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The matter of public-owned companies, which has attracted wide debate amongst Italian scholars, both commercial and administrative[1], has traditionally been investigated by analysing the model of the public-limited company and attempting to understand the ways in which the public interest could fit into (and shape) the structure of the organisation.

The prevalence of a very formalistic approach, supported, specifically, by the private law doctrine[2], has prevented the possibility to comprehend all the facets of what can be defined as a very complex and heterogeneous system.

Public-owned companies, traditionally defined as "instrumental" (clearly, for the pursuing of the public interest), can be divided into two categories: on the one hand, as companies that are merely investment vehicles for public administrations; on the other hand, other types of public companies seem to be more than a neutral model to be chosen by the public sphere and, thus, a very replacement for the form of "ente pubblico" (i.e. public body governed by the rules of administrative law).

By adopting a holistic and substantial method of analysis, the volume of Giovanni Maria Caruso looks to usher in an innovative approach within the studies of public-owned enterprises, with originality and doctrinal rigour. According to the Author, indeed, this phenomenon, which has been so far analysed through the lenses of the "company-types", requires a different approach to its interpretation.

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[1] *Ex multis*, as for the Italian literature, Rossi, *Gli enti pubblici*, Bologna, 1991, p. 170 ss., ora in Id., Pappano (a cura di), *Saggi e scritti scelti di Giampaolo Rossi*, vol. III, a cura di Farì e Guarna Assanti, Torino, 2019, 1063 ss.; Grüner, *Enti pubblici a struttura di s.p.a. Contributo allo studio delle società "legali" in mano pubblica di rilievo nazionale*, Torino, 2009; Malaguti, Mazzoni (a cura di), *Le società "pubbliche"*, Torino, 2011; Della Scala, *Società per azioni e Stato imprenditore*, Napoli, 2012; Goisis, *Contributo allo studio delle società in mano pubblica come persone giuridiche*, Milano, 2004.

[2] Moreover, this is the most prevalent thesis both in literature, and see Rordorf, *Le società participate fra pubblico e privato*, in *Le Società*, 2013, p. 1326 ss., and in Court judgments, Cass. Sez. Un., 12 ottobre 2011, n. 20941; Cass., sez. un., 19 aprile 2013, n. 9534; Cass., sez. I, 12 aprile 2005, n. 7536.

The Author immediately states the objective of the entire work. The doctrine has indeed neglected the perspective of the shareholder, overlooking all of the implications related to the choice of taking participations in companies as well. The different perspective of the characteristics, and therefore, the (public) nature of the shareholder, will provide a more comprehensive and determining contribution to the understanding of problems concerning public-owned or simply participated companies (p. 13).

A visible symptom of the previously adopted approach is the multitude of special legislation concerning individual public-owned companies[3]. Conversely, the newly recommended approach was adopted by the Italian legislator in respect of the *Decreto Legislativo* 19 August 2016, no. 175, which targets a rationalising of the entire discipline.

The full-bodied book contains ten chapters, divided into an introduction and three parts.

Consistent with the different approach proposed, the first introductory chapter focuses on the *ratio* and limits of the traditional scientific approach based on the company type, outlining the essential characteristics of the public shareholder as the best way to reconstruct the juridical content of the notion[4].

In order to fully understand the true implications of the interweaving of two disciplines, administrative and corporate law, and to comprehend the way they combine and coexist together in a public-owned enterprise, it is necessary «to separate, identify and piece back together all of the elements composing the case» (p. 35): this is the use of the Cartesian method to juridical problems[5].

The second chapter tries to set the foundations for recomposing the entire notion, through the analysis of the two constituent parts of a public-owned enterprise.

On the one hand, the public component, which derives from the public nature of the shareholder, is characterised by a peculiar system of rules

[3] For a broader overview of these special statutes and of the so-called "*società di diritto singolare*" within the Italian system, see P. Pizza, *Le società per azioni di diritto singolare tra partecipazioni pubbliche e nuovi modelli organizzativi*, Milano, 2007.

[4] It seems that the notion of "public shareholder" is apparently straightforward: a public shareholder is, in simple terms, a public subject who is willing to buy shares (or specifically create) a commercial company.

[5] Suggested, in particular, by Rossi, *Metodo giuridico e diritto amministrativo: alla ricerca di concetti giuridici elementari*, in *Diritto Pubblico*, 2004, 1-18.

aimed at pursuing what is referred to as the public interest specifically entrusted to a singular public administration.

On the other hand, creating a company implies an unvarying set of rules capable of being applied to any form of commercial entity. Being a shareholder means, according to corporate rules, being not only a party to the contract, but also the owner of the shares and a member of an organisation created for pursuing a specific purpose: the goal for profit.

Therefore, the Author presents a dual-component notion with two specific and apparently opposing purposes: on the one hand, the maximisation of profits and, on the other, the maximisation of collective interests.

Consequently, the following third chapter clarify the variety of ways by which the two identified elements are capable of being reconciled, and the conditions and limits of doing so.

Firstly, there are certain regulatory conditions that affect the decision of the Public Administration becoming a shareholder. It is indeed possible to identify situations in which it is the legislator itself to impose the creation of a company[6]; other situations where public administrations have the discretionary power to decide whether to take participations or not; and others, in which it is entirely forbidden to take participations or to create new companies.

Under this legal framework, the Author examines the model of management of public ownership in the recent past.

As well documented, in the aftermath of the 1929 crisis, the Italian government decided to acquire large amounts of participations from private companies of public interest and to entrust their management to specific public economic bodies: it is the story of the *Istituto per la ricostruzione industriale* (IRI). The "publicisation" of the system peaked in 1956 with the creation of the *Ministero per le partecipazioni statali* (Ministry for the management of State-owned shares)[7].

The public-centred system worked very well for decades, causing Italy to grow as one of the largest economies in the world. However, over time, the system started to exhibit signs of collapse due, mainly, to increasing

[6] For instance, this is the case for *Cassa depositi e prestiti* or *Radio Televisione Italiana S.p.a.*

[7] On the matter, Visentini, *Iri e partecipazioni statali*, Firenze, 2015; Segreto, *Italian Capitalism between the Private and Public Sectors, 1933-1993*, in *Business and Economic History*, vol. 27/2, 1998, p. 445 ss.; Bianchi, *The IRI in Italy: Strategic role and political constraints*, in *West European Politics*, 10, 1987, pp. 269-290 and, in particular, Holland (ed.), *The State as an entrepreneur: The IRI State Shareholding Formula*, London, 1973.

political corruption[8]. As well known, the solution was found in the "privatisation" of the public sector.

As a result of the largescale privatisation that followed, the one-time functions of the IRI and the *Ministero delle partecipazioni statali* were redistributed to different bodies: the Ministry of Economy and Finance and the *Cassa Depositi e Prestiti S.p.A.*[9].

In particular, the analysis of the latter is of great interest: *Cassa Depositi e Presititi* appears to have been created in the image of the IRI formula, albeit with a small number of changes connected with the private law framework within which this new important organisation and the single controlled companies are now immersed.

The implications of the new approach (as well as the initial conclusions in the first instance) are dealt with in chapter four.

By moving away from what is traditionally considered as public (i.e. what is called "authority" and the discretionary power of the Public Administration), the notion of "public shareholder" will appear somewhat different. Instead of adopting a static vision, a dynamic one will underline the peculiar function that public intervention in the economy takes when the State is to play a key role in companies operating in the European market: the State, as a shareholder, can be appreciated as a "public economic operator" that needs to follow specific behavioural practices, mainly imposed by European norms, which will be observed by public subjects inside and outside the company[10].

Chapter five focuses on the relationships between the public shareholder and social shares. As discussed above, this is the profile that has been most neglected by the Italian doctrine which, by adopting a perspective focused on company types, has been completely detached from it.

It is underlined that rules governing the asset-management processes are affected by the plurality of roles that can be assumed by public authorities: as founding members, they can take advantage of the contribution offered to the *genesis* of the company; as simple shareholders,

[8] IMF working paper, *Corruption, Public Investment and Growth*, 1997 on the IMF website.

[9] For more insights, De Cecco, Toniolo, *Storia della Cassa Depositi e Prestiti*, Roma-Bari, 2000 and by the same Authors, *Storia della Cassa depositi e prestiti. Un nuovo corso: la società per azioni*, Roma-Bari, 2014.

[10] These rules concern the functioning of the market and focus, in particular, on the market investor principle that must be followed by all public authorities that are willing to operate in the market.

they can then be involved in subsequent events, taking on the role of buyer or seller.

Chapter six focuses on the different types of social participations by proposing an unprecedented attempt to classify social participations which, due to the intensity of the constraints set up from time to time by the regulations, can be traced back to the different categories of public goods expounded by the Italian doctrine[11].

By adopting specific doctrinal "indexes", that of the "*appartenenza*" (belonging of the goods) and the other of "*destinazione pubblica*" (public destination), the analysis leads to a very suggestive reconstruction which serves to identify three types of participations:

- participations subject to the regime of public goods;
- participations that can be classified in the peculiar category of "goods for public destination";
- participations that are simply owned by a Public Administration.

This reconstruction makes it possible to clarify that equity investments in mixed companies (owned both by private and public shareholders) must be traced back to the category of public goods entrusted under concession to private subjects.

By autonomising the legal consequences expressed by the characteristics of social participations, this reconstruction allows an extrapolation of the essential element of the ownership position of the public shareholder, without contaminating it with the effects deriving from the nature of the asset.

The same logical path is proposed again in chapter seven which is dedicated to the organisational dynamics, where the public shareholder can be analysed as a pure member of the company.

In this context, a number of special institutes related to the powers of appointment and dismissal of directors, the liability regime provided for both the directors and the shareholders and other institutions that govern the relationship between shareholders and company are examined.

In chapter eight the types of existing public-owned companies are classified, allowing, also in this case, to highlight the company's specialty profiles, with the aim of understanding the essential substance of the organisational position of the public shareholder.

Chapter nine is dedicated to a comparative analysis.

[11] On the contrary, the doctrine has always made reference to trade company types and the exceptions enacted by the special regulatory norms with respect to the general discipline provided for by the Civil Code.

The same logical path followed with respect to the Italian system is proposed again to describe the solutions offered by Spain, France, Germany and England, highlighting, in particular, where there are unusual constraints or conditions for the realisation of a similar phenomenon: that is the existence of bodies institutionally responsible for the duties and functions of the shareholder and what is the concrete articulation of the proprietary and organisational dynamics.

In this context, the proposals put forward by the *Organization for Economic Cooperation and Development* (OECD) and some aspects of the European discipline are also analysed. The study shows a certain reproduction of the models so far examined, since these regulations seem to prelude to the institution of specific bodies which, operating through the acquisition of social participations as well, should embody a solution in which the shareholder duties and functions are assumed directly by supranational institutions.

Chapter ten aims at "recomposing" the notions deducted from the previous sectional analysis.

By systematically ordering elements to the notion of "public shareholder" - those that may accidentally concern it and those considered necessary - the essential characteristics of a notion which, however unitary, lends itself to further classifications are traced. Thus, the traits of a notion that, in its simplest form, is devoid of specific mechanisms that permit assigning primary protection to the public interest.

The A. underlines that the special characteristics of the public role in the company are mainly aimed at imposing a strictly economic behaviour both in the dynamics of the asset management and in those related to the organisation itself. In this way, all the anomalies of the Italian discipline emerge, where the public shareholder, unlike a private one, is required to adopt management policies based on a short-term vision, suggesting that the relative position is useful only for the pursuit of strictly profitable purposes.

The subsequent analysis focuses on further categories of public shareholder that can be obtained from the combination of the unintentional elements of the notion and the different conditions that govern the assumption of the related role.

The role of the "investor shareholder" presents the most analogies with the basic notion of public shareholder, since it shares a marked economic projection expressly imposed by the specific legislation dedicated

to single bodies, which are institutionally called to take on the role of shareholder to ensure objectives of financing the national economy.

In the figure of the "complementary shareholder", the position of the shareholder necessarily joins the role of the authority, held by the Public Administration, so that the assumption of the role of shareholder appears functional to the creation of a typical organisational model represented by the so-called *società miste* (both private and public companies). The figure of the in-house shareholder, in the frequently found and specific organisational form of the in-house providing, does not depart from this logic.

Finally, the notion of "formal shareholder", very different from the others so far examined, is expressive of phenomena in which the assumption of the role is only apparent, given that the administration takes a *sui generis* position in an organisation that relies only in part on the characteristics of a corporation. This situation appears as immanent in the notion of *ente pubblico in forma societaria* (i.e. public body in a corporate form), where the position of the shareholder, like the position of the company, is affected by specific statutory laws[12].

Excluding the latter figure, which has its own specificities, the discipline that the Italian legal system has reserved for the public shareholder differs profoundly from the solutions adopted by other countries which, albeit with significant differences, tend to enhance the specific needs underlying a public function, both through the establishment of special bodies institutionally called to take on the role of shareholder in the public interest, and through specific institutions that allow to assign a privileged treatment to the public shareholder.

In this way, specific criticisms emerge with respect to the Italian discipline of public-owned enterprises, where the regulatory process, that has interested the figure of the public shareholder, rather than focusing on the characteristics of the public function, has been concerned with ancillary aspects.

The position of the public shareholder is, in fact, built around a series of collateral interests, frequently merely patrimonial interests, and in any case conditioned by the assumption of one of the already examined roles,

[12] It is a matter of fact that single provisions enforced for single companies detained by public administrations are still applicable and cause a complex statutory system for public owned enterprises that starts from the Civil code, passes through single provisions and terminates with the core discipline contained in the new "*Testo unico sulle società partecipate*" (legislative decree 175/2016).

in such a manner that it seems to prove itself as a substantially sterile role (p. 583).

The volume leads us to the conclusion that there is not a single category of "public company" but there is a variety of public companies, differently articulated in consideration of the role that public power plays in them. There is a "range" of public companies: one extreme is made up of "quasi-administrations"; the other by the commercial companies in which (supposedly) public powers invest, making the profit-making purpose their own[13].

The analysis conducted by the Author allows to reflect on the most important issue in the field of Public-Owned Companies. The very question is if a real Public Corporate Governance can be found in the current Italian system[14].

The answer cannot be positive. As we have seen, the recent set of rules regarding Public-Owned Companies do not constitute a unitary *corpus* driven by an overall vision in the management of state shareholdings for the main reason that cannot be found an institutional body entrusted with the mission of coordinating the whole system of public shares.

The lack of an overall view emerges from the consideration for which, more specifically, on the one hand, it is accepted that the public shareholder adopts the operating rules of commercial companies, considered more flexible and suitable for the pursuit of interests worthy of protection, but, on the other, however, these rules are modified according to exclusive cost-saving criteria, making the use of the corporate instrument sometimes sterile.

Therefore, the huge amount of norms (special norms, singular norms and those enshrined within the Civil Code) give birth to a very confusing system.

Giovanni Maria Caruso's study highlights these (and other) critical problems by helping to understand the need for a unified approach to the issue of Public Owned Companies, which, in the "grey zone" between public and private[15] where they are located, need a unitary vision and,

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[13] This can be considered the *summa divisio* of Public-Owned companies, as they are created and operate between commercial law and administrative law.
For further information, Clarich, *Società di mercato e quasi-amministrazioni*, in *Dir. amm*., 2009, 253 ss.

[14] According to the formula used by A. Zoppini, *La società (a partecipazione) pubblica: verso una Public Corporate Governance?*, in *Riv. dir. comm*., 2018, 19 ss.

[15] Pugliatti, Enciclopedia entry: *Diritto pubblico e diritto privato*, in *Enc. dir*., vol. XII, Milano, 1972, 16 ss.

especially today in the fluidity of the European political and economic situation, of a single control room for the management of state shares.

The objectives related to the correct pursuit of the public interest, the main and very necessity for public authorities, are thus overshadowed by the Italian legislator who, feeling the need to confirm that, through public companies, the public sphere cannot pursue «institutional purposes other than those entrusted to them» (art. 4 of Legislative Decree 175/2016), does nothing except worsen the correct implementation of those public missions.