in M. Porzio et al eds, *Scritti in onore di Ermanno Bocchini* (Padova: CEDAM, 2016), II, 945-947.

of the different classes of shareholders, which highlights the increase of vertical[112] and horizontal[113] inner conflicts, is included.

The impact of interests of all these elements, and their interference with the common interest may, however, be brought back into balance. It should be taken into consideration that those are 'concrete interests' crowded around all enterprises – not just the state-owned companies – and 'the enterprise (...) *is not a* bundle of relationships (...) but *is in a* bundle of relationships',[114] many of which belong to the enterprise regulation, not to the company law.[115]

The principle of the management unity, which is an axiomatic concept in the Art 2380-*bis* of the civil code, therefore implies that all the directors, regardless the way they were appointed,[116] must care and implement the company's interests,[117] as well as they must have technical discretion in identifying

[112] See R. Weigmann, 'Luci ed ombre' n 110 above, 277; R. Weigmann, 'Dalla società per azioni' n 110 above, 171-174; A. Bartalena, 'I patrimoni destinati a uno specifico affare' *Banca borsa titoli di credito*, I, 99 (2003); U. Tombari, 'La nuova struttura finanziaria della società per azioni (*Corporate Governance* e categorie rappresentative del fenomeno societario)' *Rivista delle società*, 1100-1101 (2004); M. Cossu, *Società 'aperte'* n 76 above, 244-247; V. Cariello, *'I conflitti 'interorganici' e 'intraorganici' nelle società per azioni* (*prime considerazioni*)', in P. Abbadessa and G. Portale eds, n 55 above, 2, and n 105 above, text and fn 34.

[113] In general, inner conflicts between holders of different classes of financial instruments are 'horizontal', as noted by U. Tombari, 'La nuova struttura finanziaria' n 111 above, 1101.

[114] Our italics. For this evocative reply to the rhetoric *of the nexus of contracts reconstruction* see G. Oppo, 'Patto sociale, patti collaterali e qualità di socio nella società per azioni riformata' *Rivista di diritto civile*, II, 57 (2004), and also in Id, *Scritti giuridici* n 68 above, 316, from which we quote; in addition, on this topic see M. Cossu, *Società 'aperte'* n 76 above, 178-183.

[115] R. Costi, 'Relazione di sintesi', in R. Sacchi et al eds, *L'interesse sociale tra valorizzazione del capitale e protezione degli stakeholders. In ricordo di Pier Giusto Jaeger*, (Milan: Giuffré, 2010), 189-192; M. Cossu, 'The "company's interests" of the "società aperte" under Italian Corporate Laws' *European Company and Financial Law Review*, 45, 58 (2013). It is well-known that the *nexus of contracts theory* establishes an osmotic relationship between business and company, which makes 'the distinction between what is placed inside and what is outside of it' irrelevant: M. Cossu, *Società "aperte"* n 76 above, 30-31; C. Angelici, 'Le basi contrattuali della società per azioni', in G.E. Colombo and G.B. Portale eds, *Trattato delle società per azioni, I, Tipo, Costituzione, Nullità* (Torino: UTET, 2004), 1, 107, who notes that the *nexus of contracts theory* is based on an idea of the contract which is different from the continental one: the contract '(...) is meant in an absolutely generic way, so to speak, purified of its technical-legal value, as an equivalent to the voluntary activity of private individuals (...)'. However, the distinction between corporate interests and business interests is also present in a part of the English doctrine: among many see W. Bratton Jr, 'Public Values, Private Business, and US Corporate Fiduciary Law', in G. Mccahery et al eds, *Corporate Control and Accountability. Changing Structures and the Dynamics of regulation* (Oxford: Clarendon Press, 1994), 23-27.

[116] P. Sanfilippo, 'Il presidente del consiglio' n 105 above, 446-447, who highlights that the interest of the appointing state shareholder must remain a secondary interest. And see M. Lutter, G. Krieger and D.A. Verse, *Rechte und Pflichten des Aufsichsrat* (Köln: Otto Schmidt, 6th ed, 2014), 149-152, 275-278; K.J. Hopt, 'Interessenwahrung und Interessenkonflikte im Aktien-, Bank- und Berufsrecht - Zur Dogmatik des modernen Geschäftsbesorgnungsrechts' *Zeitschrift für Unternehmens- und Gesellschaftsrecht*, I, 1-3 (2004).

[117] In this regard, with specific reference to state-owned companies, M. Cossu, *Società* '*aperte*' n 76 above, 167-168; F. Santonastaso, 'La riforma dell'art. 2449 c.c. e le società con partecipazione degli enti pubblici locali', in G. Alpa et al eds, *Studi per Franco di Sabato*, *IV*, *Società* (Napoli:

ways to do that.[118] They are involved in to carry and include these various interests in the common interest.[119]

These conclusions are perfectly in line with a more general trend because, in all legal systems, the state-appointed directors are bound by the obligation to pursue the common interest on a par with directors appointed by private shareholders.[120]

This means, first, that if the director appointed by the state or a public entity does not act in accordance with the common interest, this justifies his removal for just cause, and therefore the 'unfaithful' director can be replaced exactly as it would occur to any other director. [121] Secondly, this also means that the state-shareholder is not entitled to bring an action for liability against directors for direct damage of the public interest.

IV. State Shareholder, State-Appointed Director and Regulation on Related-Parties' Transactions

When it is said that public interests must remain confined to extra-social interests,[122] it is assumed that such interests are a threat to the company and that

Edizioni Scientifiche Italiane, 2009), II, 377. Generally, he underlines that directors' duties are univocal regardless of the appointment procedure and the position held, F. Bonelli, 'Presidente del consiglio' n 102 above, 222-223.

[118] R. Weigmann, *Responsabilità e potere* n 104 above 122-124; V. Allegri, *Contributo allo studio della responsabilità civile degli amministratori* (Milano: Giuffré, 1979), 132, where it is stated that directors, exercising the managerial discretion, face the limit of the corporate purpose and the obligation to pursue the company's interests; F. Bonelli, *La responsabilità* n 70 above, 131-134, 372; V. Calandra Buonaura, 'Potere di gestione e potere di rappresentanza degli amministratori', in G.E. Colombo and G.B. Portale eds, *Trattato delle società per azioni* n 70 above, 112; M. Stella Richter Jr and C. Salomão-Filho, 'Note in tema di offerte' n 104 above, 113-115; M. Stella Richter Jr, 'La collegialità del consiglio di amministrazione' n 104 above, 283-284; and to the same extent, after the company law reform, F. Bonelli, 'Responsabilità degli amministratori di s.p.a.' *Giurisprudenza commerciale*, I, 3, 637 (2004).

[119] In this regard M. Stella Richter Jr, 'La collegialità del consiglio di amministrazione' n 104 above, 303; P. Benazzo, *Autonomia statutaria e quozienti assembleari nelle società di capitali* (Padova: CEDAM, 1999), 37-38; M. Irrera, *Le delibere del consiglio di amministrazione. Vizi e strumenti di tutela* (Milano: Giuffré, 2000), 448-449; M. Stella Richter Jr, 'Art. 147 *ter*' n 104 above, 4195; also the check of the compatibility of the director's background with the company's interests is a fact to be deduced *ex post* and not *a priori*: R. Santagata, '*Cumulo di cariche amministrative ed interessi in conflitto nelle società per azioni*', in P. Abbadessa et al eds, *Amministrazione e controllo* n 55 above, 432, text and fn 34.

[120] Ocde Directorate for financial and enterprise affairs corporate governance Committee, *Working Party on State Ownership and Privatisation Practices. Board of Directors of State-Owned Enterprises, An Overview of National Practices*, DAF/CA/SOPP(2012)1/FINAL (Paris: Ocde, 2012), 15 of the document: 'like any private company owner, the state acting in its capacity as shareholder needs to form ideas about whom it wants on the board to act in its own and the company's best interest'.

[121] In this regard, for all, see F. Bonelli, *La responsabilità degli amministratori di società per azioni* n 70, 12.

[122] See above, para III, 1.

they are totally irrelevant for other shareholders. To the contrary, the corporation might actually benefit from these interests, and they might coincide with the *desiderata* of all or some shareholders.

In capitalist models based on relational and reputational mechanisms, the state shareholder may especially be a vehicle of information and *special opportunities* that might favor the company over competitors. More precisely, the access of the state shareholder may represent an instrument of company asset growth or an enhancement of company's image as well as an increase of *chances*,[123] bringing it financial, political, relational and reputational benefits.

In any case it is essential to always bear in mind that the pattern of relationships that bind the public body holding a power of appointment and the director appointed by it represents a permanent influence on the director's activity, which may not be dealt solely with the traditional regulation of the conflict of interests pursuant to Art 2391, para 1, of the civil code.[124] This regulation is designed to be applied only to episodic disagreements which are traceable to a single management operation:[125] The new Art 2391, as amended by the company law reform, also regulates all of the personal interests of directors, not only those in conflict with the company;. This provision, however, only applies to situations of occasional conflict.[126] This is also established in the special regulation of Art 150, para 1, decreto legislativo 24 February 1998 no 58 (TUF), which is dedicated to directors' interests in listed companies.[127]

There is, therefore, no doubt that the state shareholder, as the main and most influential related party of the company, is able to influence the activity of one or more directors in a permanent way.[128] This is the reason why Art 2391-*bis*,

[123] A collective advantage of the presence of the state shareholder might be the access of the company into a certain market, or the possibility to confer a corporate role on certain parties; an individual advantage might be the appointment of the shareholder to certain political or corporate positions.

[124] Art 2391, para 1, of the civil code provides that 'the director must inform the other directors and the board of statutory auditors of any interest he has on his own behalf or on behalf of third parties in a particular company transaction, giving details of the nature, terms, origin and amount. In case of a managing director, he must also refrain from carrying out the transaction, delegating it to the board. If the director is a sole director, he must also notify such information at the next shareholders' meeting'.

[125] L. Enriques, *Il conflitto di interessi degli amministratori di società per azioni* (Milano: Giuffrè, 2000), 203.

[126] F. Bordiga, 'La rinuncia all'incarico del componente di organi di s.p.a.' *Rivista delle società*, 680 (2017).

[127] Art 150 of decreto legislativo 24 February 1998 no 58 (TUF) provides that 'the directors shall promptly inform the board of statutory auditors, according to the procedures established in the bylaws, and at least on a quarterly basis on the activities and the most significant economic, financial and equity transactions carried out by the company or its subsidiaries. In particular, they shall report on transactions in which they have an interest for their own account or on behalf of third parties or that are influenced by the party who exercises management and coordination activities of companies'.

[128] Generally, on the state shareholder as an influential shareholder capable of exercising 'powers of guidance' see S. Corso, *Gli interessi* n 92 above, 164; C. Tedeschi, '*Potere di orientamento*'

para 1, of the Civil Code, introduced by the company law reform,[129] provides for all listed and 'open' companies an obligation of transparency regarding all related-party transactions,[130] both from the point of view of the obligation to state reasons[131] and their accounting and fiscal evidence.[132] Indeed, the fact that, according to Italian law, transactions with related-parties are regulated only in 'open' companies is due to the fact that these companies collect public savings, and therefore such transactions are intrinsically dangerous in such a context.

More specifically, rules and obligations regarding the transparency of operations with a related party are instrumental in preventing an 'open' company from concluding a transaction that a 'closed company' would not have concluded on the assumption that this transaction is potentially detrimental to the company because *of a potential conflict of interest*.[133] Even in 'open' state-owned companies, the obligation of disclosure regarding these transactions complies with a two-fold function. First, disclosure establishes an obligation of confidentiality,[134] and prevents the circulation and disclosure of corporate information from being undue and untimely, or from happening selectively.[135] Secondly, it represses the

n 62 above, 69.

[129] Art 2391-*bis* provides that 'boards of directors of companies that make recourse to the risk capital market, according to the general principles established by the Consob (the public authority responsible for regulating the Italian financial markets, hereinafter referred to as Consob), adopt rules that ensure the transparency and the substantial and procedural fairness of related-party transactions and let them be known in the management report. To this end, they may be assisted by independent experts, based on the nature, value or characteristics of the operation. The principles referred to in the first paragraph apply to transactions carried out directly or through subsidiaries and govern the transactions themselves in terms of decisional competence, explanation and documentation. The board of statutory auditors oversees compliance with the rules adopted pursuant to the first paragraph and refers to the general meeting within its reports'.

[130] M. Cossu, *Società "aperte"* n 76 above, 275-276.

[131] It is not enough to justify the theoretical adherence to the company's interests but it is necessary to account for the convenience of the transaction concretely, otherwise that will be void due to a lack of justification: A.D. Scano, *La motivazione delle decisioni nelle società di* capitali (Milano: Giuffré, 2018), 134. A problem of accounting evidence in the financial statements of the transaction and of the relationships with the related parties is also arisen: see better below text and n 137.

[132] On the obligation of the board of directors to state a substantial and non-formal motivation, and to justify specifically and non-generically the convenience of the transaction for the company see A.D. Scano, *La motivazione delle decisioni nelle società di capitali* n 131 above, 131-132.

[133] On the relationship between 'conflicting transactions' and 'related-party transactions' see below para IV, 2.

[134] Finally, M. Stella Richter Jr, 'La informazione dei singoli amministratori' *Banca impresa società*, 342-344 (2017).

[135] In particular, it might have been revealed to certain parties, for example shareholders, reporters or analysts or be incomplete or inadequate: see the application criterion 1.C.1., lett. *j*) of the self-regulatory code of listed companies (the *Preda* Code), in the updated version of 2011. A recent overview on selective information among directors and some shareholders and its allowable boundaries (in the wider scenario of shareholders' activism and without specific reference to public shareholders) see M.C. Mosca, 'Comunicazione selettiva dagli amministratori agli azionisti e presidi a tutela del mercato' *Rivista delle società*, 36-40, 47-49 (2018).

public body's exercise of an external directive (hetero-direction) power on the company.

That said, and starting from the definition of 'related party'[136] (regardless of the general question if corporate resolutions shall be motivated, which cannot be examined in depth here),[137] we want to draw attention to the two-fold obligation of directors of 'open' state-owned companies to comply with substantial and procedural transparency and fairness[138] in related-party transactions and the obligation to *state reasons,* pursuant to Art 2391-*bis*,[139] for decisions influenced by the relationship with the state or other public body as a related party.[140]

Similarly, we will not overall exclude from consideration the fact that the

[136] Which is very wide: M. Ventoruzzo, 'Art 2391-*bis*', in F. Ghezzi et al eds, *Commentario alla riforma delle società. Amministratori. Artt. 2380 – 2396 c.c.* (Milano: Giuffré, 2005), 501. For the definition of 'related party' see Art 2391-*bis* of the Civil Code, and the regulations provided for in the *Delibera Consob* 12 march 2010 no 17221, as amended by the further *Delibera Consob* 27 April 2017 no 19974. attachment 1 (hereinafter *delibera Consob*), to the resolution states the definition of related party, establishing that for the purposes of Art 3, para 1, lett *a*) of the regulation, a person is a party related to a company if '(a) directly, or indirectly, also through subsidiaries, trustees or third parties: (*i*) controls the company, is controlled by the company, or is subject to common control; (*ii*) holds a stake in the company which may exercise significant influence over the latter'. The perimeter of the related parties referred to in the regulation is identified by the accounting principle *IAS 24*, including the financial statement disclosures on related-party transactions, approved in november 2009 and endorsed by the European Commission Regulation 632/2010/EU of 19 July 2010, which amends the European Commission Regulation 1126/2008/EC of 3 November 2008, and which also ratifies the relevance of indirect relation, requiring listed companies and their subsidiaries to provide a detailed report on the transactions carried out with these entities at the approval of the annual financial statements and the half-yearly financial report. And on the significance of the independent directors' opinion to support the justification of the transaction see L. Marchegiani, *La motivazione delle deliberazioni consiliari nelle società per azioni* (Milano: Giuffré, 2018), 85-86.

[137] Generally, among the most recent contributions, see N. Abriani, 'Assetti proprietari' n 56 above, 200; M. Libertini, 'Ancora in tema di contratto, impresa, società. Un commento a Francesco Denozza, in difesa dello 'istituzionalismo debole'' *Giurisprudenza commerciale*, I, 691 (2014), with regard to the general principle that requires an obligation to state adequate reasons – and consequently a judicial review of legality – whenever there is an internal conflict of interests, or when conflicting proposals have been submitted for approval of the decision-making body, without affirming a general obligation to state reasons such as the obligation that exists for management acts, fn 56; G. Guizzi, *Gestione dell'impresa e interferenze di interessi. Trasparenza, ponderazione e imparzialità nell'amministrazione delle s.p.a.* (Milano: Giuffrè, 2014), 26-28; M. Stella Richter Jr, 'L'inoppugnabilità delle decisioni degli organi sociali', in G. Conte et al eds, *Principi, regole, interpretazione. Contratti e obbligazioni, famiglia e successioni: Scritti in onore di Giovanni Furgiuele* (Bologna: Universitas studiorum, 2017), I, 537, text and fn 42; A.D. Scano, n 130 above, 162-164; L. Marchegiani, n 136 above, 83-86.

[138] L. Marchegiani, n 136 above, 127, who highlight that the hendiadys 'convenience and substantial fairness' which occurs in the justification of related-party transactions (see Arts 7-8 of *delibera Consob* (above fn 135) must be understood 'in the sense of convergence of the two parameters of judgment in a order of unitary evaluation and comparison of the conditions of transaction closing with the standard of the market, in a judgment which basically coincides with the former, with the conditions that would have been applied to an unrelated party'.

[139] For the text of Art 2391-*bis* see n 128 above.

[140] On the motivation as a crucial factor of the control on the fair exercise of the power see in particular N. Abriani, 'Assetti proprietari' n 57 above, 200.

transaction carried out with the self-interested state-appointed directors, pursuant to Art 2391, para 1, may be convenient to the entity.[141] We also cannot exclude the fact that the transaction carried out by having the public body-related party as a counterpart may be beneficial, or may bring 'offsetting benefits' because they do not necessarily have to be current but they might also be future benefits.[142]

Since the transaction between the company and the state shareholder as a related party is not univocally attributable neither to an advantage nor to a disadvantage, the problem then shifts to the burden of stating reasons for the transaction.[143]

1. 'Related Directors', 'Interested Directors' and 'Group Directors'

It is very common that directors involved in related-party transactions and contracts pursuant to Art 2391-*bis* of the civil code are also directors holding significant interests pursuant to Art 2391 of the aforesaid code.[144] Indeed, this possibility may be defined as 'endemic', even though not really 'structural'.[145] Therefore, it may happen that, in a transaction with related parties, both the group's interest and the interest of one or more directors may be involved. In that case, there will be a 'full aggregation,' meaning that a related-party transaction involves the director's interest along with the 'reasons and interest of the group'. In this case Arts 2391-*bis*, 2391 and 2497 of the Civil Code shall apply.[146]

However, this does not necessarily always happen.[147] First, because the regulation on related-party transactions does not consider any significant interest

[141] Ar 2391, para 2, of the Civil Code establishes that 'in the cases provided for in the previous paragraph, the resolution of the board of directors must properly state the reasons and the convenience of the transaction for the company'.

[142] Moreover, even with regard to the offsetting benefits resulting from the exercise of a management and coordination activities, it is allowable that the advantage is planned, and therefore future, even if linked to a commitment 'that, on the basis of an *ex ante* assessment, is reasonably reliable': E. Marchisio, n 101 above, 144.

[143] On the topic of the non-binary relationship between the company's interests and the directors' decision at a given point, and on the fact that the complexity of business decisions makes uncertain the outcome of a judicial review of such transactions, see C. Angelici, 'Profili dell'impresa nel diritto delle società' *Rivista delle società*, 243 (2015).

[144] On the wide overlap between the regulation of directors' interests, pursuant to Art 2391, and the regulation on related-party transactions, according to Art 2391-*bis*, in particular on the fact that usually, although not necessarily, the individual interest of one or more directors or the interest on of third parties are included in contracts between related parties, see M. Ventoruzzo, n 136 above, 540-542; A. Pomelli, 'Commento all'Art 2391 *bis*', in A. Maffei Alberti ed, *Il nuovo diritto delle società* (Padova: CEDAM, 2011), I 786; G. Minervini, 'Gli interessi degli amministratori di s.p.a.', in P. Abbadessa and G. Portale eds, n 55 above, 601.

[145] As highlighted by A. Pomelli, n 144 above, 786.

[146] P. Montalenti, 'Operazioni con parti correlate: questioni sistematiche e problemi operativi' *Rivista di diritto commerciale*, I, 68 (2015).

[147] For example, the transaction between the company and one of its subsidiaries is a transaction with a 'related party' but not necessarily a specific interest of a single director and the group's interest must be involved (and not necessarily the decision is influenced by the unitary management), as highlighted by P. Montalenti, n 146 above, 68.

according to Art 2391, para 1, but only the director's interest regarding transactions creates a correlation between the director and the related party. This confirms the opinion that Art 2391-*bis* is not limited to 'overstating the situation' with respect to Art 2391,[148] but it aims to regulate a more complex case,[149] which therefore not coincides with that.

Secondly, it is important to clarify that this pattern of relationships does not necessarily fit into a corporate group structure because the shareholding of the state or other public body does not always belong to such a structure in the public sector. Moreover, the state shareholder does not always exercise a power of management and coordination. Accordingly, 'Management' and 'correlation, as described above', are therefore two distinct phenomena.[150]

2. The State-Appointed Director, the Company's Interests and Corporate Opportunities

The analysis described above shows that Art 2380-*bis* also binds state-appointed directors to pursue the lucrative common interest of the entity. Art 2391 defines the perimeter of the obligation of transparency of directors' interests and shows that it comprises financial and non-financial interests, including relational interests, interests in conflict with the company and non-conflictual interests.

It must be added that Art 2391-*bis*, para 1,[151] prohibits both the state-majority shareholder and state-appointed director from using the shareholding in order to make the state achieve extra-social benefits of financial or non-financial nature.

The special power of appointment (now incorporated in financial instruments that include administrative rights or in a particular class of shares) and, eventually, the power of removal (which is not conferred by the law but may be conferred with the articles of association, as mentioned above) are also significant in this perspective,[152] since that their presence might be for the company a source of

[148] As stated by G. Minervini, n 144 above, 601.

[149] Highlighted by ibid 601.

[150] On reciprocal independence among 'director's interests', 'group interests' and 'related-party transactions', see P. Montalenti, n 146 above, 66-68; on the fact that neither the regulation concerning the interests of directors, pursuant to Art 2391, nor the regulation of the management and coordination activities of companies, according to Art 2497 of the Civil Code fully regulate the abuses resulting from related-party transactions, see N. Michieli, 'Gli amministratori indipendenti nel comitato parti correlate' *Giurisprudenza commerciale*, I, 1034-1035 (2014); Id, *La gestione del conflitto d'interessi nelle operazioni con parti correlate* (Milano: Giuffré, 2016), 57-59.

[151] Once again, we highlight the text of Art 2391-*bis*, para 1 (see also n 128 above): 'the board of directors of companies that resort to the risk capital market, according to the general principles stated by Consob, adopt rules that ensure the transparency and substantial and procedural fairness of transactions with related parties and let them be known in the management report. To this end, they may be assisted by independent experts, based on the nature, value or characteristics of the transaction'.

[152] A. Musso, *La rilevanza esterna del socio nelle società di capitali* (Milano: Giuffré, 1996),

remuneration opportunities not consistent with its lucrative purpose.[153]

The principle of fairness in corporate management (which is not mentioned but implicit in Art 2391, para 1,[154] and which is explicitly stated in Art 2391-*bis*, para 1) actually wishes to prevent the situation where a certain type of familiarity, and therefore a stable relationship between shareholder and manager, may create, not only an occasional, but also a regular conflict of interest. This means that this regular conflict of interest may affect not just a single act but also the whole activity of the firm.[155]

Moreover, the increasing heterogeneity in the composition of the board,[156] the public interest in general, and the board member's membership public administration are factors that help to diversify the state-appointed director from other directors and to complete his professional expertise (which must be intended as a *mix* of specific skills and experiences).[157] The public interest in general, however, is a factor hardly considered on its own regardless of additional factors.[158] Furthermore, the public interest is also included in the assessment of the independence requirement, even if it does not necessarily compromise the director's independence.[159] Therefore, the state-appointed director, both when he has a conflict of interest and when he is self-interested pursuant to Art 2391, para 1, is liable, in accordance with Art 2391, para 4, for the damage that the company may have suffered as a result of his acts and omissions.[160]

280, where it is highlighted that 'specific clauses of bylaws or the direct management policy of the state-appointed directors (...) may perhaps be suitable to balance these needs'. The author writes with reference to the regulation preceding the company law reform but his remarks are still valid; F. Barachini, 'L'appropriazione delle *corporate opportunities*', in P. Abbadessa and G. Portale eds, n 55 above, 617.

153 For hints on this topic and its connection with special rights of appointment see A. Musso, *La rilevanza* n 52 above, 279-280.

154 On the principle of fairness relating to the corporate management understood as a legal obligation and not only as a general clause see M. Cossu, *Società 'aperte'* n 76 above, 297-298.

155 ibid 154. This explains why the regulation on the transparency of transactions with related parties applies also to transactions carried out through subsidiaries, as provided for in Art 2391-*bis*, para 2.

156 On this aspect see M. Erede and F. Ghezzi, 'Regolazione pubblica e autonomia privata nella composizione del consiglio di amministrazione di società quotate: un'indagine empirica' *Rivista delle società*, 933, text and fn 18 (2016).

157 ibid 946, fn 45.

158 Thus, an example of such a provision is Art 15, para 3, of bylaws of ' 'Terna spa', which provides that those who have not gained an overall experience of at least three years in managerial activities at public institutions or administrations engaged in credit, financial or insurance sector, or in sectors strictly related to the company's activities may not be appointed as directors and, if appointed, must resign' (the alternative requirements are: a) having carried out management or control activities in public limited companies with a share capital of no less than two million euros; b) having performed professional or university teaching activities in legal, economic, financial and technical-scientific subjects closely related to the company's activities).

159 It cannot be denied that there is a specific relationship between independence and 'origin' of the director, although a director with a public background may also be independent: see M. Erede and F. Ghezzi, n 156 above, 937.

160 Art 2391, para 4, provides that 'the director is liable for damage suffered by the company

In 'open' companies pursuant to Art 2391, para 5,[161] the state-appointed directors are *also* liable for damage suffered by the company because of the use of information, news or business opportunities learned by them in the performance of his appointment for the benefit of the public entity. Moreover, it should be noted that, in all these cases the abuse of corporate opportunities do not involve self-dealing transactions but may involve misappropriation, or exploitation.[162]

In the specific context of 'open' state-owned companies, the misappropriation may acquire two main forms: abuse of privileged information, (in terms of their *preferential disclosure* in favor of the state or public body[163] or more likely in favor of his political representatives),[164] or the use of privileged information in order to obtain favors from the state or public body.[165] An example would be the director's exploitation ort access into a certain market or the participation in a public call for tenders.[166] These assumptions, however, are strongly contiguous, both because they involve the misleading use of information[167] and because they may involve an unfair competition offense.[168]

In the same way as Art 2391, para 1, involves the wider and more varied idea of 'interest', (which does not necessarily coincide with a financial benefit) Art 2391, para 5 (as extensively as para 1) provides for the use of 'information', 'news' or 'business opportunities' for personal or third-party advantage, provided that they are company-related. The only difference is that advantages must have been achieved in the director's performance of his duties.

Only a few companies have, in their rules for related-party transactions explicitly considered operations which are concluded as a result of a public

as a result of his/her act or omission'.

[161] Art 2391, para 5, provides that 'the director is also liable for the damage suffered by the company as a result of the use of information, news or business opportunities, learned in the exercise of his assignment for his personal or third-party benefit'.

[162] As highlighted by F. Barachini, 'L'appropriazione' n 152 above, 615.

[163] C. Macrì, 'L'amministratore 'interessato'', in G. Scognamiglio ed, *Profili e problemi dell'amministrazione nella riforma delle società* (Milano: Giuffré, 2003), 145, who notes that the damage resulting from the insider trading, provided for in Art 2391, para 5, should have been included in the regulation of directors' liability towards the company, since it governs the overall damages (and not also the case of liability for losses resulting from the transaction in which the director had an interest).

[164] As noted by A. Zoppini, 'La società (a partecipazione) pubblica: verso una *public corporate governance*?' *Rivista di diritto commerciale*, 32 (2018).

[165] In the former case, the conduct performs a breach of the duty of fidelity, in the latter case, it carries out the 'exploitation of the position held to achieve personal benefits or interests': see F. Barachini, 'L'appropriazione' n 152 above, 615.

[166] The case is described by F. Barachini, 'L'appropriazione' n 152 above, 615, 628. The participation in public calls for tenders belongs to the second group, as reported by the author.

[167] V. Meli, 'La disciplina degli interessi degli amministratori di s.p.a. tra nuovo sistema e vecchi problemi' *Analisi giuridica dell'economia*, 167 (2003); C. Macrì, n 163 above, 145; M. Ventoruzzo, n 136 above, 497; F. Barachini, 'L'appropriazione' n 152 above, 615.

[168] F. Barachini, 'L'appropriazione' n 152 above, 628, fn 44.

tendering procedure.[169]

V. Conclusions

Art 2380-*bis* also requires state-appointed directors to solely pursue the lucrative company's interests – that is, only interests common to all shareholders. Art 2391 sets out the parameters of the transparency obligation of directors and includes equity and non-equity interests, along with 'relational' interests, as well as a privileged relationship with the appointing public entity. Art 2391, para 2, requires the company to state the reasons for its entering transactions involving the interest of a state-appointed director and must prove the current or future 'convenience', ie the 'offsetting benefits' to the company Art 2391-*bis*, para 1, prohibits the director appointed by the state shareholder to use his shareholding to make the latter obtain extra-social benefits, both of an economic and non-economic nature. Art 2391, para 5, requires the administrator to compensate the damage caused to the company through the preferential use of information, news or business opportunities in his own interest or in the interest of a third party (therefore particularly in favor of the public administration to which the shareholder belongs).

With regard to this latter feature, it is clear that damages can be excluded if the company demonstrates the current or future 'offsetting benefits' resulting from this use (as the transaction with the self-interested director pursuant to Art 2391, para 1).

It is also clear that, in all cases, the director may negotiate with the company the possibility of using such information and business opportunities (even when their use can harm the company).[170]

The recourse to all these cautions complies primarily with the general principles of transparency, care in the fulfilment of a professional assignment[171] and fairness.[172] It also complies with the duty to get ready for an adequate

[169] An example of such a provision is the regulations for related-party transactions of 'Atlantia spa', which considers the operations which are concluded as a result of a public tendering procedure among the 'ordinary' related-party transactions, updated on 22 November 2017.

[170] G. Romano, 'La funzione della disclosure nella disciplina degli interessi degli amministratori di s.p.a.' (15-17), paper ODC 2012, available at www.academia.edu, notes that the director who owns significant information on business opportunities, which belongs to the company, and is interested in exploiting it personally or on behalf of third parties, must fully disclose it pursuant to Art 2391, para 1, as well as declare his intentions in this regard. If the director fulfils these fiduciary duties, then, he is allowed to use the information, because the law has not entirely prohibited the exploitation of business opportunities (not even when they might harm the company) but rather it has provided for a general negotiation system of their allocation between the director and the company.

[171] In general, on the relationship between the evaluation of the director's care and the adoption of inconsistent or unjustified behaviours see F. Vassalli, 'L'Art 2392 novellato e la valutazione della diligenza degli amministratori', in G. Scognamiglio ed, n 163 above, 124-126.

[172] See F. Maimeri, 'Controlli interni delle banche tra regolamentazione di vigilanza e modelli

organizational structure,[173] which is a duty to which executive directors (according to Art 2381, para 5),[174] non-executive directors, and the board as a whole (pursuant to Art 2381, para 3, second part)[175] are subject. These cautions are also part of the duty to fulfil the managerial mandate with the professional care required by the nature of the assignment, including also the duty to arrange (or rearrange) their organizational structure to prevent the eventuality a certain kind of 'familiar' relationship between a state-shareholder and a state-appointed director from creating systemic conflict of interests or misappropriation behaviors.

In terms of enforcement, the law does not establish specific penalties, either for the breach of the duty of disclosure and abstention, carried out by the director holding interests, (according to Art 2391, para 1)[176] or for related-party transactions, (pursuant to Art 2391-*bis*, para 1) or for the abuse of corporate opportunities, (pursuant to Art 2391, para 5) which are all obligations supported only by the general rules relating to directors' liability.[177]

Nevertheless, three conclusions flow from this analysis. First, the adherence to any agreement that puts the director at the mercy of, and under the permanent subjection of an external power, is unlawful and therefore justify a removal for just cause, (pursuant to Art 2383, para 3, of the civil code) as that compromises

di organizzazione aziendale' *Rivista di diritto commerciale*, I, 609 (2002); C. Amatucci, 'Adeguatezza degli assetti, responsabilità degli amministratori e *business judgement rule*' *Giurisprudenza commerciale*, I, 643-644, (2016).

[173] M. Irrera, *Assetti organizzativi adeguati e governo delle società di capitali* (Milano: Giuffré, 2005), 76-79; V. Buonocore, 'Adeguatezza, precauzione, gestione, responsabilità: chiose sull'Art 2381, commi terzo e quinto, del codice civile' *Giurisprudenza commerciale*, I, 5 (2006); M. Mozzarelli, *'Appunti in tema di rischio organizzativo e procedimentalizzazione dell'attività imprenditoriale'*, in P. Abbadessa et al eds, *Amministrazione e controllo* n 55 above, 733-735; C. Amatucci, n 172 above, 645-647. With specific reference to the financial services, see M. Rabitti, n 95 above, 38-40; F. Maimeri, n 172 above, 609-611; G. Scognamiglio, 'Recenti tendenze in tema di assetti organizzativi degli intermediari finanziari (e non solo)' *Banca borsa titoli di credito*, I, 146-148 (2010), who points out that this is a principle of enterprise organisation, and therefore it is common to all enterprises even if provided for by Arts 2381, para 3, and 2403 of the Civil Code exclusively with reference to public limited companies; A. Minto, 'Assetti organizzativi adeguati e governo del rischio nell'impresa bancaria' *Giurisprudenza commerciale*, I, 1170-1172 (2014).

[174] Pursuant to Art 2381, para 5, 'the delegated bodies ensure that the organisational, administrative and accounting structure is in line with the nature and size of the company and report to the board of directors and the board of statutory auditors, at the frequency established by the bylaws and, in any event, at least every six months, the general trend of management and its expected future development, as well as the most significant transactions carried out by the company and its subsidiaries that are particularly significant in terms of size or other characteristics'.

[175] Pursuant to Art 2381, para 3, second sentence, 'on the basis of the information received, the board of directors assesses the adequacy of the organisational, administrative and accounting structure of the company; when drafted, it examines the strategic, industrial and financial plans of the company; and, on the basis of reports from delegated bodies, evaluates the general management trend of the company'.

[176] See C. Macrì, n 163 above, 139.

[177] It has already been mentioned that, according to Art 2391, para 4, the director is liable for damage suffered by the company as a result of his act or omission.

the independence of the director's role.[178] Secondly, in spite of the fact that such an agreement is a discretionary act, judicial authorities might be entitled to review the acceptance of this agreement.[179]

Lastly the issue of the right to appoint directors by the state and other public bodies, and in particular their role as suppliers and, at the same time, users of corporate opportunities, requires a more in-depth consideration. The current regulation on related-party transactions is not able to interdict either the conflicts of interests caused by the presence of the state or other public entity as shareholder and the state-appointed directors or the singular features of transactions with related parties in state-controlled and municipally-controlled companies.[180]

[178] F. Bordiga, n 126 above, 680. And among the case-laws regarding unlawfulness of the management shareholders' agreement see Corte di Cassazione 24 maggio 2012 no 8221, *Società*, 245-247 (2013), with a note by A.M. Perrino, 'Patto parasociale di gestione e giusta causa di revoca', also G. Mollo, 'Revoca degli amministratori a seguito della stipulazione di un 'patto di gestione" *Il nuovo diritto delle società,* 19, 222 (2013).

[179] On the increase of corporate discretionary powers in the Italian company law reform and on the fact that this also leads to an extension of the judicial review, M. Libertini, n 137 above, 692; and on the topic of the increase of judicial review on board of directors' resolutions, see F. Di Girolamo, 'Regole di validità e regole di condotta: la valorizzazione dei principi di buona fede e correttezza' *Giurisprudenza commericale*, I, 569-570, (2004). Expressly on the application of the business judgement rule to transactions with related parties see also P. Montalenti, n 146 above, 70-72, for a partly different reading.

[180] For a few remarks in this respect see A. Zoppini, n 164 above, 32.