Nuove Autonomie

RIVISTA QUADRIMESTRALE DI DIRITTO PUBBLICO

Anno XXIX – Nuova serie
N.2/2020 (maggio-agosto)

INDICE

DOTTRINA

RECENSIONI

Efficient governance and spending constraints in public holding companies of Campania Region. Notes from two strategic sectors*

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1. *Methodological premises and reasons of the research. Brief notes on the issue of public participation companies in Italian law*

The topic of publicly owned companies represents a central research ground for legal science, widely investigated from all perspectives, still in motion, as it represents the point of intersection between public and private, between economic development and budget deficit; they represent dynamic points between different interests and sectors and are, in some ways, the rebalancing point of the State's own powers[1].

However, it seems necessary to delineate territorial, argumentative and prospective boundaries of the survey conducted in this forum, which is based on extremely specific profiles, in order to outline critical aspects of models proposed in Italian law.

The theme dealt with in this essay concerns the need for companies with public participation to become protagonists of economic development in the territory – this is imposed by the company's role, beyond its nature – in the publicity key, but in the awareness that it is often necessary to act in a situation of deficit[2].

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* This paper represents an expanded and updated version the text of the speech performed by the author at the *IIAS* (The International Institute of Administrative Science) conference, '*Effective, Accountable and Inclusive Governance'*, held at Nanyang Techological University (*NTU*), Singapore, in June 2019. The author wuold like to thank the chairs of the session, Professors Loredana Giani and Aristide Police and all speakers for interesting suggestions for reflection.

[1] See authoritative work by F. Merusi, *Società a partecipazione pubblica e ricomposizione del potere esecutivo*, in *Lo Stato*, 2019, 12, 303 ff.; V. Cerulli Irelli, M. Libertini (eds), *Iniziativa economica pubblica e società partecipate*, Milano, 2019.

[2] Cf. S. Marotta, *La 'spending review' nei servizi pubblici locali: necessità di razionalizzare, volontà di*

In this limited regional territorial perspective, two strategic sectors, health and transport, are taken as benchmarks to assess how organizational choices and corporate governance have responded to underlying needs.

In this perspective briefly outlined, the aim of this work is to provide an overview on the current state of companies owned by the Campania Region, also in relation to the rationalization and simplification plan, in the constant search for a difficult balance between efficient governance[3], state of crisis and subsequent commissarial regimes that have bound and guided strategic choices of the Region over last years. The analysis of the regional context focuses on specific companies operating in the field of health and public transport, two key sectors to be taken as a benchmark to be able to draw conclusions on a topic that has a central importance in the current legal and policy context.

The clarification of the title in relation to notion of efficient governance is necessary because the same term has different meanings in relation to administrative activity; here the focus is on the need to direct the management of companies with public participation to the production of an economic advantage, as occurs for companies between private entities.

The whole analysis must be read in view of the need for publicly owned

privatizzare, in *Munus*, 2014, 2, 261 ff.; although previous to the T.U. currently in force, it should be noted that there is a report on spending restrictions for investee companies that is current in terms of content, C. Barisano, *Il sistema delle società partcipate degli enti locali. Doveri di governance, adempimenti dei comuni e operazioni straordinarie*, in *www.legautonomie.it,* 2009; for an evaluation of the economic performance and their impact on the state's financial position, it is useful to consult the annual report (the last available for consultation dates back to 2017), MEF (Dipartimento del Tesoro), *Rapporto sulle partecipazioni delle Amministrazioni Pubbliche*, avaiable at *www.dt.mef.gov.it*; the analysis carried out by F. Francario, *Le società a partecipazione pubblica strumentali dopo la cd. 'spending review' (alla luce della sentenza Corte Cost. n. 229/2013),* in *Corr. Mer.*, 2013, 10, 934 ff. (spec. par. 2).

[3] On this delicate balance, see the recent and complete analysis carried out by V. Manzetti, *Quale performance amministrativa negli enti locali in situazione di grave squilbirio di bilancio*, in *www.federalismi.it*, 2019, 17, 2, legal reflection should focus on the link between situations of serious budgetary imbalance and administrative activity, or rather between the strict constraints on expenditure imposed by the serious financial situation of the body and the functions and services that the administration is required to exercise and provide; W. Giulietti, *Funzione pubblica del bilancio e tutela dell'interesse finanziario tra tecnica e diritto*, in *Dir. econ.*, 2019, 2, 298, the central and political principle of sustainability, although entrusted in today's historical situation to a mainly technical mechanism and centred on the respect of parametric limits to indebtedness, even if characterized by a certain political flexibility, has an undoubted impact on the role and position of the public administration, with direct effects, both in relations with other operators in society, and with regard to the claims of citizens; in a different perspective, i.e. the necessary profitability of publicly owned companies, among others, recently, see F. Goisis, *Il Testo unico in materia di società a partecipazione pubblica: economicità e necessaria redditività dell'investimento pubblico*, in *Dir. econ.*, 2019, 1, 23 ff.; concerning the governance of public companies, please see G. D'Attorre, *La governance delle società pubbliche*, in *Giur comm.*, 2020, 2, 262, 271 ff.; J. Bercelli, *Prevalenza dei principi di diritto amministrativo e nozione di società a controllo pubblico nel Testo Unico in materia di società a partecipazione pubblica*, in *Diritto amministrativo e società civile*, I, Bologna, 2018, 449, 458.

companies to be oriented in a profit-oriented way, therefore to produce wealth on the territory[4], and budgetary constraints to be understood as a constant situation, as a fundamental element to be considered, in terms of rule and no longer as an exception[5].

The issue of economic development at local level through publicly owned companies has been gradually forgotten and abandoned by the legal landscape, entirely concentrated with the countless novelties and issues that have required constant updating of the subject[6].

To mend this abandonment (although unintentional), it is necessary to draw attention to the special report of Court of Auditors on public limited companies with local public capital, approved by resolution of 6 December 1991, no. 80, underlined the need to promote local economic development through the participatory corporate form[7].

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[4] *Ex multis*, see A. Maltoni, *Società a partecipazione pubblica e perseguimento di interessi pubblici*, in *Dir. econ.*, 2019, 2, 187; on the same terms, see S. Del Gatto, *Le società pubbliche e le norme di diritto privato*, in *Giorn. dir. amm.*, 2014, 5, 489 ff.; M. Roversi Monaco, *I limiti operativi delle società partecipate per i servizi pubblici locali*, in *Munus*, 2013, 1, 89 ff., on the subject of scope for action and margin of company management; see 2015, S.A. Frego Luppi, *Holding pubblica e responsabilità per attività di direzione e coordinamento*, in *Dir. econ.*, 2, 273 ff. (spec. par. 6, 292 ff.), thrifty management of resources and respect for rules of correct management are principles that govern all administrative action, even if conducted in a corporate form. In addition to the efficiency of the action set out in art. 97 Cost., the objective of balancing the budget goes against decisions, clearly administrative, of an uneconomic nature; R. Ursi, *Il governo del gruppo pubblico locale al tempo della spending review*, in *Munus*, 2014, 3, 415 ff., 418, (spec. par. 2), economic results of public companies have direct effects on the budget of the local authority, which, for its part, maintains the so-called steering power intact.

[5] About this topic, reference is made to the authoritative and clarifying analysis carried out by G. Colombini, *La dimensione finanziaria dell'amministrazione pubblica e gli antidoti ai fenomeni gestionali di cattiva amministrazione*, in *www.federalismi.it*, 2017, 13, 4 ff., which focuses attention on possible remedies in order to avoid analysing the constant financial deficit in which public administrations are usually acting; in a research perspective that focuses on the need for an indicator, which in the context of organizational flexibility can also be applied to companies owned by public administrations, see G. Iacovone, *Indicatori di valutazione e buon andamento amministrativo nella performance dei pubblici dipendenti*, in *www.federalismi.it*, 2020, 1, 4 ff.

[6] On the subject see M. Dugato, *Le società a partecipazione pubblica tra efficienza e responsabilità*, in *www.cameramministrativaroma.it*, 2018, efficiency is a legal and economic concept and often in relation to companies with public participation overlaps with the efficiency of the administration-member. This nuance is obviously more difficult to grasp in relation to in house companies, where the administration is the only partner.

[7] On the subject, see the analysis by F. Cavazzuti, *Società a partecipazione locale: saggio di diritto provvisorio*, in *Giur. comm.*, 1995, 685 ff.; on the subject of territorial economic development through the use of shareholdings, reference should be made for a complete analysis to T. Ascarelli, *Corso di diritto commerciale*, Milano, 1962, 209 ff. quoted by G. Racugno, *Crisi d'impresa di società a partecipazione pubblica*, in *Riv. soc.*, 2016, 6, 1144 ff., 1150; on this issue, in view of the removal of some administrators from the board of directors of an investee company, the aim of economic development was underlined by Cons. St., Sec. V, 7 September 2017, no. 4248, in *Foro amm.*, 2017, 1830.

In its broadest perspective, the theme can be read as a synthesis of the development of a new economy in line with the principle of horizontal subsidiarity[8].

In this direction, a brief clarification is appropriate, since development to which public-sector companies are called to contribute does not correspond to an investment, but to a model of management and good governance[9].

From this point of view, economic development is to be understood as a common benefit that the 2016 Stability Law (Law 28 December 2015, no. 208) has provided only for the so-called benefit companies but that can be extended to all companies with public participation, as a principle of general management that characterizes these legal entities.

Before examining the reference territorial context, it seems appropriate to provide a brief general development framework on the subject, in an obviously not exhaustive sense, but to trace the minimum coordinates of the theme, and, in view of the two main lines of research, i.e. efficiency of governance and spending limits, also of terms chosen, which have led to this situation of financial unbalance. In the second part of the analysis, the aim is to analyse various competencies of companies in which Campania Region has a holding (in total or in part), in relation to the different skills attributed to them and the relative themes that emerge in this regard; in particular, the analysis focuses on companies that have tasks related to health sector and public transport sector, strategic fields that can provide a privileged vantage point for the whole analysis.

In order to pursue models of good governance (that in relation to administrative action it remains a vague and indefinite concept and, for these reasons, it risks being left meaningless), the public administration can use various instruments that can have an impact both on the organization and on administrative action, understood as activity in the widest sense.

However, it seems appropriate to set some minimum coordinates, obviously

[8] On this point, current are the reflections carried out by G. Terracciano, *La natura giuridica delle società a partecipazione pubblica e dei consorzi per la gestione dei servizi pubblici locali*, in *Foro amm. TAR*, 2010, 7-8, 2733 ff.; M. Antonioli, *Analisi e riflessioni in tema di responsabilità amministrativa, società a partecipazione pubblica e riparto tra le giuridisdizioni*, in *Dir. proc. amm.*, 2013, 3, 835 ff.; S. Valaguzza, *Le società a partecipazione pubblica e la vana ricerca della coerenza nell'argomentazione giuridica*, in *Dir. proc. amm.*, 2014, 3, 862 ff., with a specific reference to relations between the specialty regime and liability of directors of companies in question.

[9] On this aspect, *ex multis*, it is mentioned the leading position taken by V. Buonocore, *Autonomia degli enti locali e autonomia privata: il caso delle società di capitali a partecipazione comunale*, in *Giur. comm.*, 1994, 1, 5 ff.; G.C. Felice, *La costituzione delle società a partecipazione pubblica locale per la gestione dei servizi pubblici locali e l'autonomia privata degli enti pubblici territoriali*, in *Giur. comm.*, 1995, 6, 998 ff.; M. Nicotra, *L'oggetto sociale delle società di capitali a partecipazione comunale: servizio pubblico o attività imprenditoriale?,* in *Riv. not.*, 1997, 1-2, 203, that operated an analysis starting from the corporate object, freeing the analysis from the public and private subjectivity of society, in general and current terms, see A. Pajno, *Gli enti locali e gli strumenti di diritto privato*, in *Dir. amm.*, 2010, 3, 555 ff.

not exhaustive, of the development of the issue of publicly owned companies (a shining example of administrative activity carried out with private law instruments, specifically in corporate form[10]) in Italian administrative law, in order to apply these coordinates to the central theme of the survey, i.e. a regional perspective.

The central theme of this analysis is represented by the public participation society, a theme in which perspectives of action and organization intersect; the field is in itself very extensive and it can be studied from far-reaching perspective angles that are different from each other, and not necessarily related to public law. Over last thirty years, this issue has acquired an unavoidable legal and economic importance[11].

The issue of private intervention in the organization brings together problematic profiles and traditional contrasts that have seen different solutions being compared[12].

To be limited only to the classic issues of administrative law, companies with public participation involve questions of organization, entrustment of public services (and thus of relations between administration and market, and free competition), participation of the private sector in the activity of the public administration (although conducted in corporate form).

In addition, the issue of publicly-owned companies represents an important

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[10] In a critical sense on this aspect, see reflections carried out by F. Merusi, *Sentieri interrotti della legalità*, Bologna, 2007, 11 ff., special private law that governs these corporate structures is a reserve of public power camouflaged as an apparent references to private autonomy. The neutrality of the company model has been interpreted by the legislator as an unlimited possibility to alter the typical scheme of public limited companies, to introduce the public interest as the exclusive corporate purpose and to guarantee a power of control of the public body over the company; G.F. Campobasso, *La costituzione di società miste per la gestione dei servizi pubblici locali: profili societari*, in *Riv. soc.*, 1998, 2-3, 390 ff., on the gestural profile and any pathological derivations on the subject.

[11] Please refer to the reflections developed by M. Cammelli, *Le società a partecipazione pubblica. Comuni, Province e Regioni*, Rimini, 1989, 14 ff., that noted the few organic standards in this area. However, there was already a trend towards the increasing importance of the phenomenon compared to the 1960s. At regional level, that represents the field of investigation carried out here, the public companies were responsible for the economic development of the territory, the strengthening of tourist facilities and the provision of effective services to firms. Moreover, economic studies have been conducted since the 1980s and for all see G. Ferraro, *Le società a partecipazione comunale nell'attuale situazione legislativo-finanziaria*, in *Economia pubblica*, 1980, 1, 4 ff. For a more time-dated analysis, see A. Arena, *Le società commerciali pubbliche: natura e costituzione, contributo allo studio delle persone giuridiche*, Milano, 1942; F. Cammeo, *Società commerciale ed ente pubblico*, Firenze, 1947; G. Treves, *Le imprese pubbliche*, Torino, 1950; more recently, M. Renna, *Le società per azioni in mano pubblica. Il caso delle S.p.a. derivanti dalla trasformazione di enti pubblici economici*, Torino, 1997; from the perspective of commercial law, understood as a necessary governance-related reading, V. Dominichelli (ed), *La società pubblica locale tra diritto privato e diritto amministrativo*, Padova, 2008.

[12] For a detailed reconstruction of the theme, see F. Manganaro, *Le amministrazioni pubbliche in forma privatistica: fondazioni, associazioni e organizzazioni civiche*, in *Dir. amm.*, 2014, 1, 45 ff.

point of reference for various classical legal institutes, not only for administrative law, but also specific commercial law profiles, such as the state of insolvency of public companies.

The phenomenon, in its original expression, dates back to the 1930s, when, in order to face the economic crisis, the State decided to directly intervene in the economy to take on the role of entrepreneur and used private instruments, since structures and principles of public law were not well reconciled with economic action, which requires autonomy, understood as freedom (private) and not discretion (public)[13].

Originally, the possibility for administrations to set up public companies was only based on article no. 11 of Civil Code, that attributes private law capacity to public bodies, but there was a lack of a comprehensive legal framework of reference.

The development of the theme over the last century has led to a wavering trend, which is not uniform, also in relation to the concerted objective with which the local authorities used this corporate model.

The diffusion of public participation companies at the beginning of the 1990s was linked to the phenomenon of privatization[14], under which public economic bodies were transformed into public limited companies. In absolute

[13] S. Cassese, *Amministrazione pubblica e interessi in Italia*, in *Dir. soc.*, 1992, 2, 224 ff.; on the subject, for a reconstruction in a historical key, see F. Merusi, *Cent'anni di municipalizzazione: dal monopolio alla ricerca della concorrenza*, in *Dir. amm.*, 2004, 1, 37 ff.

[14] The subject has been examined by authoritative scholars, but here it is necessary to mention G. Berti, *Intervento alla tavola rotonda sulla 'Privatizzazione'*, in *Dir. Reg.*, 1993, 3, 807 ff., privatization is a polysemic term that corresponds to a complex transformation in which the administrative function is no longer faced with authority but with the individual's rights; on the polysemy of the term, please refer to S. Cassese, *Le privatizzazioni: arretramento o riorganizzazione dello Stato?*, in *Riv. it. Dir. pubbl. com.*, 1996, 3-4, 579 ff.; on the different privatization models, see also C. Ibba, *Le tipologie di privatizzazioni*, in *Giur. comm.*, 2011, 5-6, 464 ff.; C. Marzuoli, *Le privatizzazioni fra pubblico come soggetto e pubblico come regola*, in *Dir. pubbl.*, 1995, 3, 396, the use of private models instead of public power (as authority and not as function) achieves the objectives of the Constitution. The variety of organizational models and the institutional exercise of economic activities have favoured the spread of a negative notion of public power. Privatizations are a complement for the whole system but they have to be reason for the production of additional rules; S. Cassese, *La nuova Costituzione economica*, Roma, 1995, 20 ff.; L. Torchia, *Il controllo pubblico della finanza privata*, Padova, 1992, 328 ff., according to which it was appropriate to rethink critically the notions of public and private and adapt them to the idea of a State as a regulator and no longer as an entrepreneur. In other words, public managerial functions are reduced and regulatory and control functions are expanded; A. Perini, *Le trasformazioni in atto nel settore dei servizi di pubblica utilità: privatizzazione, concorrenza e regolazione*, in *Dir. soc.*, 1997, 2, 237, the reasons behind privatization also include the influence of EU law and the opaque links between politics and economics that emerged in Italy in early 1990s; V. Parisio, *Privatizzazione e istituti di accelerazione dell'azione amministrativa: prime brevi considerazioni*, in *Dir. Reg.*, 4, 1993, 863 ff.; F. Balassone, *Finanziamento e produzione di servizi pubblici: il sistema dei quasi-mercati*, in *Econ. Pubbl.*, 1994, 1, 6 ff.

terms, privatization corresponds to a reduction of the public power in economy and the relative placing of certain regimes under the rules of private law.

It should be made clear, as has been authoritatively observed[15], that privatization does not mean non-regulation but that the social values protected by the Constitution can lead to adjustment of market mechanisms; in other words, there are values and interests that must be imposed as limits to market rules.

A distinction needs to be made, as the transformation of national public authorities into companies showed a legislative willingness to move public authorities backwards from direct economic action, while at regional and local level the corporate model responds to different, heterogeneous purposes that need to be analysed on a case-by-case basis.

Privatization implies a new model of State (and consequently of administration) in relation to the market, as the interventionist model is abandoned[16].

In relation to the subject under investigation in the present report, privatization corresponds to the transformation of the previous public economic bodies into public limited companies, a privatization of organizational forms, with obvious consequences also in terms of administrative organization[17].

In this sense, privatization means bringing the activity carried out under the

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[15] G. Amato, *Il mercato nella Costituzione*, in *Quad. Cost.*, 1992, 1, 7 ff., the mechanisms for compensating for public intervention change their appearance, but do not disappear; C. Marzuoli, *Mercato e valore dell'intervento pubblico*, in *Le Regioni*, 1993, 1593 ff.; F. Merusi, *Credito e moneta nella Costituzione*, in *Associazione per gli studi e le ricerche parlamentari, Quaderno n. 2* (1991), Milano, 1992, 171 ff.

[16] F.G. Scoca, *Il punto sulle c.d. società pubbliche*, in *Dir. econ.*, 2005, 2, 239 ff., the public administration has dismissed the role of economic operator to assume the role of regulator. The legislator has chosen a private template, the companies carry out commercial activities and operate under a system of free competition; M. Cammelli, M. Dugato, *Lo studio delle società a partecipazione pubblica: la pluralità dei tipi e le regole del diritto privato. Una premessa metodologica e sostanziale*, in M. Cammelli, M. Dugato (eds), *Studi in tema di società a partecipazione pubblica*, Torino, 2008, 4, companies in which a public body has an ownership holding may have a significant influence on the production complex and on the market in general.

[17] On the subject, see G. Vesperini, *Le privatizzazioni nel settore pubblico industriale*, in S. Cassese, C. Franchini (eds), *L'amministrazione pubblica. Un profilo*, Bologna, 1994, 129 ff.; F. Saitta, *Strutture e strumenti nell'azione amministrativa*, in *Dir. amm.*, 2016, 4, 549 ff., the public system has been affected by a large-scale privatization process, which has affected both the organization and the activity, i.e. both subjects, transformed by public bodies into private legal persons, and the relationships, now characterized by the increasing use, in administrative action, of consensual modules or other forms borrowed from private law; A. Pioggia, *L'amministrazione pubblica in forma privata. Un confronto con la Francia e una domanda: che fine ha fatto il 'pubblico servizio' in Italia?*, in *Dir. amm.*, 2013, 3, 481 ff., the organizational aspect of the public sphere has experienced over the last two decades a period of marked disarticulation, characterized by a consistent recourse to models that combine with different degrees the traditional qualities of public organization and the typical elements of private organization; M. Cammelli, *Le società per azioni a partecipazione pubblica locale*, in *Servizi pubblici locali e nuove forme di amministrazione. Atti del XLI Convegno di Studi di Scienza dell'Amministrazione*, Milano, 1997, 147, 153.

patronage of the market, but not in the sense that the State decides to terminate its action in the field of the economy, but in the sense of rationalizing it.

In general terms, privatization (and consequently the appearance of publicly owned companies) is linked to two reasons: public policy is confronted with the need to react to the public finance crisis, due to the EU's strict state aid controls and the overt emergence of the principle of free competition as a general public interest[18].

The privatization process has had a drastic impact on the Italian administrative system, since it has produced the multiple use of subjective figures used by administrative legislation, characterised by the increasingly frequent use of instruments typical of private law.

Beyond these more or less unitary origins of these companies, their development has been confused in a composite and articulated legislative landscape[19].

Through last years, legislative provisions have accentuated the specialty profiles with respect to the rules applicable to commercial companies contained in the Civil Code, in its essential core.

This drift represented the betrayal of the original legislative intent for which the use of this model had become so widespread.

Specifically, it was noted that there were public market companies subject to the rules of free competition and the so-called semi-administrations, a hybrid solution that contradicted the nature of the corporate instrument[20]. Between these two opposing poles, there were different degrees of speciality and der-

[18] In these terms, see M. Cammelli, *Società pubbliche* (encyclopedic voice), in *Enc. dir.*, *Annali V*, Milano, 2012, 1191 ff.; P. Chirulli, *Autonomia pubblica e diritto privato nell'amministrazione. Dalla specialità del soggetto alla rilevanza della funzione*, Padova, 2005, 550 ff., among the reasons underlying the privatization process, it should be noted that private instruments are considered to be more flexible and free of the constraints arising from the specific rules governing the management of administrative activity, which are more in line with the principles of efficiency and effectiveness; F.P. Pugliese, *Sull'amministrazione consensuale. Nuove regole, nuova responsabilità*, Napoli, 1995, (reprinted in 2013), 28 ff., the idea that acting through consensual models is preferred to acting with authoritative instruments is increasingly widespread. Public power is tempered by consensus.

[19] F.G. Scoca, *Le società*, quoted, 246, the legislative franticness has created analytical and legal uncertainties; M. Dugato, *Le società a partecipazione mista per la gestione dei servizi pubblici locali. Il procedimento di costituzione, l'affidamento dei lavori e la relazione tra ente socio e società*, in M. Dugato, F. Mastragostino (eds), *Partecipazioni, beni e servizi pubblici tra dismissione e gestione*, Bologna, 2014, 212 ff., compared with the beginnings of the privatization process, there are, on the one hand, incentives to reduce the public sphere and open up the market and, on the other, a reduction of the productive dimension of the services; F. Merusi, *La privatizzazione per fondazioni tra pubblico e privato*, in *Dir. amm.*, 2004, 3, 447 ff.

[20] See M. Clarich, *Società di mercato e quasi-amministrazioni*, in *Dir. amm.*, 2009, 2, 254, according to which the reference criterion had to be the possibility of applying the rules of (private) company law to public companies, except for the derogations strictly necessary for the pursuit of public interests; M. Allena, F. Goisis, *The 2016 Italian Consolidated Law on Public Entities Owned Companies: Towards a More Consistent Private Law Approach,* in *The Italian Law Journal*, 2017, 3, 535.

ogation from private law, depending on the type of company or the law that governed them.

This legislative fragmentation combined with an unsatisfactory management of state-owned companies made rationalization measures necessary; the costs of these companies had become high for the community, many companies were involved in bankruptcy procedures and there were more than 3000 companies with less than 6 employees[21].

In order to face this distorted legislative landscape, in 2014 the Programme for the rationalization of local owned companies was presented with an overall view to revising expenditure. The rationalization program included a mapping of the number of companies and their activities, proposed to make them more efficient, reduce costs and increase the level of transparency[22].

This rationalization plan, which will be analyzed with reference to its implementation in relation to the Campania Region, was followed by a true and proper revolution, namely the introduction of the Consolidated Act on Public Participation Companies, by Legislative Decree 19 August 2016, no. 179[23].

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[21] On this subject, reference can be made to the document issued by the Impact Assessment Office of the Italian Parlament, *I dati sulle società partecipate pubbliche: molto fatto, molto da fare* (Analysis document no. 9) (2017), avaiable at *www.senato.it*.

[22] On the subject, for a preliminary approach, see F. Di Cristina, *Un programma di razionalizzazione delle società partecipate da enti locali*, in *Riv. trim. dir. pubbl.*, 2014, 4, 1174 ff.; G. Caia, *Le novità introdotte dal d.l. n. 66/2014*, in *Treccani Libro dell'anno del diritto 2015*, Roma, 251 ff.; M. Dugato, *Le società a partecipazione pubblica*, quoted, 4, the excessive number of companies with public participation and the weak results achieved by many of them have suddenly induced a sudden reversal in the attitude of the legislator, thus moving from a favor for the corporate model to an attitude of aversion. This has led to interventions aimed at imposing censuses and rationalisation of shareholdings, prohibiting the creation of new companies, preventing companies with uneven objects, distinguishing mainly between instrumental activities and public services, and containing the costs of corporate administration; A. Marra, *La razionalizzazione delle società partecipate dagli enti locali dopo la legge di stabilità 2015*, in *Dir. econ.*, 2, 299; the topic of rationalization of investee companies has once again been brought to the attention of scholars, in a slightly different light, from the consequences of the Covid-19 pandemic that occurred in 2020, see S. Mocetti, G. Roma, *Le società a partecipazione pubblica: evoluzioni dell'ultimo decennio e profili di governance,* in *www.astrid-online.it*, 2020, efforts to streamline public participation have not been coupled with an emphasis on improving governance; in detail, for a specific analysis on specific monitoring, extraordinary review, please see MEF (Dipartimento del Tesoro), *Rapporto sugli esiti della revisione straordinaria delle partecipazioni pubbliche*, avaiable at *www.dt.mef.gov.it*, for a cluster study on the so-called large local authorities and results of operations to maintain shareholdings.

[23] On the subject of the double visual perspective of study, please refer to recent analysis by M. Clarich, *Le società a partecipazione pubblica dopo il Testo Unico: il punto di vista del pubblicista*, in C. Ibba (ed.), *Le società a partecipazione pubblica a tre anni dal testo unico*, Milano, 2019, 7 ff.; for a bibliography on the theme of the Consolidated Act, in a critical perspective and on specific profiles, please refer, among others, to G. D'Attorre, *La 'governance' delle società pubbliche*, in *Giur. it.*, 2020, 1, 264, 272; J. Bercelli, *La nozione di società a controllo pubblico nella giurisprudenza amministrativa*, in *Giorn. dir. amm.*, 2019, 6, 685 ff.

The Legislative Decree in question was adopted as part of a very wide-ranging and ambitious project to reform the public administration, by virtue of Delegated Law no. 124 of 7 August 2015 (article no. 18)[24].

Among the objectives of this text there is the aim of rationalizing the system as a whole, the promotion of transparency and efficiency through the unification, completeness and maximum intelligibility of economic and financial data and the main efficiency indicators.

Specifically, article 20 of the decree provides for the periodic rationalization of investee companies through which public administrations carry out an annual analysis, with their own measure, of the overall structure of the companies in which they have holdings.

In accordance with the aforementioned article no. 20, the President of the Regional Council of the Campania Region, with Decree no. 204 of 31 December 2018 approved the periodic rationalization plan that allows to get to the core of the investigation.

The aim of the whole survey is to analyse the obstacles between the current situation and the objective of achieving territorial economic development in relation to the health and transport sectors, two key sectors which constitute a privileged observatory for an analysis carried out in this direction

2. *Reference framework and corporate screen through in house approach: the choice of the Region as sole partner*

Before analyzing in detail specificities of the sectors chosen for the analysis, it is appropriate to give an account of the chosen corporate structure, which for the subjects under investigation is the in house company.

The organizational choice mentioned above, beyond what will be said in the proceedings, makes it possible to have recourse to the corporate structure, with all resulting operational flexibility[25], but leaving the control intact on the part of the administration.

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[24] As far as the analysis is concerned, P.L. Portaluri, *Società partecipate e riforma Madia: nuove immagini del diritto amministrativo?*, in S. Luchena, M.L. Zuppetta (eds), *Il riordino delle società partecipate nella riforma Madia. Profili giuridici e economici*, Roma, 2016, 33 ff.

[25] On the subject, recently, even if in the pathological perspective of the state of insolvency, it confirms the full subjection of the in house to the discipline of investee companies, see the analysis by F.A. Re, *Il fallimento delle società 'in house': nessuna deviazione rispetto alla comune disciplina privatistica delle società di capitali*, in *Dir. famm. Soc. comm.*, 2020, 3-4, 825 ff., to which reference should be made for an extensive bibliography; E. Codazzi, *L'assetto organizzativo delle società sottoposte a controllo analogo: alcune considerazioni sull'in house providing tra specialità della disciplina e proporzionalità delle deroghe*, in *Dir. econ.*, 2019, 2, 127, 141; Id., *Le società in house. La configurazione giuridica tra autonomia e strumentalità*, Napoli, 2018, 41 ff.; A. Meale, *L'affidamento a società 'in house' come eccezione all'esame della Corte di Giustizia (ord. CGUE, Sec. IX, 6 February 2020, C-89/19)*, in *Giur. it.*, 2020, 5, 1178 ff.

A rapid and non-exhaustive analysis is needed on this issue, given the magnitude of the issues involved in this research trail.

In-house company does not represent a legal type of company, governed by its own rules and different from those contained in the Civil Code and the general rules of private law.

These companies are regulated in the Consolidated Act of 2016, in a unitary context, in the same way as the other companies with public shareholdings.

In this sense, and this may seem trivial, the clear will of the delegated legislator to determine an identity of private discipline, in spite of public participation, makes clear the need for the exceptions (i.e. the special supplementary rules) to be revealed, but above all to be interpreted as some aspects of speciality with respect to previous provisions and not to give rise to an excessively differentiated or very special and atypical discipline with respect to the paradigm of the company contract.

The issue of legal nature, widely analyzed by all prosepective[26], cannot be debated here, but it is necessary to make some brief reflection on the regional choice that led to this management model.

According to the regional situation of reference, the chosen model is not the result of a free-will choice on the part of administration, but rather of a need, due to the prolonged budget deficit.

In this sense, the by now consolidated equality between models on the part of the administration, and specifically the choice (rectius la necessity) that the Region has made, guarantees the identity-uniformity of the subjective configuration of economic operators, meaning the same form and regime for all public administration contractors.

In other words, it makes it possible to take advantage of the corporate model, with its relative benefits, albeit with control and administrative supervision[27], which is very necessary in a situation of financial deficit for the administration.

3. *Participated companies of the Campania Region: a picture of constant uncertainty*

According to article no. 7 of the Campania Region's Statute, the Region is to act to regulate economic development, the market economy and free competition in order to promote full employment, the promotion of well-being, social aims, economic and social cohesion and the defence of welfare state.

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[26] Cf. G. Caia, *Le società in house: persone giuridiche private sottoposte a peculiare vigilanza e tutela amministrativa*, in *Giur. comm.*, 2020, 3, 457 ff.

[27] On this subject, it should be noted that control, i.e. supervision, is exercised by means of private law instruments and not by means of so-called conforming administrative acts, see E. Codazzi, *Note in tema di controllo analogo congiunto su società in house pluripartecipata*, in *Giur. comm.*, 2018, 4, 630 ff.

From this rule there is an irrelevance in legislative data with respect to organizational choice made by Region, which is linked to premises of this work concerning the need for an efficient management of all subjects (including companies with public participation) to promote regional development, understood as growth in the broadest sense.

The operating framework seems to be totally different from the objectives mentioned and, specifically, the situation of companies in which Campania Region has a holding has revealed significant problems, both in terms of management and in terms of reorganization and rationalization[28].

The general context of companies in which the Campania Region has a holding is marked by a high degree of uncertainty in legal relations, with temporary commissarial regimes that have become almost ordinary, legal decrees that have subverted previous provisions, in an overall situation characterised by a single certain and objective fact, namely the constant crisis situation from an economic point of view[29].

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[28] The situation in fact seems to have betrayed all single assumptions, not only original, but also linked to recent reforms on the subject of investee companies, as moreover noted in general terms by F. Bassanini, *Le società a partecipazione pubblica tra Stato e mercato*, in *www.astrid-online.com*, 2019, 6 ff., the private legal structure and submission to private law rules can guarantee efficiency and dynamism in management and less risk of bureaucratic obsolescence, due to the natural aptitude of the corporate form to promote an efficient organization of business activities. The presence in the shareholding structure of a public controlling shareholder can ensure attention to positive externalities, ability to define and finance long-term industrial plans, sustainability of the company even in areas of market failure, where the pursuit of general interests would inevitably be frustrated or sacrificed by those who operate on the basis of a profit maximisation logic. However, it should be noted that unlike the last 20 years, during which the corporate model, considered more appropriate to the needs of a modern and efficient administration, has been encouraged, today it is necessary that there is a good reason to set up and/or maintain a public company and that this reason is adequately motivated; in order to carry out a reconnaissance, also with reference to the territorial scope of the survey, it seems useful to consult Corte dei Conti – Sezione delle Autonomie, *Gli organismi partecipati dagli enti territoriali e sanitari* (Relazione 2019), 2020, avaiable at *www.corteconti.it*, for the pursuit of the objectives of efficiency gains, rationalization and reduction of public expenditure, a crucial profile is given by the specification, among the criteria for the acquisition and management of public shareholdings, of the company's strict adherence to institutional purposes of the participating entity, as well as the imputability of the activity carried out to those allowed by law; G. Farnetti, *L'evoluzione del sistema delle partecipate e dei controlli della Corte dei Conti*, in *Aziendaitalia*, 2018, 12, efficiency relates to better use of resources (minimization of costs) with same results and that effectiveness has deal with meeting defined objectives and meeting needs of internal or external recipients of those activities. While cost-effectiveness, when referring to economic activity, expresses its purpose, given certain resources, in terms of efficiency and effectiveness; when, on the other hand, it is combined with the two criteria just mentioned, it postulates the need for a continuation over time, i.e. conservation of available resources, in order to give continuity to administrative activity, to make it sustainable.

[29] The theme, which seems to be a feature of the regional situation in different areas of Southern Italy, can be studied from the inverted perspective of the possibility of creating utilities,

To give an overview of the situation and its criticality, in 2015, among 25 companies in the Region, 15 were active, 8 were in liquidation and 2 had gone bankrupt. One of first critical issues, which will not be examined further during the analysis, concerns two categories (together with the companies in which the Region has an indirect stake) in relation to which there is a lack of availability of data relating to asset management and economic impact in situations of great hardship that adversely affect the speed of closure activities and resulting accounting regulations.

3.1. *Duties assigned to So.Re.Sa. S.p.a.: from the entity entrusted with the recovery plan in the health sector to the strategic role of single purchasing centre for the Campania Region*

A central role in this regional context of reference is played by *So.Re.Sa. (SOcietà REgionale per la SAnità*, namely regional healthcare company) S.p.a., a company wholly owned by the Campania Region, which is also its exclusive shareholder.

The entity, established by Regional Law no. 28 of 24 December 2003, initially had the task of managing and playing an operational role in the management of debts accrued in the regional healthcare system to facilitate the recovery of liabilities in the health sector of the regional balance sheet.

Although two tasks are not alternative, as company in question currently holds both functions related to health sector (with specific tasks related to debt situation) and is regional single centre for public procurement, it is appropriate to split the analysis into two autonomous parts to detect the critical issues related to the two core tasks assigned.

Outside these two categories chosen for reasons of convenience of treatment, it is appropriate to note, a specific function allocated that concerns – precisely in response to the challenges related to economic sustainability of health systems – an innovative and entirely digital approach to this specific health context, through a fully interconnected system of health agencies and through promotion of various e-health tools (including, for example, electronic health record, *FSE*)[30].

3.1.1. *Deficit, recovery plan for the health sector and maintenance of essential levels of care: a difficult balance*

The origins and causes of the economic deficit in the health sector are several, but an important role belongs to the lack of coordination in terms of public

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G. Marinuzzi, W. Tortorella, *Le imprese pubbliche nazionali nello sviluppo economico del Mezzogiorno*, in *L'industria*, 2020, 2, 347 ff.

[30] The issue concerns the need for innovation in the health system through a series of instruments that are partly already regulated, to ensure health services even in a context of rationalization of financial resources, on the subject in the broad sense see L. Giani, *Spunti per la costruzione di una 'cultura dell'innovazione' negli appalti in sanità*, in this *Journal*, 2018, 2, 205 ff.

finance between the State and Regional levels, at the beginning of the 1980s, which led Regions to use the criterion of the so-called historical expenditure for the planning of sums to be allocated to the health sector. This financing model has caused the deficits that still affect the management of finances in the health sector nowadays.

This issue raises need to find a delicate balance between different aspects, in particular, existing tension between two institutional interests is evident, on the one hand, requirement to return from debt and contain public spending, and on the other hand, not to compromise the right to health.

First of all, need to recover from debt, then to balance limited public finances with the need to guarantee a level of care that is an essential right of the person[31].

Secondly, the interest of the Regions in safeguarding their political autonomy with regard to the definition of organizational and welfare choices that qualify the presence of the health service in the territory[32].

Resulting deficit made it necessary to adopt the recovery plans (*PDR, Piani di rientro*), a particularly complex point, also because it has gone through several stages[33].

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[31] M. Calabrò, *Linee evolutive del servizio di assistenza farmaceutica. Ipotesi di valorizzazione dell'art. 32 Cost. in senso proconcorrenziale*, in *Riv. it. dir. pubbl. com.*, 2015, 5, 1243 ff., if right to health represents a legitimate and necessary limit to market rules, it is all the more so in case of limited economic resources on the part of public administration; M. Luciani, *I livelli essenziali delle prestazioni in materia sanitaria fra Stato e Regioni*, in E. Catelani, G. Cerrina Feroni, M.C. Grisolia (eds), *Diritto alla salute tra uniformità e differenziazione. Modelli di organizzazione sanitaria a confronto*, Torino, 2011, 11 ff.; A. Spadaro, *I diritti sociali di fronte alla crisi (necessità di un nuovo modello sociale europeo: più sobrio, solidale, sostenibile)*, in *Rivista AIC*, 2011, 4.

[32] T. Cerruti, *I piani di rientro dai disavanzi sanitari come limite alla competenza legislativa regionale*, in *Rivista AIC*, 2013, 8 ff.; D. Immordino, *Razionalizzazione della spesa farmaceutica e contributo regionale di solidarietà ambientale: prove tecniche (fallite) di federalismo fiscale*, in *Le Regioni*, 2012, 6, 607 ff.; in a broader sense on the subject, see G. Pitruzzella, *Sanità e regioni*, in *Le Regioni*, 2009, 6, 1184 ff.; E. Griglio, *Il legislatore 'dimezzato': i consigli regionali tra vincoli interni dei piani di rientro dei disavanzi sanitari e interventi sostitutivi governativi*, in *Le Regioni*, 2012, 3, 455 ff.; recently on the subject, with a view to examining solutions related to innovation to convey expenditure difficulties in the health care sector, see F. Aperio Bella, *Tecnologie innovative nel settore salute tra scarsità delle risorse e differenziazione: alla ricerca di un equilibrio difficile*, in *www.federalismi.it*, 2020, 2, 245, 258 ff.

[33] For a complete overview of the theme see S. Calzolaio, *Il modello dei Piani di rientro dal disavanzo sanitario dal punto di vista dell'equilibrio di bilancio*, in *www.federalismi.it*, 2014, 23, 61 ff.; G. Carpani, *I piani di rientro tra emergenze finanziaria e l'equa ed appropriata erogazione dei Lea*, in R. Balduzzi (ed), *La sanità italiana alla prova del federalismo fiscale*, Bologna, 2010, 25 ff.; E. Giglio, *La legislazione regionale alla prova dei piani di rientro dai disavanzi sanitari: possibile la ratifica, non la conversione in legge*, del piano, in *Rivista AIC*, 2012, 1, 2 ff., among other things, the issue of the recovery plan occupies a central position in the framework of relations between the State and the Regions and intersects with a plurality of legal issues – from those relating to the relationship between the guarantee of essential levels of assistance and efficiency in the use of available resources to those relating to

The return plans are aimed at verifying the quality of health care services and at achieving a high level of health protection and rebalancing the accounts of regional health services.

Constitutional Court in its judgment of 11 April 2011, no. 123 pointed out that the rules which provide for agreements between the State and the regions on the deficits are aimed at containing public health expenditure and, therefore, are expressive of a related principle of public finance coordination[34].

Awaiting the development of this issue at national level, Regional Law of Campania, 24 December 2003, no. 28, containing urgent provisions for restoration of regional funding was released, with which Campania Region constitutes a single-sector limited company (*So.Re.Sa.*) for purposes of drawing up and managing an overall project to be carried out with savings, aimed at carrying out operations of an equity, economic and financial nature to be integrated with the interventions for the consolidation and recovery of the matured debt of the regional health system and for the balance of the current management of the health debt.

As far as the analysis carried out is concerned, it should be noted that Decree Law 20 March 2007, no. 23 established that the Government would contribute to the settlement of the deficit for the regions that had signed the recovery plan (Campania was among the regions that signed the plan).

Moreover, since the same Decree Law, the Regions are responsible for covering the deficit incurred through the implementation of rationalization measures.

In addition, Decree Law 29 November 2007, no. 222 provided for the nomination of an *ad acta* commissioner for the Regions with a particularly high deficit, and the Campania Region fell within this category[35]. This circumstance

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the nature of the return plan and the intervention of the State as a substitute – has in recent years repeatedly solicited the interest of the constitutional judge.

[34] On the subject of containing expenditure in the health sector, see the ruling of the Constitutional Court of 23 May 2018, no. 103, with commentary note drafted by E. Mariani, *La rideterminazione unilaterale del contributo statale alla spesa sanitaria al vaglio del Giudice Costituzionale: riflessioni in merito al rapporto tra leale collaborazione e normativa sui finanziamenti ai servizi sanitari*, in *www.federalismi.it*, 2018; in the broad sense, for a commentary on the Budget Law on health, see M. Conticelli, *Analisi della normativa. La legge di bilancio per il 2017. La salute*, in *Gior. dir. amm.*, 2017, 2, 204 ff.; U. Usai, *La legge di bilancio 2017 pospone di un anno l'obbligo della predisposizione del programma di acquisti di beni e servizi*, in *Gazzetta degli Enti Locali*, 2016, 1, 3 ff.

[35] On the subject, see the analysis carried out by S. Villamena, *Il Commissariamento della sanità regionale. Conflittualità ed approdi recenti anche con riferimento al c.d. decreto Calabria*, in *www.federalismi.it*, 2019, 20, about the delicate balance between financial needs and guaranteed health care levels; with specific reference to the Calabria Region, a reference should be made to the jugdment released by Corte Cost., 24 July 2019, no. 200, in *Foro. it*, 2019, 2984; E. Jorio, *Dopo il Lazio e l'Abruzzo, anche la Campania e il Molise (forse la Calabria). Una sanità commissariata come soluzione per i danni prodotti dai governi regionali*, in *www.federalismi.it*, 2009; S. Parisi, *Tendenze della legislazione sanitaria in Campania: una policy com-*

widened the difficulties since it doubled the number of persons to be referred to for the recovery plan, with complications from an organizational point of view, and made it necessary to have the passive legitimacy of the *ad acta* commissioner for all administrative disputes relating to the recovery plan.

The corporate mission initially entrusted to *So.Re.Sa.* was to manage the debt repayment plan in the health sector, since the subject in question enjoys a privileged perspective of observation of the regional health care landscape, with particular attention to the balance sheet offices of the health companies and, for these reasons, has developed and consolidated in the management of health care debt an experience of analysis of economic-financial, organizational, procedural and administrative criticality.

In other words, the management of debt accumulated by health authorities of Campania Region has been entrusted, since 2006, with separate regional measures, to *So.Re.Sa.* S.p.A.

Among instruments identified to operate the recovery from debt in the health sector, it is particularly relevant for the subject under investigation that *So.Re.Sa.* was identified as a single centre for purchases in the health sector (a function that will be extended in relation to all sectors in 2014, when the same entity will become a regional single purchasing centre)[36].

The strict constraints on public expenditure, both European and domestic, adopted in the broader context of containing public expenditure, when applied to public health sector raise a number of issues that are difficult to overcome.

As noted above, in the health sector, constraints placed on the reduction

plessa in una Regione commissariata, in *Le Regioni*, 2017, 1270 ff.; V. Sotte, *Rapporto intercorrente tra Regione e Commissario ad acta per l'attuazione del Piano di rientro dal disavanzo sanitario* (note on the margin of T.A.R. Campania, Napoli, Sec. I, 11 June 2014, no. 3235), in *www.federalismi.it,* 2014; C. Tubertini, *Diritti alla salute, organizzazione e risorse finanziarie. Lo stato attuale della questione*, in *Diritto amministrativo e società civile*, I, Bologna, 2018, 545 ff.; M. Conticelli, *Le criticità della spesa sanitaria*, in F. Castello, V. Tenore (eds), *Manuale di diritto sanitario*, Milano, 2018, 377 ff.; with specific reference to the possibility of using technology to tackle these obstacles, F. Aperio Bella, *Tecnologie innovative nel settore salute tra scarsità delle risorse e differenziazione: alla ricerca di un equilibrio difficile*, in *www.federalismi.it*, 2020, ability of the rules in force in the sanitary matter to remodel itself to intercept the reorganization of the juridical relationships produced by innovative technologies is indispensable condition for the full affirmation of the rights in the encounter between health and technological innovation and therefore, in last analysis, for the concrete implementation of the constitutional guarantee of the health as fundamental right.

[36] G. Romeo, *Il contenimento della spesa nei servizi sanitari regionali: la razionalizzazione del sistema degli acquisti*, in *Le Regioni*, 2009, 561, the solution of selecting *So.Re.Sa.* as the entity to be entrusted with the role of purchasing centre in the health sector seemed more an emergency solution than a conscious choice of legislative policy. However, it is undeniable that the aggregation of public expenditure brings with it a number of advantages in terms of public efficiency; R. Ferrara, *Organizzazione e principio di aziendalizzazione nel servizio sanitario nazionale: spunti problematici*, in *Foro amm. TAR*, 2003, 7-8, 2500 ff.; M. Belletti, *Le Regioni figlie di un Dio minore. L'impossibilità per le Regioni sottoposte a Piani di rientro di implementare i livelli essenziali delle prestazioni*, in *Le Regioni*, 2013, 5-6, 1078.

of public expenditure must be balanced (in the sense that they must not compromise) the right to health, which is constitutionally protected by article no. 32.

For this reason, the institutional mission of *So.Re.Sa.* has been divided into several steps, to prevent that the urgent need to cover the previous debts of the health sector would affect the services provided. A first phase of comparison with Local Health Authorities (*ASL*), a second phase with possible models to be adopted, and, finally, an operational stage.

In the operational phase, the task of *So.Re.Sa.* is to support the directors of local health authorities and to define the settlement agreements in relation to the credits matured.

The task assigned to the company by the instituted law appears to be of fundamental importance, since it is a role of coordination and management of a delicate matter that involves several sensitive issues.

Debt recovery is not yet complete, but, with the exception of a few issues relating to the management of certain events, there is a positive assessment by other institutions of this specific task.

The programme for repayment of accumulated debt is still in an unsettled state, in consideration of the obvious shortcomings that afflict the current health system (with specific reference to waiting lists and accreditation paths for private structures) and at the time of writing this work, the preparation of an Operational Programme 2019-2021 was approved, with a view to (yet remote) overcoming that commissarial regime.

The overcoming of the commissarial regime is desirable as a sign of overcoming a debt situation and crisis that has been gripping the regional context for many years, but the current regime seems to have found management balances that should not be altered, since the deficiencies and gaps in the regional health system are to be found in other phenomena and circumstances (*maladministration* and corruption).

3.1.2. *Centralization of public expenditure: the choice of corporate model for Campania Region*

The role of subject with tasks relating to the debt repayment plan in the health sector intercepts another role which, however, has its own autonomy due to the centrality of the theme, i.e. to be a unique purchasing centre for regional purchases, initially limited to the health sector and then, from 2014, for all purchases by the Campania Region.

The Regional Law no. 16 of 7 August 2014 identified the company with public shareholding under investigation as purchasing centre (for all purchases submitted by the regional public administration and instrumental entities) for the Campania Region and, moreover, *So.Re.Sa.* itself is an aggregating entity (for public purchases) by virtue of Decree Law no. 66 of 2014.

Although inspired by the same need to save expenditure and increase the professionalism of public works stations, issues relating to central public bodies and aggregators must be kept separate[37].

Directive 24/2014/EU – later transposed in Legislative Decree no. 50 of 18 April 2016 – identified the central purchasing bodies in order to reduce fragmentation of public demand; instead, Decree Law 66/2014 cited above obliges regional legislators to implement all principles dictated by the State Legislator in order to regulate duties and functions of aggregators of local relevance[38].

The whole reform project operates in a well-defined direction, i.e. to pursue the objective of improving quality of public contract services which is now based, according to new legal reading, not only on the quality of tenderer and of offers, but above all on the redefinition of public demand, therefore on the quality of the public contractual part[39]. This analysis cannot dwell on such a broad theme, but merely focuses on a corporate model chosen by aggregators in the regional context of reference.

The choice of the company model compared to alternative solutions adopted in other regional contexts seemed more a coercion than a free choice. Through the corporate model (even if in house) there was more freedom of action than the choice to entrust this role to a public entity, at least in terms of governance policy[40].

The current model of aggregation of public expenditure originates at the national level in the so-called 'Consip model'[41] and allows the single purchasing centre to identify on a large scale the standard requirements for public administrations, detect anomalies in public contracts, and develop market strategies for kinds of administration[42].

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[37] Cf. G. Fidone, F. Mataluni, *L'aggregazione dei soggetti aggiudicatori di contratti pubblici fra ragioni di integrità, specializzazione e riduzione della spesa*, in *Foro amm.*, 2014, 11, 2995, 3001 ff.; for a more outdated reading of aggregation trends, see W. Gasparri, *L'evoluzione della disciplina per la concentrazione della domanda di beni e servizi nell'amministrazione*, in D. Sorace (ed), *Amministrazione pubblica dei contratti*, Napoli, 2013; G. Ferrari, *Misure urgenti per la competitività e la giustizia sociale: primi commenti al D.L. 66/14*, in *www.lineeavcp.it*, 2014.

[38] This list of aggregating entities is kept and updated by ANAC, as established by resolution no. 31 of January 31, 2018, and can be consulted on *www.anticorruzione.it*; on the subject, albeit marginally, so-called simplification decree, 76/2020, as a legislative response to Covid-19 pandemic, which added paragraph 3-bis to article no. 38 of Public Contracts Code (Legislative Decree 50/2016).

[39] Please refer to G.M. Racca, S. Ponzio, *La scelta del contraente come funzione pubblica: i modelli organizzativi per l'aggregazione dei contratti pubblici*, in *Dir. amm.*, 2019, 1, 33 ff., new models of aggregation of public demand have spread throughout the European Union, albeit with significant differences linked to consolidated national experiences, i.e. with recent launching of experiences recognised as not only legitimate, but also efficient and promising for the management of the procurement function at national and European level.

[40] On the subject of central purchasing bodies in the Campania regional health system, please allow a referral to F. Pinto, V. Brigante, *Centralizzazione delle committenze pubbliche, trasparenza e gruppi di pressione nel sistema regionale campano per la sanità: prime evidenze empiriche*, in *Ist. fed.*, 2018, 3-4, 723 ff.

[41] Please refer to L. Fiorentino, *Il modello Consip e i soggetti aggregatori*, in *Giorn. dir. amm.*, 2018, 2, 202 ff.

[42] B.G. Mattarella, *La centralizzazione delle committenze*, in *Giorn. dir. amm.*, 2016, 5, 613 ff.

Aggregation of public expenditure has in recent years proved to be more of a necessity than a choice for administrations, as it allows for more favourable purchasing conditions thanks to the exploitation of economies of scale, reduces process costs, and provides for larger and therefore tendentially more competent administrations[43].

Moreover, as has been pointed out[44], through the aggregation of public expenditure it is possible to achieve heterogeneous objectives, such as sustainable development, environmental protection and technological development; among achievable objectives, a specific mention should be made of the possibility of using the strong corporate tool, intended as a model, as a factor preventing corruption within the companies themselves and their activities in the territory[45].

The expenditure for public contracts incurred by the government represents a significant part of the total amount of government spending[46]. In addition, the worsening of the economic crisis has led the legislator to make corrections aimed at saving for the management of public tenders.

Italian legal and organizational system of aggregation of public expenditure has always been characterized by a high degree of backwardness with respect to European context[47].

Legislative choices aimed at aggregating public expenditure are necessary

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[43] L. Fiorentino, *Le centrali di committenza e la qualificazione delle stazioni appaltanti*, in *Giorn. dir. amm.*, 2016, 4, 446, adequate size and professionalism of contracting authorities allow public authorities to deal more authoritatively with businesses.

[44] Please refer for a detailed analysis to A. Zito, M. Immordino, *Aggregazione e centralizzazione della domanda pubblica di beni: stato dell'arte e proposte di migliorie al sistema vigente*, in this *Journal*, 2018, 2, 223 ff., which, however, identify scope for improvements to the current system, both at national and regional level. The rationalization of purchases by the public administration through centralized models has undoubted advantages but it cannot be the panacea for all problems that the administration faces in that sector.

[45] On the subject matter the following are merely referred for a detailed analysis, to F. Elefante, *Società pubbliche e normativa anticorruzione*, in *Munus*, 2014, 3, 445 ff.; R. Cantone, *La prevenzione della corruzione nelle società a partecipazione pubblica: le novità introdotte dalla 'riforma Madia' della pubblica amministrazione*, in *Riv. soc.*, 2018, 1, 233 ff.; L. Bertonazzi, *Società in controllo pubblico e normativa in materia di responsabile e piano di prevenzione della corruzione*, in *www.giustamm.it*, 2016, 6, 3, 6 ff.; F. Costantino, *Le società a partecipazione pubblica e l'applicazione in materia di trasparenza e contrasto alla corruzione*, in *www.federalismi.it,* 2018, (special issue, *Le società partecipate al crocevia*), 2018.

[46] C. Cottarelli, *La lista della spesa. La verità sulla spesa pubblica italiana e su come si può tagliare*, Milano, 2015, 31 ff.; in a conforming sense, but according to recent reforms, cf. L. Fiorentino, *La gestione delle amministrazioni pubbliche nei più recenti interventi normativi*, in *Giorn. dir. amm.*, 2020, 2, 171 ff.

[47] With reference to the skills of central purchasing in the health sector, which is still a competence attributable to *So.Re.Sa.*, please refer to G.M. Racca, *Public procurement in the Italian healthcare sector: common problems in European procurement*, in *Public Procurement Law Review*, 2010, 3, 119 ff., in European models, central purchasing bodies carry out aggregate tenders for a large number of plots and carry out market analyses to assess the needs of administrations and instrumental bodies. The reduction in public procurement expenditure related to public contracts must be coordinated with a redefinition of needs and activities.

and can lead to a control of public costs and a high level of contractual performance; these considerations play an independent role if it is considered that the Campania region has a high overall public finance deficit.

In addition, for non-centralized tenders, the *So.Re.Sa.* has the role of authorizing Local Health Authorities (*ASL*) for certain assets whose total amount must not exceed certain thresholds set annually by the Commissioner to acta by decree.

The objectives of centralization, in this sense, can involve and lead to significant cost savings that can assist the repayment of debt, whose structural and original causes however require (as has happened) a commissioner intervention to remedy a critical situation from the standpoint of regional management.

3.2. *The intricate issue of regional public transport in an effort to achieve sustainable mobility: an unresolved affair (remarks in margin of a recent judgment of Constitutional Court)*

Management of regional public transport entrusted to investee companies has always been (and not only in the Campania Region) one of the most difficult unresolved issues to settle, in relation to many problems that have emerged.

Public transport represents the public service *par excellence*, also at European level, while other services are considered "of general interest"[48].

The classification of a specific service activity as a public service may allow for some derogation from the general rules on economic activities and such derogations may concern the greater discretion accorded to public administrations representing local authorities in their choices of organization and management of public transport services[49].

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[48] This topic is related to a series of legal conditions and qualifications that cannot be dealt with here, but please refer to the following document, Dipartimento delle politiche europee, *I servizi di interesse economico generale*, avaible in *www.osservatorioappalti.unitn.it; Testo Unico dei servizi pubblici di interesse generale. Atto del Governo n. 308* (Dossier), avaiable at *www.senato.it*, 2016, 18, services of general interest including both economic and non-economic services are complex and constantly evolving.

[49] Please refer to G. Caia, *Il trasporto pubblico locale come paradigma del servizio pubblico (diciplina attuale ed esigenze di riordino)*, *Rivista AIC*, 2018, 334 ff.; for a complete overview of the legislation and critical points in perspective, see F.A. Roversi Monaco, G. Caia, *Situazione ordinamentale e prospettive del traporto pubblico regionale e locale*, in F.A. Roversi Monaco, G. Caia (eds), *Il trasporto pubblico locale*, I, Napoli 2018, 7 ff.; M.I. Triolo, *Il trasporto pubblico locale: la qualificazione dell'attività in termini di servizio pubblico e il contratto di servizio*, in *Rass. Avv. St.*, 2016, 1, 247 ff.; on the modalities of entrustment of the service, *inter alia*, see L.R. Perfetti, *Le procedure di affidamento dei trasporti pubblici locali*, in *Munus*, 2015, 1, 129 ff.; S. Vasta, *Diritti e obblighi dei passeggeri nel trasporto pubblico locale*, in *Diritto e processo amministrativo*, 2015, 4, 1123 ff., the challenges of local public transport concern both the way local public transport services are allocated and the question of financing local public transport, as well as the relationship between local and national legislative; D.U. Galetta, M.

Issue of public transport contracts, both rail and non-rail, in the Campania Region takes on particular features, which are associated with a relatively low level of quality and performance of these service provided.

Transport (of persons and goods) and mobility in general are entrusted to two separate companies, both of which are owned only by Campania Region (i.e. two in-house companies).

These two wholly-owned companies are *EAV* S.r.l. (*Ente Autonomo Volturno*), which is responsible for operating public transport, maintaining and modernising the railway network and managing the infrastructural assets, and *A.IR.* S.p.a. (*Autoservizi Irpini*), with tasks similar to those mentioned, but limited to Irpinia area; respectively, the companies are result of a merger deed and a corporate transformation deed.

In relation to main subject under investigation, namely debt situation of owned companies of the Campania Region, it should be noted that article no. 11 of Decree Law 22 October 2016, no. 193 to cover the debts of regional rail transport system, in accordance with the balance of public finance, has granted the Campania Region an extraordinary contribution, up to 600 million euros, for the year 2016 to meet its debts to the company *EAV* s.r.l., concerning previous years for management activities and investments carried out by the *EAV* on the network.

This provision in turn originates in article no. 14, paragraph 22, of Decree Law 31 May 2010, no. 78 (concerning urgent measures to ensure continuity of transport services), by virtue of which an *ad acta* commissioner was nominated for implementation of measures relating to rationalization and reorganization of regional investee companies, brought by financial stabilization plan of Campania Region approved by decree of Minister of Economy and Finance of 20 March 2012, in order to allow the effective implementation of the process of separation between the operation of regional rail transport and the ownership, management and maintenance of the network, safeguarding the essential levels of performance of network, while preserving essential levels of performance.

In order to account of the centrality of the issue of deficit and commissioner management, it is appropriate to make a brief reference to a recent ruling drafted by Constitutional Court of 20 March 2019, no. 54, relating to a litigation in which the *EAV* itself was a claimant (ordinary court of Rome); it is appropriate to give a brief account of the state of affairs in the proceedings.

The judgment provides useful guidance on finding a difficult balance between different requirements, such as the provision of public service, com-

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Giavazzi, *Trasporti terrestri*, in G. Greco, M.P. Chiti (eds), *Trattato di diritto amministrativo europeo*, IV, Milano, 2007, 2294 ff.; emblematic is title of investigation carried out by F. Manganaro, *Evoluzione ed involuzione della normativa sul trasporto pubblico locale*, in G. Leone (ed), *Scritti in memoria di Giuseppe Abbamonte*, II, Napoli, 2019, 923 ff.

missioner management and proper economic management of investee companies.

EAV had taken over the passive reports of the *ad acta* commissioner[50] (on behalf of *Ferrovie dello Stato S.p.a.*) and had requested a repayment of the amounts paid to the Ministry of Infrastructure and Transport (in the context of the payments for the recovery of public debt in the transport sector). This reimbursement was refused because the request made by *EAV* was beyond the deadline set by article no. 31 of Decree Law no. 4 of 10 January 2006, which contained provisions on the economic recovery of so-called fixed transport.

The fixing of the final deadline for the submission of claims for repayment placed the economic weight of the debt as a whole on *EAV*, which had taken over the passive relationship with the legitimate expectation of obtaining that sum.

As the Constitutional Court has made clear in its settled case-law, legitimate expectations cannot be harmed by irrational provisions which undermine the certainty of relations between the State and its citizens[51].

For these reasons, the Court of Appeal of Rome raises a question of constitutionality with regard to the abovementioned article, which provided for a final deadline for the submission of a request for repayment by the companies that had taken over the commissarial management.

The Constitutional Court decides the controversy with sentence 20 March 2019, no. 54 declaring the unconstitutionality of the provision that prescribed a final deadline for the request for refund, because it conflicts with the principles of reasonableness and legitimate expectations

In other words, the interests of the public companies which had taken over from the government commissioner by virtue of an act of law and which had replaced the passive relations with the expectation of obtaining repayment of the sums paid had to be protected.

This judgment can be used as a source of support for the proper and therefore sustainable management of public services by publicly owned companies.

The financial sustainability of the management of a public service, even if managed through an in-house company (such as *EAV*), must be made compatible with the optimal provision of the service.

The judgment of the Constitutional Court, in defending the legitimate expectations of the regional company which took over from the ad acta com-

[50] The replacement of the Commissioner by *EAV* was necessary to prevent a continuation of the Commission's management without a final deadline and was implemented by d.p.c.m. 16 November 2000, in implementation of Laws 59 and 422 of 1997.

[51] In general terms, as clarified by Corte Cost., 15 May 2013, no. 83, which clarifies – on another subject, but the assumption must be reported – that certainty is at the centre of the order, but not at its summit, to prevent it from becoming a tyrant against other values and rights.

missioner, shows the imperative to safeguard the proper functioning of these public companies, which have a strategic role in the management of basic public services, which in themselves are instruments for improving governance on a regional basis.

4. *Concluding remarks: a balance far to be found*

The proposed research horizon, analyzed from a peculiar perspective, both in territorial terms and linked to a particular issue, such as that of publicly owned companies, reveals need to maintain a balance between budgetary constraints and the quality of services provided[52], i.e. the synthesis of efficient management, including from a public law point of view.

In an organizational and territorial context such as the one outlined above, possibility of the public society becoming a player in production of profit and, therefore, in the well-being of these territories fades away, since pre-eminent interest of a balanced budget prevents the company (and therefore the controlling body, the Region) from being entrusted with tasks that would instead be fully compatible with its institutional role[53].

The subject examined potentially opens up to countless issues to be addressed, central and specific issues that public administrations have to deal with on a daily basis, often in a regime linked to critical situations from the point of view of financial management.

The issue of the inadequate management of publicly-owned companies, with matured deficits, is not new, since, as has been noted, already in the 1980s there were, to a large extent, management inefficiencies and dangerous budget deficits, often masked by state aid and continued recourse to public debt.

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[52] In general terms on the subject, see the conclusions recently proposed by A. Marrone, *Verso un'amministrazione democratica. Sui principi di imparzialità, buon andamento e pareggio di bilancio*, in *Dir. amm.*, 2019, 2, 383 ff., both form and substance of public administration must be geared to these guidelines, precisely because of the fungibility of legal form chosen by the administration itself; Id., *Pareggio di bilancio e Stato costituzionale*, in *Rivista AIC*, 2014, 2 ff.; on the issue, please refer to the exhaustive analysis carried out by M. Trimarchi, *Premesse per uno studio su amministrazione e vincoli finanziari: il quadro Costituzionale*, in *Riv. it. dir. pubbl. com.*, 2017, 3-4, 623 ff.

[53] In these terms, see unsurpassed analysis by M. Dugato, *Il finanziamento delle società a partecipazione pubblica tra natura dell'interesse e procedimento di costituzione*, in *Dir. amm.*, 2004, 3, 561, 575, according to which, progressive loss of clarity of legal boundaries between concepts of public service and function and that of purely economic and entrepreneurial activity. In this way, it becomes difficult to distinguish between purely economic activities and economic activities that can be defined in terms of public service; in a compliant sense, G. Gruner, *Compiti e ruolo del socio pubblico: direzione (società miste) e dominio (società in house)*, in *Dir. econ.*, 2012 (special issue, *L'assetto delle società pubbliche*), 3 ff., 5, the public partner is responsible to manage the company itself, so as to direct its overall activity not only to profit production, but also – if not above all – to better management and supply of service to users.

Budgetary constraints, from which the regional companies are not exempted, beyond the chosen corporate structure – without necessarily taking into account the pathological situations relating to commission and special regimes – impose a rational management of resources, which must not preclude or impede the implementation of rights, especially when considering two fundamental areas such as those investigated[54].

The assumption that the mere fact of management by means of companies was adequate to guarantee success of operation has been disproved by the circumstances and results recorded over years, at both local and national level.

As noted in relation to indebtedness in the health sector, where choice for society, in the mindset of public administrators, could be separated from an economic-financial plan and an industrial plan, and management could be identified in the old officials employed in special companies, such as consequences in terms of accumulated debts and commissarial regimes that have followed over the years.

The current situation in Campania Region presents unresolved criticisms relating to an economically management of essential public services (such as health and public transport) with issues that involve the affairs of companies with public participation with strategic importance.

Continuos alternation of commissarial and ordinary regimes has favoured a framework of constant uncertainty which has led to an inefficient service for users (even if it is not the only cause).

Whole issue directly involves a complex challenge that the legislator and public administrations have to face, in the exercise of their discretionary powers, especially of an organizational nature, in maintaining a balance between the protection of fundamental rights, which are connected and depend on a regular use of most public services – such as the regional health service – and the saving of public resources.

A proper management of the regional public service, beyond the selected mode, is in itself a model of good governance and therefore of sustainable development.

Shareholdings play a central role in the pursuit of regional efficiency and performance, which contribute to the achievement of economically sustainable development.

Picture outlined by Campania Region shows considerable criticality, commissarial regimes and absolute *maladministration*, especially if assessed in terms of quality of service provided, in two key areas for the community.

A well-managed model of good management of participating companies

[54] The following conclusions are fully shared, especially in the hypotheses under consideration in terms of collaborative management control, G. Colombini, *La dimensione finanziaria dell'amministrazione pubblica*, quoted, 22 ff.; on the need not to compress the underlying rights, F. Pallante, *Dai vincoli 'di' bilancio, ai vincoli al bilancio*, in *Giur. Cost.*, 2016, 6, 2498 ff.

in situations of tight financial constraints is necessary both as a driving force for local economy and to ensure optimal use of service.

The control over management, the submission to bankruptcy procedures, the different profiles of responsibility provided for the directors may be deterrents to avoid mismanagement, but this aspect does not necessarily correspond to the economic growth linked to the necessary role of publicly owned companies, inevitably linked to the territory in which they operate; publicly-owned companies must represent a system for attracting economic resources, exploiting an hybrid role and discipline in terms of growth, even in the event of budgetary constraints[55].

It is not possible to give solutions to such a serious issue here, but the need to guarantee certainty in the relations between the service provider, the administration and the citizen, through a unitary set of rules and tariff regimes to be guaranteed by regional laws (to avoid the paradoxical situation that has affected *EAV*) seems to be the minimum starting point.

Indeed, the choice to use company models is a free choice of an organizational nature that should allow the administration to be more flexible, with due responsibility, but it can never become an obligation or an arbitrary appeal to conceal failures and improper administration.

[55] On the subject, in a broad sense, see G. Rossi, *Pubblico e privato nell'economia semiglobalizzata. L'impresa pubblica nei sistemi permeabili e in competizione*, in *Riv. it. dir. pubbl. com.*, 2014, 1, 39 ff.; F. Bassanini, F. Cerniglia, F. Pizzolato, A. Quadro Curzio, L. Vandelli (eds), *Il mostro effimero. Democrazia e corpi intermedi*, Bologna, 2019, on a central role of intermediate bodies, on intermediation of hybrid subjects and on efficient push to territorial economy.

Abstract

Il presente contributo si propone di analizzare il ruolo delle società a partecipazione pubblica (nella specifica veste di società 'in house') quali soggetti deputati all'attuazione di politiche pubbliche sul territorio, in relazione alla complessa ricerca di equilibri tra i, pur flessibili, vincoli di contenimento della spesa e la necessità di garantire efficienza nella gestione di lungo periodo. Lo studio analizza un ambito territoriale specifico regionale (la Regione Campania) e due settori strategici, quello della sanità e dei trasporti, che rappresentano un osservatorio privilegiato di indagine.

Efficient governance and spending constraints in public holding companies of Campania Region. Notes from two strategic sectors

by Vinicio Brigante

This paper aims to analyze how public-participated companies (in the specific guise of 'in house' companies) can play a role in the implementation of public policies in their territories, in relation to a complex search for a balance between, although flexible, constraints of expenditure containment and need to ensure efficiency in long-term management. Research focuses on a specific regional territorial area (Campania Region) and two strategic sectors, health and transport, which are a privileged observatory of investigation.

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FINITO DI STAMPARE NEL MESE DI NOVEMBRE 2020
PRESSO LA BUONA STAMPA, NAPOLI