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Legal Regime of State-Owned Corporations: The Contribution of OECD Guidelines.

1. Introduction and scope of the analysis: an investigation on how Italian law, European law and OECD guidelines address certain main profiles of the legal regime of state-owned corporations and on the significance and usefulness of the OECD guidelines and of a global regulation of SOCs.

2. Purpose-nature of state-owned corporations (neutral organizations versus for profit enterprise): corporatization as privatization.

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1. Introduction and scope of the analysis: an investigation on how Italian law, European law and OECD guidelines address certain main profiles of the legal regime of state-owned corporations and on the significance and usefulness of the OECD guidelines and of a global regulation of state-owned corporations.

In this paper, we will try to address certain central and mostly debated profiles of the legal regime of state-owned corporations (SOCs): specifically their nature, and, as a result, legal regime. In doing so, we will consider, simultaneously, Italian law, European law and OECD guidelines on corporate governance of public enterprises.

Such guidelines represent a set of non-binding principles and best practices on corporate governance of state-owned enterprises[1] (especially, insofar as) involved in commercial activities[2].

[1] P. 9.

Our aim is, at first, to understand whether and to what extent the three systems are consistent and, hopefully, to reach conclusions on the nature and, so, legal regime of SOCs, that may be of interest also for jurisdictions other than the Italian one.

We will also address another point: how is it actually possible and, in any case, of use a global regulation (although in the form of soft-law) of such profiles? And, in this connection, which role can play the differences among the various legal systems?

At a first sight, in fact, legal issues posed by SOCs may certainly present a real global significance: in the sense of involving legal profiles that appear to be, in many cases, essentially similar, regardless the specific jurisdiction at stake and, secondly, because certain forms of SOCs, like, for example, sovereign wealth funds (SWF), have an intuitive global dimension, as they normally act in a global context.

The two areas of investigation seem strictly connected: in particular, analyzing with a certain degree of attention the particularities of Italian law (as influenced by European law) will not only offer a picture on how a given legal system addresses the main issues posed by SOCs and may be consistent and influenced by the guidelines, but also could help us (or to a certain degree may represent even a necessary step) to answer the question of the usefulness and practicability of a global regulation, like the guidelines prepared by OECD.

Specifically, to the extent that the legal regime of SOCs in Italy will appear substantially determined by choices taken at a national (and/or European) level, this might indicate that a global regulation is condemned to be of limited effectiveness.

2. A teleological analysis of state-owned corporations in Italy: corporatization as privatization.

According to OECD guidelines, "*Any obligations and responsibilities that an SOE is required to undertake in terms of public services beyond the generally accepted norm should be clearly mandated by laws or regulations. Such obligations and responsibilities should also be disclosed to the general public and related costs should be covered in a transparent manner*"[3]. In the annotations to the principle, OECD clarifies that the special responsibilities and obligations of SOCs need to be fully expressed and transparent (and in fact preferably

[2] P. 11.
[3] Principle I.A.

inserted in the by-laws). Also the ways by which such obligations are funded and compensated by the state should be transparent[4].

In practice, this seems to mean that, at least in general terms[5], even when SOCs receive specific public law obligations or other forms of public interest binding objectives (such to contrast with their commercial nature), this public mandate should be clearly defined and should not represent a sort of general and comprehensive objective of the entity, such to be imposed without clear and definite criteria and limitations. It is not entirely clear, however, whether and to what extent a duty of compensation exists (or whether, insofar as compensations are paid, simply they need to be adequately disclosed).

Principle III.A, then, prescribes that "*The co-ordinating or ownership entity and SOEs should ensure that all shareholders are treated equitably*" and principle VI.A lays down that "*The board should be fully accountable to the owners, act in the best interest of the company and treat all shareholders equitably*". Indeed, an equitable treatment of all shareholders and a duty for the board to act in the best interest of the corporation (as opposed to the interest of a specific shareholder[6]) seems difficult to harmonize with a system in which a certain group of shareholders (i.e. that of public entities) is in condition to impose its own specific interests,

[4] See in particular, the relative annotation, at p. 20: "*In some cases SOEs are expected to fulfil special responsibilities and obligations for social and public policy purposes. In some countries this includes a regulation of the prices at which SOEs have to sell their products and services. These special responsibilities and obligations may go beyond the generally accepted norm for commercial activities and should be clearly mandated and motivated by laws and regulations. They should also preferably be incorporated in the company by-laws. The market and the general public should be clearly informed about the nature and extent of these obligations, as well as about their overall impact on the SOEs' resources and economic performance. It is also important that related costs be clearly identified, disclosed and adequately compensated by the state budget on the basis of specific legal provisions and/or through contractual mechanisms, such as management or service contracts. Compensation should be structured in a way that avoids market distortion. This is particularly the case if the enterprises concerned are in competitive sectors of the economy*".

The right of a compensation (for the costs or losses imposed for pursuing public goals) seems also mentioned at p. 37: "*the government should not use SOEs to further goals which differ from those which apply to the private sector, unless compensated in some form. Any specific rights granted to stakeholders or influence on the decision making process should be explicit. Whatever rights granted to stakeholders by the law or special obligations that have to be fulfilled by the SOE in this regard, the company organs, principally the general shareholders meeting and the board, should retain their decision making powers*".

[5] In reality, as we will show, the OECD's view appears less clear, as especially emerging from the draft implementation guide subsequently published.

[6] The same problem has been discussed also in USA. See SCHWARTZ, *Governmentally Appointed Directors in a Private Corporation – The Communications Satellite Act of 1962*, in *Harvard Law Rev.*, 79, 1965, 350, 361 ss., where, after the observation that "*The Presidential nominee is a corporate director, and under traditional corporate principles has a primary obligation to shareholders*", the risk of conflicts of interest is analyzed, with specific regard to the event of the *"...much discussed question of extending service to less profitable underdeveloped areas*".

In Italy, see, basically, SENA, *Problemi del cosiddetto azionariato di Stato: l'interesse pubblico come interesse extrasociale,* in *Riv. soc.,* 1958, 43 and ASQUINI, *I battelli del Reno,* in *Riv. soc.,* 1959, 620, 622.

even when in contrast with the corporation's interest and so in conflict with the common interest of all the shareholders.

To fully understand the potential significance of these principles in a Italian and then in a global perspective as well the intrinsic importance of the teleological profile in the legal regime of SOCs, at first we will investigate whether and to what extent Italian law recognizes and protect the common economic interests of the shareholder, so characterizing SOCs as a lucrative-for profit (of every and any shareholder) enterprise.

a. The primary significance of the legal purpose, for the purpose of understanding the nature of a legal entity.

Indeed, the first point to be discussed seems to be the legal (and so mandatory) purpose of SOCs. It should not be too difficult to agree, in fact, that the primary and most significant feature of any legal entity is the purpose legally given, if any. The legislative choice of providing an entity with a specific purpose, in particular, characterizes all it legal regime (that should be consistent with such legal option): in principle it represents the key element around which any profile of the entity's regime is built and, so, is to be interpreted, in case of doubt.

In relation to SOCs, furthermore, the legal purpose of the entity seems such to determine also its substantial nature (as opposed to a merely legal-formal regime), as far as it involves and describes also its economic mission, i.e. its necessary (as legally required) economic behavior. Moreover, since in Italy[7] one of the primary criteria by which classifying an entity as public or private law one is, traditionally, the fact of being established for pursuing a private or public-general purpose, it is well clear that when a given entity pursues a strictly egoistic purpose, like profits to be distributed to its shareholders, it is impossible (or at least very difficult) to attribute to this entity a public law nature. Indeed, such type of purposes is, (we would say) by definition, a not public-general-altruistic one. Therefore, it is not even necessary to discuss whether, in view of the difficulty of individuating which purposes are public by nature, the teleological approach may really be considered the most appropriate and effective in the attempt of identifying an entity as a private or public. In fact, if we just agree that a public entity needs to be directly devoted to a public and general interest (as opposed to the specific interest of a restricted group of individuals, like, for example, the shareholders of a corporation), when an (undoubtedly) egoistic purpose is

[7] As well as in European law, if we, for example, consider the definition of body governed by public law, with its reference to the specific purpose of meeting needs in the general interest, not having an industrial or commercial character.

legally assigned, the concerned entity is a private law one. And this regardless whether, in general terms, the teleological approach may be deemed as an effective criteria for distinguishing among private and public entities

b. Sect. 2247 of Italian civil code (lucrative purpose) and its (persistent) systematic significance, as confirmed by art. 90, par. 17, law no. 289 of 2002.

The legal purpose established by sect. 2247 of Italian civil code is strictly egoistic: "*with the agreement setting up a corporation, two or more persons contribute goods or services for the common exercise of an economic activity, with the aim of sharing the relative profits*". This purpose, in fact, characterizes the corporations as a (necessarily) for profit (of all the shareholders, to which are to be distributed) entities. Thus, corporations are not only a neutral form of organization of a given activity. Corporations, are, on the contrary, private law forms of organization of economic activities susceptible of being (and intended to be) profitable and able to create (and maximize) value for (all) the shareholders. Someone has, eloquently, spoken of an even "*ontological contrast*" between lucrative purpose and a qualification as a public entity[8]. As a result, the board is required to protect the interests of the corporation as a whole and not merely those of a particular dominant shareholder, as the majority shareholder (state or other public entity, in the SOCs): profits (and other economic achievements, creating value for shareholders and so the conditions for future profits) represent the legal purpose of the entity, and such economic interests are to be, as far as possible, maximized.

Is this rule applicable also to SOCs, or is it legally admissible a total or partial derogation, so to allow SOCs to take primarily or partially in count also general-public (for example social) objectives, even when in contrast with the egoistic, for profit, mission of the corporation?

In Italy, this point has been extensively debated in relation to the legal regime of SOCs.

In particular, in many occasions, the case-law (especially, as we will see, that of administrative courts) and the scholars (again, especially public lawyers) have developed theories according to which SOCs, in particular when established on the basis of a specific (public) law provision, are neutral organizations, mainly devoted to pursue public interests, which might lawfully prevail on the lucrative purpose. In other terms, the purpose of the

[8] IRTI, *L'ordine giuridico del mercato,* Roma, 2003, 162.

specific public law provision at stake is viewed to be, by these theories, as the purpose also of the corporation, being the two profiles strictly connected and almost undistinguishable.

Moreover, according to these theories, where a purpose is given by law, this would mean that the entity cannot decide to stop its activity and cease its existence: and this would be enough to characterize it as a public entity, as a legal necessity to exist and to continue to operate would be the main element for qualifying an entity as a of a public nature.

These theories should be evaluated in the light of the applicable, positive, legal rules. Indeed, too often, opinions on SOCs (and the relative criticisms) have risked to be based on "natural law"'[9] or even extra-juridical and political approaches, while, in reality, (at least) at a first stage, one should analyze whether the positive law provides answers or give indications on the nature of SOCs[10].

The ministerial report to the civil code[11] clearly stated that, where the state and other public entities decide to participate to corporations, "*it is the State that subjects itself to the laws of corporations, to provide to its management more effective forms and new possibility of achievements. The common regime of corporation shall therefore apply also to corporations in which the State or other public entities are shareholders without exceptions, unless special provisions establish the contrary*". In other terms, corporatization, according to the historical intention clearly and explicitly expressed by the legislator, means not only promotion of higher efficiency through a more flexible organizational form, but also a clear choice for privatisation (i.e., for the full subjection to the private-corporation law). No doubt may exist, therefore, on the fact that, in the intentions of the makers of the civil code, sect. 2247 (and of all the other private law provisions, that sect. 2247 presupposes) has to full apply to SOCs.

Finally, art. 90, par. 17, law no. 289 of 2002 again clarified that "*sport non professional corporations….may assume one of the following forms:….sport limited liability corporation….set up in compliance with the current provisions, with the exception of those establishing the lucrative purpose*". In other terms, unless thinking that the legislator is unaware of the basic terms of the general corporate law, we have to conclude, that, in the legal regime of corporations, one of the principles currently in force is the lucrative purpose.

[9] See in particolar, with various criticisms to the administrative courts' approaches, CASSESE, *Gli enti privatizzati come società di diritto speciale: il Consiglio di Stato scopre il diritto naturale,* in *Giorn. dir. amm.,* 1995, 1134.

[10] For a comprehensive analysis of the case-law and opinions about SOCs, see PIZZA, *Le società per azioni di diritto singolare tra partecipazioni pubbliche e nuovi modelli organizzativi*, Milano, 2007.

[11] Par. 998.

Indeed, it represents the legal-mandatory purpose of corporations and exclusively in given cases it can be derogated, by means of special law.

c. An implied modification of the (lucrative) legal purpose?

However, as already observed, certain authors have argued that the specific (public) law provision based on which the corporation is established (obviously if and to the extent a specific legislative provision exists), may, impliedly, modify the legal purpose of the corporation, derogating from the mentioned sect. 2247, and, as a result, transforming the corporation in a public entity[12].

Indeed, in abstract, a similar derogation may well be conceived, since sect. 2247 is not a constitutional provision, and so it can be derogated by any subsequent legislative provision. Once deprived of its typical legal purpose, then, also a SOCs may well be qualified as a public entity in a proper sense.

The real point, in sum, is not whether to accept or to deny, in abstract terms, such theoretical possibility, but to research an interpretative rule on the conditions based on which a legislative intention to modify the legal purpose of sect. 2247 may be reasonably identified. In this respect, what seems unacceptable is the approach under which from the mere fact that a given SOC is legally intended to perform activities that, at least to a certain degree, are of public interest (for example performing a public service) infers, *per se*, a modification of its legal purpose.

In fact, it is absolutely common and understandable that SOCs are set up with the aim of performing an activity of a certain public interest. Art. 3, par. 27, of the budget law for 2008[13] has even expressly established that, "*for the purpose of safeguarding competition and market",* traditional public administrations *"are not allowed to set up corporations involved in the production of goods and services not strictly necessary for pursuing their own institutional objectives*…".

However, it almost does not exist any activity (apart, perhaps, the so called public good in a strict sense) that is not, per se, susceptible of a profitable management. Thus, it cannot be inferred from the activity in which the corporation is (even on the basis of a legal duty) involved, any sufficiently clear indication on whether the corporation is, contrary to and

[12] See in particular, ROSSI, *Gli enti pubblici*, Bologna, 1991, 170.

On the specific issue of corporations set up by law, but in a more private law oriented perspective, see IBBA, *Le società legali*, Torino, 1992.

[13] Law no. 244 of 2007.

in derogation from sect. 2247, a non profit one. In other terms, the legal purpose of SOC cannot be confused with the activity in which it is involved[14].

d. The 2003 reform of corporate law and the confirmation of the entrepreneurial and for profit nature of all the corporations (also when in the hands of the State and other public authorities).

In a legal system, like the Italian one, in which the civil code plays a primary role in establishing the main principles of corporate law, we have now to examine whether subsequent amendments to civil code might justify (different) conclusions in the sense of a neutral (and not for-profit) nature of corporations, and, in particular, of SOCs.

In particular, in 2003[15], the law of corporations has been extensively reformed. However, this reform, generally intended to introduce a higher flexibility in the corporate law, has expressly been in the direction of an even higher degree of entrepreneurial characterization of corporations. In particular, it is worth mentioning that legal principles on the basis of which the reform has been drafted, provided, among others aspects, for a promotion of the "*entrepreneurial character of the corporation*"[16] and for a "*profitable management of the corporation's enterprise*".[17]

And in fact, also with specific regard to SOCs, one of the main innovation is probably represented by the new sect. 2497 of the civil code, under which "*corporations and entities that, exercising activities of direction and coordination of corporations, act in their own or of third parties interest violating principles of fair corporate and entrepreneurial management, are directly responsible toward the shareholders for the prejudice created to the profitability and the value of the equity participation, as well as toward the corporate creditors for the damages caused to the integrity of the corporate assets*".

As stated in the ministerial explanatory report to the 2003 reform, among the interests that sect. 2497 is intended to guarantee, there is the right of minority shareholders to dividends, expressly defined as "*one of the essential value of the equity participation to corporations*" [18].

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[14] On the necessity of a clear distinction in SOCs between "causa" (legal purpose) and "oggetto sociale" (activity concretely performed to pursue the lucrative purpose), see CAMMEO, *Società commerciale ed ente pubblico,* Firenze, 1947, 28-29.

[15] Legislative decree no. 6 of 2003.

[16] Art. 1, lett. b, of law no. 366 of 2001.

[17] Art. 4, lett. a, of law no. 366 of 2001.

[18] Par. 13 of the explanatory report.

On the rationale of the new form of liability, see also SACCHI, *Sulla responsabilità da direzione e coordinamento nella riforma delle società di capitali*, in *Giur. comm.,* 2003, 661, according to which the legislator was influenced by the (American) principle of the so called "shareholder value" (664).

The main reason of interest for us rests in the fact that such provision - that manifestly implies and better protects the lucrative nature of the corporations (as not only stated in the explanatory report but also made evident by the literal reference to the profitability of the of the participation) - is applicable to any type of entities (comprising public entities), when they are majority (or in any other form dominant) shareholders of corporations. This means that the duty to preserve the "profitability" of the enterprise covers also SOCs and that the power of public entities, as dominant shareholder, to impose public interest objects, may be lawfully exercised only as far as such public interests are compatible with the profitability of corporations. It is true that a subsequent law provision of 2009[19] has expressly exempted the state from the liability introduced by sect. 2497, but, apart from the fact that such exclusion makes even clearer (in terms of *a contrario* interpretation) that the other public entities different from the state (for example local authorities, or regions) are certainly subject to sect. 2497, it appears a provision in contrast with European law and so to not be applied, as we will see.

Moreover, such exception seems in conflict with the principles of equitable treatment laid down by the OECD[20]. In fact, a real equitable treatment implies not only equal rights, but, symmetrically, also equal duties and obligations. In this perspective, the common liabilities ordinarily established for any other dominant shareholder should apply to the State, which, like any dominant shareholder, should not exercise its powers for purposes different from the common benefit of all the shareholders and so of the corporation.

e. Recent legal provisions which reinforce the for profit nature of SOC.

Lastly, the lucrative nature of SOCs has received a new and eloquent confirmation by a just passed law provision[21] that, with the aim of ensuring savings for the state treasury, lays down that, unless specifically authorized by a prime minister's decree in connection to serious reasons of public interests, public entities are prohibited from refinancing corporations that, in the last three financial years, have been losing money. The same law decree, in extending limitations to consultancy and sponsoring agreements applicable to

[19] Art. 19, law decree no. 78 of 2009.

[20] Annotations to Chapter III, p. 33: "*As a dominant shareholder, the state is in many cases able to make decisions in general shareholders meetings without the agreement of any other shareholders. It is usually in a position to decide on the composition of the board of directors. While such decision making power is a legitimate right that follows with ownership, it is important that the state doesn't abuse its role as a dominant shareholder, for example by pursuing objectives that are not in the interest of the company and thereby to the detriment of other shareholders*."

[21] Art. 6, par. 19, law decree no. 78 of 2010

public entities also to certain categories of corporations[22] under their dominance, prescribes that the economic savings so realized should be, in principle, assigned to the public shareholder, in form of profits. Again, this means that also SOCs should (at least, in the normality of cases) produce dividends, and so, far from being neutral instruments by which non-profit purposes are and may lawfully been pursued, are required, like the other corporations, to aim at conducting a lucrative activity.

f. Constitutional principles in the sense of the for profit nature of SOC.

But also from a constitutional standpoint, certain relevant principles might be invoked, so to defend the lucrative nature of SOCs in Italy. In particular, under art. 23 of constitution, "*no personal or pecuniary obligations may be imposed, unless provided for by law*". According to art. 97 of constitution, public administrations are to be organized on the basis and pursuant to law provisions.

Art. 23 is relevant since it makes it unconstitutional any general (and not specifically grounded on law[23]) imposition to private shareholders of economic sacrifices in view of the public interest: and economic sacrifices are also those to which private shareholders would be subject, as a result of a hypothetical general (and unwritten) principle according to which SOCs may pursue public interest, also when in contrast with the profitability of the enterprise. In this respect, it is well clear the consistency between this interpretation of art. 23 of constitution and OECD requirement that general interest's obligations shall be mandated to SOCs only insofar as specifically and transparently declared and imposed. However, under art. 23, not only the sacrifices are to be transparent, but also grounded on a clear and sufficiently detailed legislative provision: in other terms, not simply based on a different (more informal or in any case not legislative) statement of objectives (for example, a provision of the by-laws or other sources of "soft law", even of public law nature, like ministerial guidelines or similar provisions).

Art. 97 is relevant, insofar as it requires that the qualification of an entity as a public body (as such certainly belonging to the administration and so an instrument of its organization) is based on a decision of the legislator, and not on the mere factual circumstance that a private law entity is under a public entity dominance and involved in an activity of public interest.

[22] Art. 6, par. 11. To be subject to this provision, the corporation needs to be so economically connected to the public sector, to be inserted, for statistical purposes, in the list of public administrations, prepared by the National Institute of Statistics (Istat).

[23] Law means a legislative act of the parliament, of the regional legislative assemblies, and of the government (law-decrees and legsilative decrees).

Finally, such constitutional principles should also suggest a prudential interpretation of the laws establishing SOCs: in order to avoid an elusion of arts. 23 and 97, before concluding for a not-for profit nature of the specific SOC at stake, one should look for clear (and not debatable and equivocal) legal directions. In other terms, the relevance of the mentioned constitutional principles is not just that of excluding that a public interest purpose may be arbitrarily mandated to a SOCs without any law base, but also that of prescribing that SOCs established by law cannot be viewed as not for profit-ones merely based on the fact that the legislator mandates that they are involved in an activity of specific public relevance. By contrast, in absence of different, unequivocal, legislative indications, we should deem that where a given public law provision refer to a corporation, it wants to apply the civil code, and thus to have the SOC fully governed by private law and, as a result, (also) by sect. 2247.

g) European law principles in the sense of a private and for profit nature of SOCs.

The opinion according to which SOCs would not be (necessarily) for profit entities, it is strictly connected to a more general theory, developed in 1970s by a corporate law scholar[24], who tried to demonstrate a so called general (i.e., not only related to SOCs, but potentially relative also to privately owned corporations) "decline" of the lucrative purpose in corporations.

The criticisms that we are about to discuss in relation to this general theory, will offer the opportunity also to introduce the topic of the contribution that European law may provide on the nature and legal regime of SOCs.

In fact, the opinion in question is essentially based on the circumstance that the implementation of the first EC directive on company law[25] has eliminated any reference to the nullity-invalidity of the corporation, when set up in violation of its typical legal purpose[26].

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[24] SANTINI, *Tramonto dello scopo lucrativo nelle società di capitali,* in *Riv. dir. civ.*,1973, 133. This Author was well aware of the potential relevance of his theory also, and particularly, with respect to SOCs.

On the relevance of such theory on the subsequent opinion in terms of neutralization of SOCs, see for example, RENNA, *Le società per azioni in mano pubblica. Il caso delle S.p.a. derivanti dalla trasformazione di enti pubblici economici ed aziende autonome dello Stato,* Torino, 1997, especially 216, who in fact defines the corporation as "*neutral organizational model*" (5).

Lastly, also GRUNER, *Enti pubblici a struttura di S.p.A.: contributo allo studio delle società "legali" in mano pubblica di rilievo nazionale*, Torino, 2009, 28, that again follows a perspective based on the alleged neutralization of corporations.

[25] First Council Directive of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (68/151/EEC).

The directive was implemented in Italy by means of art. 3 of d.p.r. 1127 of 1969.

[26] This as a consequence of art. 11 of Directive 68/151/EEC: "*The laws of the Member States may not provide for the nullity of companies otherwise than in accordance with the following provisions: 1. Nullity must be ordered by decision of a court of law; 2. Nullity may be ordered only on the following grounds: (a) that no instrument of constitution was executed or that the rules of preventive control or the requisite legal formalities*

As a consequence, the agreement by which a corporation is set up would be a neutral (i.e. without legal purpose) one, and, thus, a not for profit-corporation would be a legally admissible entity, fully in conformity with the legislative requirements.

This is not the right place to comprehensively discuss the merit of this theory. We just wish to note that the first EC Directive is very clear in stating that (primary) condition for its application is the fact that the entity at stake is a for profit one. And in fact, it makes reference to (and is intended to cover exclusively companies falling within the definition of) art. 58, par. 2, of the EC Treaty, by which ""*Companies or firms" means companies or firms constituted under civil or commercial law, including co-operative societies, and other legal persons governed by public or private law, save for those which are non-profit-making*". In this connection, it appears frankly a bit paradoxical that the lucrative purpose might be deemed "neutralized" by a national legal innovation, in reality implementing a directive, whose condition of applicability is, precisely, the same lucrative purpose.

Also the second directive on corporate law[27] may play a significant role.

This directive has codified, in fact, the principle of equal treatment to all shareholders: "*For the purposes of the implementation of this Directive, the laws of the Member States shall ensure equal treatment to all shareholders who are in the same position*" (art. 42). Now, it is true that the principle literally regards corporate law, only insofar as specifically addressed by the same directive[28]. But, the directive covers many important profiles of corporate law, and, among them, that of distribution of dividends[29]. In such a way, then, the equal of treatment (also) in relation to the right to dividend seems to receive a specific protection at European legislative level.

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were not complied with; (b) that the objects of the company are unlawful or contrary to public policy; (c) that the instrument of constitution or the statutes do not state the name of the company, the amount of the individual subscriptions of capital, the total amount of the capital subscribed or the objects of the company; (d) failure to comply with the provisions of the national law concerning the minimum amount of capital to be paid up; (e) the incapacity of all the founder members; (f) that, contrary to the national law governing the company, the number of founder members is less than two. Apart from the foregoing grounds of nullity, a company shall not be subject to any cause of non-existence, nullity absolute, nullity relative or declaration of nullity".

[27] Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent.

[28] But see JAEGER, *Privatizzazioni, profili generali,* in *Enc. giur. Treccani,* vol. XXIV, Roma, 1995, 5, according to which the equal treatment principles would represent the base of the entire European company law, as such regarding any profile of this law .

Furthermore, it seems certainly still relevant and of central importance, since as been recently codified also by directive 2007/36/EC on the exercise of certain rights of shareholders in listed companies, whose art. 4 established that "*The company shall ensure equal treatment for all shareholders who are in the same position with regard to participation and the exercise of voting rights in the general meeting*".

This means, in practice, that a system under which the common interest of all the shareholders may be sacrificed in view of the public interest (i.e., in view of the interest of a specific shareholder) would be of (at least debatable) conformity even with the equal treatment principle, as codified by art. 42 of Directive 77/91/EEC. In particular, it seems easy to agree that imposition by the majority shareholder of an economic sacrifice to the corporation with the aim of better pursuing the general-public interest, does not simply represent a way by which the state may "*gain from the corporation's activities, in ways that other shareholders cannot*"[30], but is substantially equivalent to an anticipated distribution of dividends in a disproportional way.

But the potential contribution of European Law on the legal purpose of SOCs and other aspects of their regime (and in particular on an hypothetical attribution to public authorities as shareholders of privileged position) is even more significant. In particular, it is time to introduce what, so far, probably represents the major reason of interest of the European case-law: the golden share doctrine.

3. Golden share and other privileges of the State and other public entities as shareholders.

In the annotations to Chapter 3 on equitable treatment of shareholders, OECD suggests that "*The state and state-owned enterprises should recognise the rights of all shareholders and in accordance with the OECD Principles of Corporate Governance ensure their equitable treatment and equal access to corporate information".* This with the consequence that "*governments should, as far as possible, limit the use of Golden Shares and disclose shareholders' agreements and capital structures that allow a shareholder to exercise a degree of control over the corporation disproportionate to the shareholders' equity ownership in the company*". Moreover, as to the ownership and voting structure of the company, according to OECD (chapter V) "*It is important that the ownership and voting structures of SOEs are transparent so that all shareholders have a clear understanding of their share of cash-flow and voting rights. It should also be clear who retains legal ownership of the state's shares and where the responsibility for exercising the state's ownership rights are located. Any special rights or agreements that may distort the*

[29] See art. 15.

[30] We quote here the wording of GILSON & MILHAUPT, *Sovereign Wealth Funds and Corporate Governance: a Minimalist Response to the New Mercantilism*, *Standford Law Review*, 60, 2008, 1345, 1361.

ownership or control structure of the SOE, such as golden shares and power of veto, should be disclosed"[31].

More in general, as far as possible (i.e., probably until not clearly necessary, in conformity to the principle of proportionality[32]), the common corporate law should be preserved: "*When streamlining the legal form of SOEs, governments should base themselves as much as possible on corporate law and avoid creating a specific legal form when this is not absolutely necessary for the objectives of the enterprise. Streamlining of the legal form of SOEs would enhance transparency and facilitate oversight through benchmarking. It would also level the playing field with*"[33] .

In other terms, the guidelines express a tendential disfavor in respect to golden shares, even if without assuming an absolutely negative approach. Provided that fully transparently publicized and justified by real public interests reasons, golden shares are, in fact, accepted.

The European case-law on golden share is too well known to require a comprehensive description here. So we will shortly examine only which are, in our view, the most significant (especially from the Italian perspective) judgments and, most of all, the real principles we can derive from the European Court of Justice (ECJ), in order to understand the European basic requirements as to the regime of SOCs in Europe and in Italy.

In the judgment on the *Volkswagen* case[34], ECJ declared in contrast with the freedom of circulation of capital, a German law introducing certain privileges (derogatory from common corporate law) in relation to the appointment of directors and the majorities required for certain resolutions of the general assembly, because such to destroy "*the symmetry between capital strength and possibilities of participation in the management of a company*"[35]. Among the other reasons why similar law provisions were deemed to create unacceptable restrictions to the private investments, in fact, the Court noted that "*in certain special circumstances, the Federal and State authorities in question may use their position in order to defend general interests which might be contrary to the economic interests of the company concerned, and therefore, contrary to the interests of its other shareholders*."[36].

The specific problem of the economic impact of golden shares has been previously raised by a 2006 judgment, in which, again, the Court underlined the risk of deterrence

[31] P. 45.

[32] In this sense in relation to OECD guidelines, see CLARICH, *Società di mercato e quasi-amministrazioni*, in *www.giustizia-amministrativa.it*.

[33] P. 20 of the OECD *Guidelines.*

[34] ECJ, 23 October 2007, in case C-112/05, *Commission v. Federal Republic of Germany*.

[35] Point 72 of the conclusions.

[36] Point 79.

against private investments of the imposition, by the State, of public interest purposes, in contrast with the lucrative ones[37].

Similarly, in the judgment on the case AEM[38], the ECJ has held that "*Article 56 EC must be interpreted as precluding a national provision, such as Article 2449 of the Italian Civil Code, under which the articles of association of a company limited by shares may confer on the State or a public body with a shareholding in that company the power to appoint directly one or more directors which, on its own or, as in the main proceedings, in conjunction with a provision such as Article 4 of Decree Law No 332 of 31 May 1994, which became, after amendment, Law No 474 of 30 July 1994, as amended by Law No 350 of 24 December 2003, which grants that State or public body the right to participate in the election on the basis of lists of the directors it has not appointed directly, is such as to enable that State or public body to obtain a power of control which is disproportionate to its shareholding in that company*". And this notwithstanding the fact that the special rights given to the municipality of Milan by the by-laws (in itself a private law act, ordinarily approved by a resolution of the general shareholder meeting, and, thus, not an authoritative decision) were governed by the civil code, and, most of all, were similar to the powers that, using the instruments commonly available under private laws mechanisms, might have been at disposal of any common shareholder (for example, by means of shareholders agreements). In other terms, despite the fact that a disproportionate power of influence could have been obtained also by means of entirely common provisions of private-corporate law[39].

Indeed, the two cases seem particularly significant for four main reasons:

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[37]ECJ, 28 September 2006, joint cases C-282/04 e C-283/04, *Commission v. Kingdom of the Netherlands*, point 30: "*the Netherlands State might exercise its special rights in order to defend general interests, which might be contrary to the economic interests of the company concerned. The special shares at issue thus entail the real risk that decisions recommended by the organs of those companies as being in the economic interests of the latter may be blocked by that State*".

[38] ECJ, 6 December 2007, C-463/04 and C-464/04, *Federconsumatori.*

[39] The ECJ in fact observed that "*The existence of a restriction on the free movement of capital cannot be called in question by the arguments of the Comune di Milano and the Italian Government that, first, Article 2449 of the Civil Code falls within the scope of ordinary company law and, secondly, the right of the Comune di Milano directly to appoint directors was conferred voluntarily upon it by AEM's shareholders in general meeting and pursuant to a normal application of ordinary company law. It should be stated, first, that Article 2449 of the Civil Code enables only the State and public bodies with a shareholding in a company limited by shares to have the right to appoint directly one or more directors under the articles of association of that company. Given that, as stated in paragraph 17 of this judgment, the national court bases its reasoning on the premiss that the rule in Article 2449 of the Civil Code derogates from ordinary company law, there is no need to examine what the situation would be if that right were to give all shareholders, including private shareholders, an identical right of appointment. The mere fact that the national legislature has included in the provisions of the Civil Code governing such companies a measure designed specifically to confer special powers on the State or a public body with a holding in a company limited by shares cannot remove that measure from the scope of application of Article 56 EC*".

1. any disproportionate power of the state and other public entity seems unacceptable from an European law's standpoint, as such to discourage private investors;

2. disproportionate powers risk to specifically sacrifice the economic interests of the private shareholders, i.e. their right to participate to the corporate profits on equal basis;

3. it is immaterial whether the power at stake has a private or public law source, and so whether it may be defined as formally authoritative: the real point is whether the power at stake derives from a law provision that is applicable only to public entities; and this despite the fact that by means of ordinary instruments of private law (for example, shareholders agreements), it may be well possible to obtain similar privileges and that the source of the privilege is not an authoritative decision, but a private law act, like a corporation's resolution[40];

4. as a result of the judgment, in 2008[41], sect. 2449 of the civil code was amended, so to ensure that public authorities (in their capacity as shareholders) cannot directly appoint directors in such a way to exercise a disproportionate power on the corporation. In other terms, the proportionality principle between public authorities' equity participations and influence on corporations has been expressly introduced into Italian law.

Of specific interest it is also the case C-326/07[42], in which the ECJ declared inconsistent with European law the special powers conferred to the ministry of economy by the law-decree no. 474 of 1994, i.e. of the legislation that has mainly governed the process of privatization of SOCs in Italy.

In fact, notwithstanding various attempts, by means of regulations issued by the government implementing the provisions of law-decree no. 474, to make more detailed, selective and certain the conditions under which the special powers could be exercised, in the court's view, the legislative predetermination of the powers was not sufficiently detailed, giving to the government an excessive ambit of discretional power, in contrast with the

[40] Even more explicit the opinion of the Advocate General Poiares Maduro, delivered on 7 September 2006, par. 19: "*In my opinion, the fact that the powers of appointment of the Comune di Milano are based on a provision of private law does not preclude the application of Article 56 EC. In that regard, it is worth noting that, for the purpose of determining whether the free movement of capital is restricted where the State enjoys special powers in an undertaking, it is immaterial how those powers are granted or what legal form they take. The fact that a Member State acts within the framework of its domestic company law does not mean that its special powers cannot constitute a restriction within the meaning of Article 56 EC. (4) Otherwise, Member States would easily be able to avoid the application of Article 56 EC, by using their position as incumbent shareholders to achieve within the framework of their civil laws what they would otherwise have achieved by using their regulatory powers*"

[41] Law no. 34 of 2008.

[42] 26 March 2009¸ *Commission of the European Communities v Italian Republic*.

European requirement of making the golden share powers sufficiently legally certain, so to preserve the attractiveness of corporate investments within the European Union[43].

In sum, if , in relation to golden shares, we compare OECD guidelines and ECJ case-law, we find that both of them look with suspect at privileges conferred to the state as shareholder. However, the latter appears more radical in restricting the lawfulness of privileges to marginal situations, in which specific powers are strictly necessary and proportional. It does not seem casual, in this connection, that almost no national legislation on golden share proved to be accepted by ECJ, notwithstanding the fact that the concerned member states (among them Italy) had tried to make their laws as consistent as possible with a (by then) well established European case-law.

Based on the above, this case-law represents a powerful, and probably the strongest, reason of preservation of the private and lucrative character of SOCs in Italy and in the European Union.

In reality, there is almost no profile of SOCs private law regime that is not, at least to a certain degree, potentially protected by the European (anti) golden share case-law. In particular, it seems sufficiently clear that no possibility exists, in the light of this position of the European judges, to admit that the rights of (existent or potential) private shareholders to a management of the corporation pursuant to sect. 2247 of Civil code (i.e., aimed at the maximization of the profitability of the enterprise) may be limited, with the result of giving a privilege to the public shareholder, as such.

4. In house providing: toward a full (juridical) emersion of the substantial-economic connections between state and state-owned corporations?.

Under OECD guidelines "*The government should not be involved in the day-to-day management of SOEs and allow them full operational autonomy to achieve their defined objectives*", and "*The state should let SOE boards exercise their responsibilities and respect their independence*"[44]. In particular, "*The boards of SOEs should be assigned a clear mandate and ultimate responsibility for the company's performance. The board should be*

[43] "*Even if the criteria at issue concern different kinds of public interests, they are formulated in a general and imprecise manner. What is more, the lack of any connection between the criteria and the special powers to which they relate increases the uncertainty surrounding the circumstances in which those powers may be exercised and gives them a discretionary nature, having regard to the latitude enjoyed by the national authorities in making use of them. Such latitude is disproportionate in relation to the objectives pursued*".

fully accountable to the owners, act in the best interest of the company and treat all shareholders equitably"[45]. Moreover, "*SOE boards should carry out their functions of monitoring of management and strategic guidance, subject to the objectives set by the government and the ownership entity. They should have the power to appoint and remove the CEO. The boards of SOEs should be composed so that they can exercise objective and independent judgement.*"[46].

In sum, in OECD's view, corporations should conserve their decisional autonomy, and a real management role of the board of directors has to be preserved. This in order to ensure that, even if subject to the strategic objectives indicated by the public shareholders, directors are not simply required to follow the instructions issued by the dominant shareholder. On the contrary, they need to pursue, with independence of judgment, the best interest of all the shareholders, without discriminations between private and public interests.

These principles lead us to another important development of the European law of SOCs: the case-law on in house providing. According to ECJ's judgment on the case *Teckal*[47], as for the existence of a contract "*the national court must determine whether there has been an agreement between two separate persons*", therefore "*where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities*", this fact would, per se, exclude the existence of a contract and so the requirement of a public tender.

The theory at stake, initially developed in relation to an Italian public enterprise having the form of a public entity (a public law's consortium among local authorities), then has been extended to public enterprises, in the form of private law corporations. As a consequence, it is clearly material for our analysis.

However, with another judgment of 2005 regarding a corporation under the dominance of an Italian local authority[48], the ECJ offered a prudential interpretation of the real possibility of qualifying as in house the relationship with a private law corporation. In particular, no similar control may exist, when, like in the case of the this corporation, the concerned entity is market-oriented. This "market orientation" may be identified where the following elements are present:

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[44] Par. II, B and C, p. 13.
[45] Par. VI.A., p. 17.
[46] Par. VI.B-C, p. 17.
[47] ECJ, 18 November 1999, C-107/98.

(a) the fact of being a company limited by shares and the nature of this type of company (i.e., the fact in itself of being a private law corporation);

(b) the broadening of its objects, i.e. the fact of not being restricted, under by-laws, only to the public interest activities, specifically indicated by the municipality;

(c) the obligatory opening of the company, in the short term, to other capitals (private ones);

(d) the expansion of the geographical area of the company's activities, to the whole of Italy and abroad;

(e) the considerable powers conferred on its board of directors, with in practice no management control by the municipality.

Now, it is true that each of such features does not represent, per se, grounds by which excluding that an in house relationship may be at stake. However, it seems undeniable that, at least, most of these features jointly considered, exclude, in the ECJ's view, an in house relationship.

What seems mostly interesting, now, is analyzing how these elements are common and frequent, in the factual and legal experience of Italian SOCs:

a. the first element is present in the normality of the SOCs. We have already seen, in fact, that they generally belong to the realm of private law, being fully subject to the civil code, unless specifically provided for the contrary;

b. on the second element, no doubt that the corporation's object may be a clearly (and narrowly) defined. But, at the same time, it as well clear that, due to the implementation of the first EC directive on corporate law, the limitations to the corporation's object, contrary to the ultra vires principle, cannot be enforced toward third parties[49]. This means, in practice, that ultra vires acts are perfectly valid and enforceable, and that from an ultra vires act can simply arise a reason of liability for the concerned director, where he lacks a proper authorizations from the shareholders to perform it;

c. the obligatory opening to private investments is not a general feature (but has been and may be introduced by certain laws in view of accelerating the privatization process). However, unless specific law provisions establish the contrary, the shares possessed by public

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[48] 13 October 2005, Case C-458/03, *Parking Brixen GmbH. v. Gemeinde Brixen and Stadtwerke Brixen AG*.

[49] Art. 9, par. 1, of directive 68/151/EEC: "*Acts done by the organs of the company shall be binding upon it even if those acts are not within the objects of the company, unless such acts exceed the powers that the law confers or allows to be conferred on those organs*".

entities may be transferred without particular limitations. In other terms, it is always possible that shares are transferred to the private sector;

d. also with regard to geographical limitations, they may be introduced, but without being enforceable against third parties (unless such limitations are specifically grounded on special legislative provisions[50]);

e. as to the management powers and the role of the board, certain mandatory provisions of the civil code have to be mentioned. According to sect. 2380 *bis*, par. 1, (at least in corporations limited by shares) the management powers are reserved to the board of directors, on which rests the ultimate liability for any act that unlawfully produce a damage to the corporation[51]; moreover, under sect. 2449, par. 2, of civil code, even the directors of SOCs who have been directly (i.e., without a resolution of the general meeting) appointed by the public entity have exactly the same duties and liabilities of the others, ordinarily appointed by the shareholders. In other terms, they are required to act in the general best interest of the corporation, as opposed to the specific one of the public shareholder and are not subject to specific powers of the dominant (public) shareholder.

Specifically significant and directly related to Italy is also the case *SEA*, decided by the ECJ at the end of 2009[52]. There, ECJ observed that "*In view of the extent of the supervisory and decision-making powers they confer on the committees they set up, and also of the fact that those committees are made up of representatives of the shareholder authorities, provisions laid down in statutes such as those of the contracting company involved in the main proceedings must be regarded as putting the shareholder authorities in a position to exercise, through those committees, conclusive influence on both the strategic objectives of the company and on its significant decisions*". However, while the European judges recognized the potential relevance of such committees (established by the by-laws to implement the power of supervision to be exercised by local authorities), they also noted that "*The court making the reference is, however, of the view that Articles 8 bis to 8 quater of Setco's statutes, inasmuch as they refer to the joint and technical committees, are comparable to shareholders' pacts falling within Article 2341 of the Italian Civil Code. It infers therefrom that the control similar to that which the shareholder authorities exercise over their own departments which the machinery of those committees is intended to attain*

[50] Like, in the field of local services of general economic interest, art. 23 *bis*, law decree no. 112 of 2008 and art, of law decree no. 223 of 2006.

[51] Sect. 2380 *bis*, par. 1: "*The management of the enterprise is exclusively reserved to the directors, who perform all the operations necessary to realize the corporations object*".

[52] ECJ, 10 September 2009, case C-573/07, *Sea Srl.*

might be ineffective", concluding that it "*is a matter of the interpretation of rules of domestic law which it is for the court making the reference to settle*" and so "*Without prejudice to the determination by that court of the effectiveness of the relevant provisions of the statutes, it follows that, in circumstances such as those of the case in the main proceedings, the control exercised, through the bodies established under the company's statutes, by the shareholder authorities may be regarded as enabling those authorities to exercise over that company control similar to that which they exercise over their own departments*".

In other terms, ECJ seems to have held that the "similar control" requirement and then the connected alterations to the ordinary distribution of powers within the corporation need to be ensured by means of binding legal provisions, as opposed to a mere factual situations or even agreements that are enforceable only *inter partes,* i.e. that have a just relative (and not absolute, *erga omnes*) enforceability, like, for example, shareholders agreements. It does not suffice that, *inter partes* or, all the more, *de facto*, the most important management choices are reserved to the public entity-shareholder. This dominance is to be based on clear (and fully enforceable) legal powers.

In sum, it seems that, in ECJ's view, to create an in house relationship, the dominance exercised on the corporation has to be legally certain, but, at the same time, (much) more intense than that allowed under the common principles of corporate law[53].

But if this interpretation of the judgment is correct, it follows that no real in house providing relationships may actually exist in Italy. No doubt, in fact, that factual situations of (even deep or full) dominance may exist and, as a matter of fact, frequently exist in SOCs, but such situations are in contrast with the provision of the civil code and so of always debatable validity and, in any case, effective and enforceable only *inter partes.* In other words, they are not such to provide any (legally) certain dominance.

These conclusions appear even more persuasive if we consider the interactions between, respectively, in house and golden share ECJ's lines of decisions. And in fact, how an in house relationship can exist, when the fact in itself of conferring privileges to the State as shareholder in principle represents a violation of the freedom o circulation of capitals? In

[53] ECJ, 11 May 2006, case C--340/04, *Cabotermo*, in *Racc.* I 4137 ss., especially point 38: "*It is apparent from the case-file that the statutes of AGESP Holding and AGESP confer on the Board of Directors of each of those companies the broadest possible powers for the ordinary and extraordinary management of the company. Those statutes do not reserve for the Comune di Busto Arsizio any control or specific voting powers for restricting the freedom of action conferred on those Boards of Directors. The control exercised by the Comune di Busto Arsizio over those two companies can be described as consisting essentially of the latitude conferred by company law on the majority of the shareholders, which places considerable limits on its power to influence the decisions of those companies*".

other words, if it is true that as a condition to have an in house relationship, the dominance exercised on the corporation needs to be grounded on something different from the common principles of corporate law, how is this situation possible, in light of golden share case-law, that contrasts any alteration of common corporate law, in favor of the public shareholder?

In this perspective, the only acceptable answer might turn out to be the following: at least in Italy, where SOCs are legally qualified (unless differently provided by specific laws) as real and autonomous enterprises, with a lucrative purpose and (a necessary) managing autonomy , the in house relationship appears difficult (if not impossible) to be recognized.

This conclusion, although well consistent with the position in our view so far expressed by the ECJ, nonetheless does not appear fully satisfactory.

In fact, the concept of in house has been created by the ECJ essentially on the basis and pursuant to the model offered by the concept of enterprise developed within European competition law. In this respect, in particular, it easy to agree that the public procurements law may be viewed as a special part of the competition law, for and insofar as it is intended to create a sort of "artificial" intra European Union competition, in markets, otherwise, tending to be closed to foreign undertakings. In particular, we have to make reference to the idea that, consistently with the American theory known as single enterprise theory[54] (as opposed to the intra-enterprise conspiracies theory[55]), a group of corporations may represent, especially in relation to prohibitions of anticompetitive conspiracies, a single enterprise, as such not sanctionable, when the parent company coordinately decides the economic behavior of the subsidiaries[56].

Indeed, in a legal system that considers a group of corporations that are subject to a real guide and economic coordination by the parent corporation substantially as a single

[54] USA Supreme Court, *Copperweld Corp. V. Independence Tube Corp.,* 467 U.S. 752, 777 (1984): "*... the coordinated activity of a parent and its wholly subsidiary must viewed as that of a single enterprise for purposes of § 1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one ...*".

[55] According to which "*The fact that there is common ownership or control of the contracting corporations does not liberate from the impact of the antitrust laws*". See *Kiefer-Stewart Co. V. J.E. Seagram & Sons., Inc.*, 95 *L. Ed. Ed.*, 219 (1950); Timken Roller Bearing Co. V. United States, 95 *L. Ed.*, 1199 (1951); *Perma Life Mufflers Inc. v. International Parts Corp.*, 20 *L. Ed.*, 2d, 982 (1968); *United Staes v. Citazines & S. Nat. Bamk*, 45 *L. Ed.*, 2d, 41 (1975).

[56]ECJ, 24 October 1996, case C-73/95, *Viho Europe BV*: "*When a parent company and its subsidiaries form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their course of action in the market, but carry out the instructions issued to them by the parent company which wholly controls them, the fact that the parent company' s policy, which consists essentially in dividing various national markets between its subsidiaries, might produce effects outside the ambit of the group which are capable of affecting the competitive position of third parties cannot make Article 85(1) applicable, even when it is read in conjunction with Article 2 and Article 3(c) and (g) of the Treaty. On the other hand, such unilateral conduct could fall under Article 86 of the Treaty if the conditions for its application were fulfilled".*

enterprise, it would be difficult to understand why the same should not be true as to the relationships among a public entity and a controlled corporation. In reality, on the contrary, in the relationships with public entities, to recognize the existence of an economic unity is even easier: especially in a system (like the Italian one) in which the law directly addresses the economic nature of the corporation (lucrative purpose, established by sect. 2247 of civil code), where a corporation is fully controlled by the public entity-shareholder and therefore is obliged to behave in contrast with its entrepreneurial nature so that public-general objects-interests prevail on its own egoistic (lucrative) purposes, it seems easy to conclude that the public entity and its subsidiary are an economic unity, without any appreciable economic separateness. In other terms, when the corporation nature is neutralized, then such a "denatured" enterprise represents no more than a department of the public entity, and so its distinct legal personality can easily be disregarded.

In such an approach, at least originally based on a substantial-economic perspective (as opposed to a formal-merely legal one), the current requirement, by the European judges, of a formal demonstration of the power of domination does not persuade: the domination, the group "hierarchic" relationship, should be, on the contrary, better considered as a (mainly) *de facto* situation, as opposed to something that needs to be certainly grounded on formal legal relationships[57]. Otherwise, in a similar formalistic approach, no group relationship might ever be found: under the ordinary corporate law, indeed, it would be almost impossible to justify why a subsidiary corporation might be obliged to follow the guidelines of the parent corporation. However, the absence of formal duties for subsidiaries corporations to recognize the dominance of the parent corporation has never prevented the ECJ from giving relevance to the group relationship.

5. Preliminary conclusions. National, European and OECD principles: consistent views as to state-owned corporations' nature and legal regime?

It is time, now, to try to reach certain preliminary conclusions on the positions assumed, respectively, by Italian and European legal systems and OECD in respect to SOCs.

[57] On the point, see also IAIONE, *Local Public Entrepreneurship and Judicial Intervention in a Euro-American and Global Perspective,* 7 *Wash. U. Global Stud. L. Rev.* 215, according to which "*It is practically impossible for most public or private undertakings to fulfill this second Teckal criterion. Contracting authorities comply with procurement rules before concluding contracts with their subsidiaries, insofar as those subsidiaries are organized as public or private limited companies. Therefore, the choice of a public or private limited company as a form of organization is appreciably less attractive. Such extensive interference with the organizational sovereignty of the Member States and, in particular, with the self-government of many municipalities is not necessary for the market-opening purposes of public procurement law*" (250).

In doing so, we will also extend our analysis on national case-law, so to give a more comprehensive idea of the living law in Italy.

Italian law presents, to a certain extent, a double-faced situation.

As we have tried to show, the positive law seems, in sum, fairly clear: SOCs are governed by private-civil law (and, as a consequence, by the lucrative purpose established by sect. 2247 of civil code), unless otherwise laid down by special legislative provisions. Such (exceptional) provisions, however, especially in the light of the constitutional and European principles that we have mentioned and shortly investigated, should be identified prudentially. In other terms, the fact of attributing to SOCs, without the support of an unequivocal special legislative intention, a binding public interest purpose (such to compress their lucrative purpose: i.e. without specifically and transparently compensation for the connected economic losses) and, thus, of qualifying them as having a public nature, seems legally incorrect, as well as a source of uncertainty (uncertainty, as we know, already opposed at European level, in the context of the golden share case-law).

But what does it happen in the context of national case-law? Are decisions of Italian judges in general terms consistent with the mentioned legislative choices?

In reality, the Courts trends are less clear than the legislative positions. Especially the administrative judges (probably as a reaction to the privatizations realized in the last 20 years[58] and whose merely formal character has been in many cases noted[59],) tend to privilege a so called substantialist approach, in which they recognize a crucial (but not well explained as to its legal grounds) importance to the connections between the corporation and the dominant public entity. In doing so, they often assert the neutral nature of the SOCs and so their (at least partial) subjection to public interest purposes and public-administrative law[60].

[58] Prior to the privatization process, in fact, administrative courts in principle accepted the idea of the general private law nature of SOCs. See, for example, in this sense, Consiglio di Stato, 20 August 1946, no. 266, according to which " *a corporation with commercial purposes, although fully or partly owned by the state, is in principle a private law entity, and may assumed a public law nature only provided that a particular organization or public interest objectives are assigned to it*".

[59] On this, see CASSESE, *Le privatizzazioni: arretramento o riorganizzazione dello Stato?,* in *Riv. dir. pubbl. com.*, 1996, 579, 587, who speak of an Italian process of privatization sometimes merely opportunistic and characterized by transformismo.

On the use of the corporatization by (especially) local authorities with the aim to circumvent public laws, the same CASSESE, *Il diritto amministrativo nell'ultimo decennio,* in *Giorn. dir. amm.*, 2004, 5, according to which where administrations decide to participate to corporations "*they are not really interested to private law, but to the private law form, for the usual purpose of circumventing, or escaping from, public law restrictions*".

[60] For example, Consiglio di Stato, 15 May 2002, no. 2636, in *Foro amm., CDS*, 2002, 1310 ss., where public entities owned corporations are defined as "*neutral organizational instruments*". According to Consiglio di Stato, 10 April 2000, no. 2078, in *Foro amm*. 2000, 280 ss., especially public entities owned corporations would demonstrate the increasing neutralization of corporations.

In other terms, in their view, the reasons of public interest that the activities exercised by SOCs involves seem to replace (at least partially) the lucrative purpose and so the SOCs are (and should be) governed by an hybrid set of rules, in which public law principles are due to play a very important role[61].

This line of case-law expresses a, per se, well understandable concern: avoiding that, by means of the use of private law corporations, public duties and guarantees are eluded. Particularly at risk, as noted by the OECD, are "*the administrative controls*"[62], i.e. the internal controls and safeguards that are aimed to ensure the efficiency, impartiality and lawfulness of the activity of the administrations. However, the administrative courts, in our view, have not, so far, demonstrated a real capability of creating and following a consistent approach and, most of all, to provide a satisfactory explanation on when and at which conditions public law is due to prevail on private law: as a consequence, substantialist approaches have proved to obstruct the formation of general rules, so creating a too uncertain and unpredictable situation.

In essence, even if we might cite also judgments, (especially of the ordinary courts) that recall and apply the legislative choices in terms of private nature of SOCs[63], Italian law appears, at the same time, sufficiently clear (as to the legislation) and too unclear (due to the case-law, for it does not always follow the legislation, but introduces reasons of uncertainty, in the attempt of avoiding the elusion of public law through private forms of organization of the administrative activities).

European law, again, expresses a general approach inclined to defend the subjection of SOCs to common-private law. In fact, once (and to the extent that is) ensured the full applicability of European law also where a SOC is involved in a given activity subject to European law vertical obligations (it is not permitted to use SOCs as means to elude European law duties, as well shown, in the field of public procurements, by the notion of

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Lastly, Consiglio di Stato, 20 January 2009, no. 269: "*in the case-law of Consiglio di Stato is undisputed the substantial nature of the activity performed of the AQP, to which it has been recognized the qualification as body governed by public law*".

[61] For certain interesting criticisms to the views of the administrative courts on the nature of privatized corporations, see, among others, NAPOLITANO, *Le società pubbliche tra vecchie e nuove tipologie,* in *Riv. soc.,* 2006, 999 ss.; PIZZA, *Società per azioni di diritto singolare, enti pubblici e privatizzazioni: per una rilettura di un recente orientamento del Consiglio di Stato,* in *Dir. proc. amm.,* 2003, 486 ss.; SCOCA, *Il punto sulle c.d. società pubbliche,* in *Dir. econ.,* 2005, 239 ss. e RORDORF, *Le società "pubbliche" nel codice civile,* in *Le società,* 2005, 423 ss.

[62] *Implementation Guide, draft 2008,* 6.

[63] For example, Cass., sez. un., 19 December 2009, no. 26806, that has denied that, in the normality of cases, directors of SOCs are subject to the jurisdiction of State Auditors Courts.

On the topic, see TORCHIA, *La responsabilità amministrativa per le società in partecipazione pubblica,* in *Giorn. dir. amm*., 2009, 791.

body governed by public law), then European law mainly wishes to preserve the freedom of investment and so to keep attractive for investors shares of SOCs. To reach this primary purpose, there is no other choice but to fully preserve the rights (especially the economic ones) of the actual or potential private shareholders, prohibiting any privilege in favor of public shareholders. In such a way, the traditional approach of many European legal systems of conferring privileges to public shareholders is completely reversed. By contrast, public entities cannot be granted even of those special rights that, by means of common-private law, could be well provided to private shareholders.

In OECD guidelines, again, a primarily private-law approach emerges. In particular, the ordinary principles of corporate governance suggested by OECD are generally speaking extended also to SOCs (whose specific guidelines, in fact, "*should build on, and be fully compatible with, the OECD Principles of Corporate Governance"*[64], albeit OECD recognizes that SOCs "*face some distinct governance challenges*"[65], in terms, typically, of "*undue hands-on and politically motivated ownership interference…*"[66] and this is arguably the main reason why particular guidelines have been draft). But, obviously, the absence of a specific legal system to which making reference (by definition, the guidelines are intended to apply to different jurisdictions, in which the principles of corporate law can be even substantially different) makes OECD principles a bit undefined. In particular, it is not fully clear what it means exactly that corporations have to pursue the common interest of all the shareholders: are these common interests to be defined case by case by the by-laws, or are to be deemed necessarily coincident with the common economic interests of the shareholder, i.e. the profitability or, in any case, other common economic objectives? In other terms, to what extent interests different from the economic ones (common to all the shareholders) may be lawfully pursued, without a specific compensation? If one reads the draft of implementation paper issued in 2008 by the same OECD, he finds that the Organization recognizes that the various legal system are different (also) in this (essential) respect: "*In some countries the governance is more or less identical to the governance of privately owned commercial companies. In other countries the governance is more tied to the owners' political interests, especially when the plans of the specific SOE are decided or agreed in detail between the owner and the company. Regardless of the means by which the SOE Guidelines are implemented, it is essential that authorities always scrutinise the effectiveness and the*

[64] P. 18.
[65] P. 10.
[66] P. 10.

relative costs and benefits of alternative approaches"[67]. But, if it is true what we have said about the centrality of the legal purpose in the reconstruction and interpretation of the legal regime and nature of a given entity, this uncertainty about the objectives of SOCs risks to represent a serious limitation.

In sum, in this respect, Italian law appears more precise and (as a result) certain than both European law and OECD guidelines: it provides a clear and mandatory rule on the purpose that all the corporations and so also SOCs are (legally) required to pursue. Moreover, since such purpose is the duty to maximize a specific interest (the profitability-dividends to be distributed by the corporation to shareholders), it is able to offer, in addition, a not ambiguous and immediately applicable rule on how to balance this legal purpose with other possible ones: in reality, the latter can be lawfully pursued only to a very limited extent, i.e. as long as they may be harmonized with the lucrative purpose.

6. The identification between SOCs and the State and the application of public law: recognizing that under the veil of the legal personality a public entity is operating.

It is time, now, to address a very important (albeit not specifically covered by the OECD guidelines, exclusively dedicated to the corporate governance of SOCs) profile of the legal issues that SOCs pose, especially in the perspective of a public lawyer: the role that public law may and should play in their legal regime.

In fact, the circumstance that, under Italian law, SOCs are, as a matter of principle, lucrative and private law entities, does not exclude, in our view, the potential applicability of public law. In this respect, a preliminary clarification is due: for the purpose of this paper, public law is (narrowly) meant as the law applicable only to legal persons which are public entities; no doubt that, in an increasing number of cases, rules that belong to public law in a broader sense (basically, the law governing the exercise of the typical, public, activities of administrative authorities) are applicable also to private entities, insofar as they concretely exercise administrative activities and powers. For example, recently, the law on administrative procedure as been amended so to make it clear that, where exercising an administrative power, SOCs and other corporations in public entities' hands, have to comply with the procedural guaranties[68]. Obviously, in relation to the rules applicable regardless the nature of the concerned entity but exclusively in relation to the nature of the activity in itself,

[67] *An implementation Guide to Ensure Accountability and Transparency in State Ownership*, draft 2008, 4.

[68] Art. 29, par. 1, law no. 241 of 1990, as amended by law no. 69 of 2009.

there is no need of disregarding the private personality of the SOCs is at stake. Other rules, on the contrary, at least in their current interpretations, require that a public entity is at stake: for example, this seems to be the case of art. 97, last par., of constitution, that imposes public procedures to select public employees. This provision (intended to ensure the impartiality of the selection through the imposition of an administrative procedure as a legally required instrument of recruiting), in principle and unless otherwise provided by a specific law provision, does not govern the recruiting by private entities, even when involved in public activities or services or under a strict public control.[69]

In particular, for the purpose of discussing the elusion of laws applicable only to public entities, it is worth starting from art. 97, par. 1, of constitution, according to which public administrations have to be organized in full compliance with legislative provisions.

In the light of such constitutional principle, specifically in relation to the administrative organizations (and so also with regard to the use of corporations, as instruments of organization of the state), it is well clear that the legal system cannot accept any elusion-circumvention of public laws obligations and guarantees, by means of the use of private legal persons.

But, more in general, the legal system cannot reasonably tolerate that the legal personality represent an instrument by which circumventing mandatory rules and principles. Otherwise, the principle of non-contradiction (within the legal system) would be violated[70]. In particular, as well explained, for the first time, by the American case-law, in relation to a corporation used to circumvent the application of a mandatory rule, *"[A] corporation will be looked as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of*

[69] However, within a more general legislative trend of extending to public owned corporations certain public law rules intended to ensure a proper organization and financial management typical of ordinary public administrations, similar duties of public selection have been imposed also to certain local authorities' owned corporations by art. 18, par. 1, law decree no. 112 of 2008. But, at a legislative level, the duty to recruit and, more in general, to internally manage SOCs, pursuant to public law still appears exceptional and to be based on specific legislative requirements.

70 On this, see in particular SERICK, *Forma e realtà della persona giuridica*, Milano, 1966, 37 (orig. title *Rechtsform und realitat juristischer personen*, Tubinga, 1956), in partic. 88-100, whose thoughts have been greatly influenced by the American case-law, that the German scholar explained to continental lawyers.

For a reflection on public entities'owned corporation regime in the light of Serick's contribution, see NIUTTA and POLICE, *Forma e realtà nelle società per la gestione dei servizi pubblici locali,* in *Riv. dir. comm.*, 1999, 477.

persons"[71]. As subsequently reaffirmed by the USA Supreme Court, therefore, "*corporate entities may be disregarded when used to subvert clear legislative intent*"[72].

As a result, the legal system should address any form of fraudulent use of the legal personality of the corporation through (as primary and most direct reaction) disregarding the formal separateness between the corporation and its shareholders[73].

Thanks to this disregard, in case of SOCs, the corporation will be viewed as nothing but a department of the public entity-shareholder, and so all the mandatory rules that its establishment was aimed to elude are, ultimately, applied.

In this connection, the real issue and challenge seem that of establishing at what conditions we may say that the corporation is used to circumvent public law obligations and therefore to be disregarded. And in fact, in Italy, the subjection of SOCs to private law is something absolutely normal and physiologic, as it is provided for by the civil code. So it would not be sharable a position that refuses in any case and a priori the subjection of SOCs to common-civil law.

Nonetheless, we can identify situations in which the corporate veil can (and, we think, is due to) be disregarded: where there is a so clear and pervading domination of the public entity on a SOC, that it may be concluded that the SOC at stake represents a mere instrumentality of the public entity, whose substantial nature of lucrative enterprise has been concretely annihilated. This denaturizing of the normal corporate nature is in contrast with sect. 2247 of civil code and so it denounces the elusive use of the corporate veil. In other terms, the conditions to be met for considering a corporation a real corporation are not satisfied, and this may justify a disregard of the autonomous legal personality of the corporation in order (and to the extent necessary) to enforce mandatory public rules.

In this respect, the American case-law appears of great interest.

In particular, we can mention the decisions *Lebron v. National Railroad Passenger Corporation*[74] of 1995 and *First National Bank v. Banco para el Comercio exterior de Cuba* of 1983[75].

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[71] *United States v. Milwaukee Refrigerator Transit Co*., 142 Fed. 247, 255 (C.C.E.D. Wis. 1905).

[72] In relation to action of the *Federal Energy Regulatory Commission*, see in this sense, USA Supreme Court, *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986).

[73] See, recently, *United States v. Bestfoods*, 524 U.S. 51 (1998), according to which "…*there is an equally fundamental principle of corporate law, applicable to the parent-subsidiary relationship as well as generally, that the corporate veil may be pierced and the shareholder held liable for the corporation's conduct when, inter alia, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf*".

[74] 513 U.S. 374.

[75] 81 U.S. 984.

In the former judgment (by the American scholars usually classified as an expression of the State action doctrine[76]) after having noted that ""*Amtrak was created by a special statute, explicitly for the furtherance of federal governmental goals. As we have described, six of the corporation's eight externally named directors (the ninth is named by a majority of the board itself) are appointed directly by the President of the United States - four of them (including the Secretary of Transportation) with the advice and consent of the Senate*" and that Amtrak is subject to a federal government control such intense that the public shareholder acts *"not as creditor, but as a policymaker"*, the Court expressed the opinion according to which Amtrak should be subject to the constitutional duties imposed to federal agencies (and in particular to the first amendment of the American Constitution). And, it is worth noting, the judges reached this conclusion, albeit the federal act establishing the corporation expressly excluded a nature of Amtrak as a federal agency. However, in the view of the judges, "*It is not for the Congress to make the final determination of Amtrak's status as a government entities for purposes of determining the constitutional rights of citizens affected by its actions".* Otherwise, it would be even too easy to elude the constitutional safeguards[77].

This decision has influenced also state courts.

In particular, the Supreme Court of Alaska[78] declared the Alaska Railroad Corporation subject to certain constitutional obligations of transparence provided by the state constitution. In fact, in Alaska's judges view, the public notice clause[79] has to be complied with by the SOC, notwithstanding the fact that the Alaska Railroad Corporation Act establishes the *"legal existence independent of and separate from the state"* of the corporation. However, in light of the circumstances that the Governor nominates almost all the director and, above all, the corporation *"is not in the temporary control of Alaska, as a*

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[76] See in particular BUCHANAN, *A Conceptual History of the State Action Doctrine: the Search for Governmental Responsibility*, in 34 *Hous. L. Rev*. 333, especially 423, who notes that "*In substance, Lebron is a case about the "ultimate contact" between an actor and the state. That ultimate contact occurs when the actor in question is government itself, not merely a private actor who is to some extent entwined with the state.* [n610] *When that actor assumes a nonhuman, corporate form, as in Lebron, it is simply not possible for the actor to act in a private capacity for state action purposes*".

[77] In fact, you can read that: *"It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form"*; *"This reliance on the statute is misplaced. Section 541 is assuredly dispositive of Amtrak's status as a Government entity for purposes of matters that are within Congress' control - for example, whether it is subject to statutes that impose obligations or confer powers upon Government entities, such as the Administrative Procedure Act, 5 U.S.C. § 551 et seq. (1988 ed. and Supp. V), the Federal Advisory Committee Act, 5 U.S.C.App. § 1 et seq., and the laws governing Government procurement, see 41 U.S.C. § 5 et seq. (1988 ed. and Supp. V….")..*

[78] *Laverty* v. *Alaska Railroad Corporation*, 12 December 2000, *sp –5338,* in *West's Pacif Reporter*, vol. 13 P.3d, 2001, 725.

[79] Art. VIII, par. 10, of Alaska constitution, prohibiting the "*disposal of state lands, or interests therein,…without prior public notice*".

private corporation whose stock comes into [State] ownership might be", but, on the contrary, it is in a permanent and stable state's control, aimed at pursuing certain specific state's objectives (*"was created by the legislature to carry out the essential government function of operating the Alaska Railroad"*), the public nature of the corporation was recognized In fact, according to the Court, the SOC *"remains, by its very nature, what the Constitution considers to be government"* and so the legislator cannot exclude the subjection of the corporation to constitutional duties.

Similarly, in the *Bancec* case, the Supreme Court held that a SOC in principle is to be deemed as a separate entity from the State-shareholder ("*we agree with the court of appeals that there should be a presumption in favour of recognizing the juridical autonomy conferred upon foreign state-owned instrumentalities by their own law*"). But, ""*Although a corporation and its shareholders are deemed separate entities for most purposes, the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy. . .*".

To understand whether in the concrete case an unlawful use of the corporation was at stake, the Court investigated the substantial-economic nature of the relationships between the Cuba government and the corporation[80].

In this respect, the fact that Bancec was wholly owned by the Government, with all the directors appointed, again, by the Government, one of whose ministers was the chairman of the corporation, convinced the Court to disregard its separateness from the State of Cuba[81].

Such American approaches appear in certain respect similar to the European in house doctrine. However, the in house doctrine, if it has certainly the merit of underling the importance of an investigation on economic-substantial profiles in order to reach a conclusion on the law applicable via an identification (or not) between corporation and public shareholder, it presents, as noted, also certain limitations. In fact, so far, as noted before, it

[80] According to BLUMBERG, *The multinational Challenge to Corporation Law. The Search for a New Corporate Personality*, Oxford, 1993, 99, "*The opinion* [that expressed in Bancec case] *is an outstanding demonstration of the overriding principle that application of enterprise theory and rejecton of entity law should be determined according to the particular considerations presented by the case at bar in the light of the underlying policies and objectives of the law in the area in question. The Court rejected application of the formal conceptualism of "piercing the veil jurisprudence*"".

[81] "*The Government supplied all of its capital and owned all of its stock. The General Treasury of the Republic received all of Bancec's profits, after deduction of amounts for capital reserves. A Governing Board consisting of delegates from Cuban governmental ministries governed and managed Bancec. Its president was Ernesto Che Guevara, who also was Minister of State and president of Banco Nacional. A General Manager appointed by the Governing Board was charged with directing Bancec's day-to-day operations in a manner consistent with its enabling statute*".

has showed a too rigid position, requiring a formal-legal grounded power of domination, that appears, in reality, incompatible with the principles of (at least Italian) corporate law.

By contrast, American case-law seems more flexible and ready to accept that the transformation of public enterprises in something different (i.e. in mere departments of the dominant public administration) may well occur and, most of all, this transformation, even where in disputable coherence with corporate law and/or existing only de facto, needs to be effectively addressed. In particular, in such an event, an identification between the concerned corporation and the dominant, public, shareholder, is in the interest of the legality and of the full enforcement of public law guaranties.

More delicate is, from certain standpoints, the reconstruction of the legal regime of SOCs established by a specific law or on the basis of it.

At first, they may have the nature of a public entity, where the legislator (unequivocally) confers them a public interest purpose. This public interest purpose, combined with, in addition, the control exercised by the public entity as a shareholder, may well meet not only the condition to fall within the European law definition of body governed by public law, but also the requirements, that, traditionally, in Italy, have been proposed in the effort to qualify an entity as a one of a public nature: i.e., the facts of being legally mandated with a public interest purpose and of being linked by means of a formal relationship of control with a public entity. It would appear, in fact, too formalistic a theory according to which only forms of control through public law mechanisms are relevant in order to characterize an entity as a public law one. In this connection, it does not seem surprising that, in a specific case, Italian legislator has already qualified a SOC as a public law's corporation, i.e. as a public entity[82].

However, in the great majority of the cases, it is difficult to find sufficient legal indications such to conclude in the sense of the substitution of the lucrative purpose with a public interest one in SOCs established pursuant to a specific law. As a result, the non application of public laws appears established directly by the legislator, exactly like in relation to other SOCs. Nonetheless, also in this case, mandatory public laws cannot be eluded through the separate legal personality of the corporation: thus, insofar as the SOC is improperly, in concrete, transformed in something different from a real, lucrative, enterprise, public laws are due to be applied, as a form of reaction of the legal system against an elusive use of the corporation form.

All the more, in case of SOCs established by or on the basis of a specific law, the constitutional provisions cannot be disregarded. And this is true for both the public administration (in the concrete exercise of its powers of dominant entity) and the legislator, wherever it establishes a SOC with such (unconstitutional) intention (or, in any case, effect).

As well noted by the American courts, in fact, the legislator does not have the power to decide on the scope of application of constitutional duties and guaranties. So, unless being ready to admit a potentially extensive elusion of constitutional rules, where a SOC has the substance of a formal public entity (thanks to its, legally determined, pervasive submission to the dominant public entity, such to transform it in something different from a real and for profit enterprise), then the constitutional guaranties should be fully applied. More in details, when it is clear that the intention of the legislator was to elude constitutional provisions, this should in principle represent a reason of unconstitutionality for the concerned legislative provision. Otherwise, when a so clear intention is not identifiable, the interpreter is due to prefer a construction according to which the legislator did not intend to, improperly, modify the constitutional status of a given SOC, as being aware of its lack of competence for addressing such profiles. Similar arguments can be extended to European law obligations, as also European Union's rules are superordinate in respect to Italian law provisions. In the field of European law, in any case, and specifically as to public procurements, the notion of body governed by public law has exactly the primary rationale to prevent member state from eluding EU law, by means of SOCs (and other private legal persons), in reality substantially equivalent to public entities. But even when this notion does not apply, the ECJ is ready to consider, at certain conditions and for given purposes, SOCs equivalent to formal public bodies[83].

In Italy, Constitutional Court has already proved to deem that the constitutional status of SOCs may, at certain conditions, be the same of public bodies.

In particular, the constitutional judges[84] held that art. 97, last par., of constitution applies also to local authorities owned corporations, which, for being in a in house

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[82] Agecontrol s.p.a., as set up by art. 18, par. 9, of law no. 887 of 1984, *"in the form o f company limited by share with public law personality*".

[83] ECG, 12 July 1990, case C-188/89, *A. Foster and others v British Gas plc*.: "*Unconditional and sufficiently precise provisions of a directive may be relied upon against organizations or bodies which are subject to the authority or control of the State or have special powers beyond those which result from the normal rules applicable in relations between individuals . They may in any event be relied upon against a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals.*".

[84] Corte cost., 1 February 2006, n. 29, in *Giur. cost*., 2006, 1732 ss..

relationship, are granted with a direct award of local public services' concessions. A regional law, thus, may lawfully impose the duty to recruit employees by means of a public selection, since, by doing so, it is correctly implemented "*the principle laid down by art. 97 of Constitution in relation to a corporation which, being fully owned by public entities, although formally private, may be assimilated, as to the legal regime, to public entities*".

However, the position of the Constitutional Court is more complex: in a later judgment, it observed that SOCs belong, at least from a formal standpoint, to the realm of private law, even if they may be involved in administrative activities in a strict sense, meant as activities that do not present any entrepreneurial nature, not being subject to any form of competition[85]. Therefore, they may be defined, (but exclusively) from the standpoint of the activity performed (as opposed to their nature as legal persons), as quasi-administrations.

More in general, to fully recognize, at certain conditions, that the state operates through a given SOCs may help to provide effective and proportional answers also to other important, global, issues.

For example, as to SWFs, they seem to raise concerns essentially insofar as used to pursue strategic-political (as opposed to genuinely economic- entrepreneurial) aims. As already noted[86], in fact, real concerns do not arise where SWFs invest with the mere purpose of maximizing their profit (like any other private investor), but where they invest in strategic activities, regardless the economic rationality of the investment.

In this perspective, SWFs could be identified and treated as equivalent to foreign states, and, thus, subject to the same legal limitations to investments hypothetically applicable to foreign states, if and to the extent that their concrete economic behavior proves to be politically-strategically (instead of economically) driven. In a similar scenario, in fact the very circumstance that a given SWF performs investments politically driven may denounce, at the same time, its lack of real economic-entrepreneurial autonomy from the state and the risk that, through the formal separateness of the SWF from the foreign state-dominant shareholder, this latter eludes the limitations to investments, which are established by the concerned legal system.

7. Conclusions: a legal regime in search of a higher degree of certainty; to what extent a global regulation of SOCs is of use?

[85] Corte cost., 1 August 2008, n. 326.

[86] See on this, GILSON & MILHAUPT, *Sovereign Wealth Funds and Corporate Governance: a Minimalist Response to the New Mercantilism*, *Standford Law Review*, 60, 2008, 1345.

In Italy, the legal regime of SOCs has always been discussed and difficult to be satisfactorily defined. This is probably due to the almost unsolvable contradiction between the for profit purpose generally assigned by sect. 2247 of civil code and the public interest that, at least to a certain extent, it is difficult to deny to be the main motive why a public entity may set up and then dominate the corporation. As noted by an Italian scholar, SOCs represent, in themselves, an "insincere formula" [87].

However, two main lines of evolution seem identifiable both in Europe and in Italy.

At first, a tendency to better safeguard the private law nature of SOCs. In other terms, also thanks to OECD guidelines, it is by now widely accepted the idea that a corporatization which does not involve a real (formal) privatization represents a (even more) insincere formula, whose legal and economic rationality is hard to understand.

For example, as to in house corporations, why using the corporate form with the complications that the mandatory rules of corporate law create, when, traditionally, Italian law knows public entity specifically mandated to exercise entrepreneurial activities and whose full "instrumentality" to public interest has never been doubted[88]?

Secondly, a growing awareness that, albeit SOCs are generally governed by private law, they cannot become an instrument of elusion of public law.

This concern has been and may be addressed in various ways:

- by disregarding the veil of legal personality, so to identify the public entity, which acts through the corporation;
- by qualifying SOCs as, substantially or even formally, public entities, that, as such, are naturally subject to the (full) application of public law;
- by introducing "public law" rules that are applicable regardless the private or public law nature of the subject at stake.

Obviously all the three systems may be of use and contribute to a reasonable and balanced legal regime of SOCs.

For example, in this respect, the American state action doctrine seems to fall into both the first and the last of the above categories: on a side, the specific connection that grounds the application of the state action's doctrine can be represented by a particularly intense

[87] ASCARELLI, *Tipologia delle società per azioni e disciplina giuridica*, in *Riv. soc.*, 1959, 995, 1013.

[88] We make reference to the so called "enti publici economici", that stands for "economic-entrepreneurial public entities".

corporate control by the federal or state government[89]; on the other side, also the nature of the activity at stake can, at certain condition, per se justify the application of constitutional guarantees.

However, for the purpose of ensuring an acceptable level of legal certainty, what should be certainly avoided is a too confused situation. Deciding the applicable legal regime case by case, in fact, while it may ensure a higher level of flexibility, risks to prevent citizens from knowing in advance which laws are applicable .

In this respect, in our view, to ensure a good compromise between legal flexibility, full enforcement of public law and legal certainty, a way could be the following:

- at first, to clarify what are, according to the principle of the concerned legal system, the definition of public entity and the rules applicable only to public entity (public law in a strict sense).
- secondly, to define what are, in abstract terms, the conditions that the definition of corporation requires to be met: for example, in Italy, a really entrepreneurial and lucrative activity.
- thirdly, to analyze the SOC concretely at stake in the light of such definitions, so to understand whether its legislative provision falls within the category of public entity, or, while being governed only by civil code (and so in principle being a private law entity), it has been concretely used in way inconsistent with its legal nature, i.e. substantially transformed in a department of the dominant public administration;
- lastly, where the SOC is a public entity or has been used in a way inconsistent with its legal nature, to apply, for both the internal organization-activities and the external ones, public laws.

In sum, in the efforts to safeguard the enforcement of public laws, the distinction between corporations and public entities, contrary to what too often happens in Italian case-law, should not be denied or attenuated. On the contrary, in our opinion, only once the distinction between the two different categories is fully appreciated, it is possible to effectively understand whether, in a given and concrete case, a SOC has been used in a way incompatible with its nature and with the aim of eluding mandatory public law provisions. By

[89] According to PADFIELD, *Finding State Action when Corporations Govern*, in 82 *Temp. L. Rev.* 703, all the corporations, for the very fact of having received the privilege of incorporation, could be, in principle, subject to the State action doctrine, when involved in activities of specific public interest.

contrast, when the boundaries between the different categories are undefined, ensuring an acceptable level of legal certainty is, inevitably, an harder task.

Alternatively, to offer an acceptable level of certainty, public laws in a strict sense might be replaced, by the legislator, with rules which apply only on the basis of the activity at stake (whether of specific public interest and/or clearly incompatible with an entrepreneurial management), or, alternatively, with rules which, while still based on the subject at stake as opposed to the activity, are expressly extended also to SOCs and other enterprises in public hands.

But this evolution appears far from being completed and, as to an extension of public laws to SOCs, in contrast with the civil code's provisions currently in force, according to which, on the contrary, the full application of private laws to SOCs should represent a general and prevailing principle.

It is certainly shareable that, as particularly held by the ECJ in the case *Meroni v. High Authority* of 1958[90], delegation to private entities of the exercise of public activities cannot result in a reduction of the guarantees provided by the legal system vis-à-vis public-authoritative powers. In fact, no delegation of powers more intense than those possessed by the delegating authority (whose powers are limited by the very existence of public law guaranties) is (legally and logically) admissible. However, this convincing principle is difficult to apply in relation to guaranties that regard the internal organization of the public entities and other instrumental activities, as opposed to powers directly enforceable toward private citizens. In such a latter case, in fact, the point is more that of understanding whether a given organizational form complies with its condition of existence, or, on the contrary, is

[90] Judgment 13 June 1958, case 9/1956.

For a last application of this doctrine, see judgment 12 July 2005, jointly cases C-154/04 e C-155/04, *The Queen, ex parte: Alliance for Natural Health,*, *Nutri-Link Ltd e Secretary of State for Health* and 26 May 2005, case C-301/02 P, *Carmine Salvatore Tralli e Banca centrale europea*, where, in particolar, at par. 43, the Court observes that "*With regard to the conditions to be complied with in the context of such delegations of powers, it should be recalled that, as the Court held in Meroni (see [1958] ECR 149 to 152, 153 and 154), first, a delegating authority cannot confer upon the authority to which the powers are delegated powers different from those which it has itself received. Secondly, the exercise of the powers entrusted to the body to which the powers are delegated must be subject to the same conditions as those to which it would be subject if the delegating authority exercised them directly, particularly as regards the requirements to state reasons and to publish. Finally, even when entitled to delegate its powers, the delegating authority must take an express decision transferring them and the delegation can relate only to clearly defined executive powers*.".

For a similar approach in Germany, see LOHSE, *Fundumental Freedoms and Private Actors – towards an 'Indirect Horizontal Effect',* in *Eur. Publ. Law*, 13, 2007, 159, especially 168: "*It is unanimously assumed that fundamental rights bind the 'private' actors, as the state must not 'abandon' its obligations by delegation or the choice of the organizational form*".

On the comprehensive issue in European law, see LENAERTS, *Regulating the Regulatory Process: Delegation of Powers in the European Community*, in *Eur. Law Rev.*, 1993, 23, in partic. 40, who underlines the persistent significance of *Meroni*'s case.

intended to escape from certain mandatory rules, whose formal condition of application is the public nature of the concerned entity.

In conclusion, to recognize - as consistently suggested, although with different level of clarity and intensity, by OECD guidelines, European law and Italian civil code - that the legal regime of SOCs belongs, in principle, to the realm of private law, seems one of the steps to avoid, in conformity with the case-law of ECJ expressed in the case case *Meroni,* that the delegation (or exercise) of public activities through SOCs may affect the role of public law guarantees, and, in such a way, the internal coherence of the legal system .

The above remarks lead us to a final comment on the usefulness of OECD guidelines, and, more in general, of a global regulation in this field.

If it is true that, as we have tried to demonstrate thanks to the example represent by the Italian system, the legal purpose of a SOC, where, like in Italy, legally established in terms of maximization of the profits to be distributed to shareholders, is such to characterize its full nature (i.e., also its substantial features, as opposed to its mere and formal legal regime); in particular, if it is true that such element is capable of directly conditioning the entire legal regime of SOCs, in terms both of internal organization-corporate governance and laws applicable to the external activities, a conclusion seem possible.

As demonstrated by OECD guidelines, probably any global regulation tend to be at the same time weak and narrow.

Weak, because the main issue of corporate governance, and especially of corporate governance of SOCs, i.e. the regulation of conflicts of interest within the corporation, cannot be effectively (and consistently) addressed without having clearly in mind which is the legal requirement governing the corporations' purpose: for example, inevitably, it is substantially different to state that public interest obligations and duties are to be pursued in a transparent way, in a legal system in which the lucrative purpose applies to SOCs, as opposed to one in which, on the contrary, the circumstance that the corporation is under the dominance of a public entity transforms, at least partly, its legal purpose or even its nature as public or private entity. As a consequence, the same real chances of the OECD guidelines to influence in a uniform way the corporate governance of SOCs in distinct jurisdictions risks to be affected by the differences among the various legal systems in relation to the legal purpose and nature of SOCs.

Too narrow, because only having in mind the formal and substantial nature of SOCs, in our view, it is possible to understand when and to which extent the internal coherence of the legal system requires to apply public laws to a given SOC. And in order to understand

this nature, as we hope to have shown in relation to Italy, it seems necessary to analytically study each legal system, avoiding preconceived ideas (SOCs may be fully private entities or, on the contrary, fully public entities, or private entities that, at certain conditions, are subject to public law. It depends on the positive choices of the national legislator).

In sum, are OECD guidelines useless? This would be an exaggerated conclusion: they have the merit of proposing a private law and entrepreneurial view of SOCs. And, as observed above, this represents not only a position in line with Italian as well as European law, but also such to help to reach, at a global level, a conceptual clarification on the nature and legal regime of SOCs. In essence, although with the limitations we have discussed, if concretely applied, the guidelines may give a contribution in the direction of a more effective legal regime for SOCs.