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# Financial Relationships Between Public Administration and Public Enterprises: Theoretical Foundations and Practical Implications

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## Abstract

The objective of this study is to analyze the institutional and organizational structure of public service companies in Italy. After analyzing the various reforms of the Public Administration, research has focused on the crisis and the insolvency of publicly owned companies, as, for the first time and recently the legislator has organically regulated the consequences of the insolvency of the same, affirming their general submission to bankruptcy and insolvency proceedings. Still the norm also outlined the procedure for the adoption of preventive plans should aim to avoid insolvency in financial hardship cases, and to remedy the crisis of the investee companies. After having dealt with the issue of historical evolution and territorial distribution of the phenomenon of public enterprises in Italy, aspects of the legal framework of the object of study will be addressed. The next section analyzes the contents of the reform of public companies, recalling the reference standards and the important news concerning the coverage of losses of companies. The new discipline produces important repercussions on public budgets and therefore on the community: for this reason, the conclusions of the study will deal with this aspect.

**Keywords:** public service companies, default, budget, Italy

## 1. Introduction

The objective of this study is to analyze the institutional and organizational structure of public service companies in Italy. This structure was the subject of a profound reform generated by reasons of public finance protection. After analyzing the concept of the public sector and the object of this study, the theoretical framework of the analysis will be addressed, which will be carried out from a historical-temporal perspective, with an interpretation of a company nature on observation phenomena.

In this sense, recalling what is reported in national and international literature, we analyzed the different strands of research that characterized the various reforms of the public administration. Research areas have shifted the objectives of the studies toward conditions of greater efficiency and value of public

performance while allowing to identify and analyze the evolution of the various systems of planning and control of public administration. In consideration of the pathological phenomena that have occurred with increasing frequency in recent years, research has focused on the crisis and the insolvency of publicly owned companies, as, for the first time and recently the legislator has organically regulated the consequences of the insolvency of the same, affirming their general submission to bankruptcy and insolvency proceedings. Still the norm also outlined the procedure for the adoption of preventive plans should aim to avoid insolvency in financial hardship cases and to remedy the crisis of the investee companies. After having dealt with the issue of historical evolution and territorial distribution of the phenomenon of public enterprises in Italy, aspects of the legal framework of the object of study will be addressed. This last topic is very controversial in doctrine; in fact, far from being a mere academic exercise, the qualification of the legal nature of such enterprises involves significant practical consequences on the *disciplinary* level. The next section analyzes the contents of the reform of public companies, recalling the reference standards and the important news concerning the coverage of losses of companies. The new discipline produces important repercussions on public budgets and therefore on the community: for this reason the conclusions of the study will deal with this aspect.

## 2. What constitutes the public sector and the public entities: defining boundaries

The public sector is traditionally constituted by all organizations owned and controlled by government, which provide utilities and services to the community [1].

Especially public complex and difficult to define, inputs are not being easily measured, and as a consequence, it is difficult to value the public sector efficiency [2].

Public entities differ from private sector organizations, but rather the delivery of outcomes to stakeholders [3].

Bossi et al. [4] have identified specific characteristics that define the public sector in relation to the private sector:

- Less incentive to adopt new management approaches, due to a non-competitive environment.
- Intangible objectives are less linked with the market value and financial profit.
- More importance is given to social and environmental responsibility.
- Most public organizations provide services (education, health, etc.), that is, intangibles.
- Intangibles—knowledge and human resources.
- Inflexible management procedures and rigid structures—the bureaucratic model does not facilitate new approaches.
- Less necessity to quantify.
- Increase in external demand for accountability and transparency in the use of public funds.

In general terms, we can point out that the public sector has experienced great processes of intense transformation which have been caused mainly by two factors: (1) financial and tax burdens, and as a result, the increasing importance of an efficient public sector management and (2) society's new demands to improve services [5].

The modern public sector management boasts public attention and service quality, which justifies the need to establish a series of initiatives to help efficiency and effectiveness in the public function.

The concepts related to innovation in the public sector can be included in new managerial view (or framework) of governmental administration called new public management (NPM) [6] since public service quality improves.

According to the paradigm of NPM, the role of public entities is changed to the name of decentralization, increase in autonomy of public managers, competition, quality strategies, economy, efficiency and efficacy, citizen guidance, emphasis on private sector management techniques, and performance indicators.

Since the new vision of public administration is the result of a process for the introduction of the principles of NPM [7–9].

NPM has brought about transformations in managing entities in public entities, whose main characteristics—defined by Hood [10], Olsen and Peters [11], and Hodges and Mellet [8]—include a wide variety of changes such as deregulation, decentralization, subcontracting, substitution of input control systems, management of results, responsibility assignment, and the introduction of different management techniques. The ultimate objective of these reforms is to improve the efficacy and effectiveness of public entities, surpassing bureaucratic problems and guaranteeing transparency in entities and accounts renderings.

As a result of NPM, public entities better response to the needs of service users, emphasis on performance and result management, introduction of performance standards, better communication of results, decentralization and competence of financial and personal management, interest in market forces and the creation of internal markets, privatization of public companies, and application of private sector management methods [12].

These characteristics all justify the need to draw together in an easily understandable system to those elements that are differentiating the sources of competition and that will generate value for the administration, such as the focus on the citizen, social responsibility, and professionalism.

In order to achieve this task, we consider public funding, ownership and operation of services. These organizations may be part of two areas of activity: the other is those monopolies which supply services and utilities and which also charge their customers for their services. In the 1990, the policy of privatization has made it more difficult the identification of public sector, given the less direct links which now exist between organizations and government.

The provision of public services may be organized in a variety of ways and controls through different organizational and regulatory mechanisms. Public services might have some element of government funding, ownership, public direction, or regulation, in different combinations, but there is no longer a need for direct government ownership for the provision of these public services. This study includes some hybrid organizations, in which private sectors were used by the public sector and public service organizations were urgent to be “commercial.”

Public services are those activities that are enshrined within the public service rather than the private provision through market. It is assumed these “public services” should be available for all members of the society provided in an equitable fashion [1].

Regime around it is a complex of domains of public services that relies on the perceived nature of the services. This is for several reasons. The main issue concerns the nature of public services and is widely used by the public services to be provided, that is, the boundary of public services is not fixed but varies from country to country. Thus, we use only the public services business (PBE) but not public institutional systems (PIS).

In light of this premise, the research field identifies which universe of companies on which the investigation is to be carried out partially or totally held directly or indirectly by public administrations, with the following legal form:

- Srl and SpA
- Srl and SpA in cooperative form
- Consortium companies in the form of Srl or SpA

### 3. Public companies in Italy: evolutionary profiles

The reasons behind the latest reform of publicly owned companies are the need to simplify and rationalize an impressive number of public companies in Italy.

For the purposes of the analysis of the regulations contained in Legislative Decree 175/2016 laying down “*Consolidated Law on the subject of companies owned by the public administration*,” it is necessary to define a public entity, and therefore, it is necessary to start from the models of public bodies that have become known over time.

The administrative organization of *the liberal state* was simple and was characterized by few territorial entities: state, provinces, and municipalities. There were, also, very few other government-owned businesses by local authorities, who mostly were characterized by a structure-associated *attiva*.

This state was essentially concerned with controlling the internal public order and the defense of the territory from external enemies, leaving the market free to seek its equilibrium.

Toward the end of the nineteenth century and the beginning of the twentieth century, the state was strengthened, with the relative growth of the ministries and agencies that began to take care of public services.

This historical moment marks the start of the process of expansion of the original organizational structures of the state, with the creation, at the state level, of *autonomous companies* (entities included in the ministerial area with management autonomy and a different financial, accounting and controls), while at the local level, *municipalized companies* (as branches of the territorial bodies that carried out, at the levels closest to the citizen, the same functions of the autonomous companies), as well as with the multiplication of functional public bodies, which has led to a progressive differentiation and multiplication of public bodies. We pass, in this way, from one State controller to an “*interventionist*.”

Following the crisis of 1929, as well as in the post-war period, there was a strong state intervention in the economy due to the consequential economic difficulties of these historical events.

In particular, the state started to take stock of private companies in difficulty in order to avoid bankruptcy (e.g., the purchase of shareholdings by IRI, an institute for industrial reconstruction).



We have thus moved on to a model of State *entrepreneur* and lender.

With the entry into force of the Constitution, the panorama of public bodies has been enriched by another body: the region (public body endowed with legislative and statutory power in certain matters listed in Article 117 of the Constitution) and with the reform of the Title V administrative functions has been redistributed with a view to subsidiarity, differentiation, and adequacy.

In the same perspective of the evolution of the group of public subjects, the law on parastato (L.70/1975) continued the work of transformation through an uncontrolled proliferation of necessary public bodies, qualified as parastatals. This framework has made it difficult to give a single definition of public administration, or we speak, in fact, of *pluralism of public administrations* or *public administrations with variable geometry*.

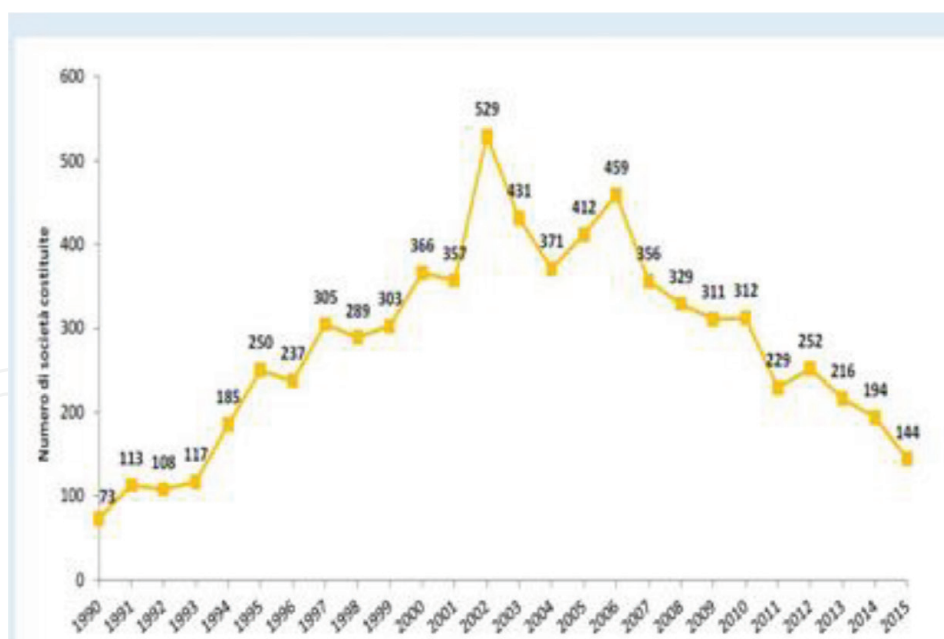
This organizational pluralism is presented as:

- Pluralism of public authority (state, regions, and local authorities)
- Pluralism of the state organization (plurality of ministries)
- Plurality of public bodies (i.e., organizations differentiated by public authorities in the strict sense and endowed with their own legal personality but linked to them by more or less intense organizational ties)

Uniformity has given way to the diversification of models, envisaging a system of administration no longer revolving around the State-apparatus, but inspired by the principle of institutional pluralism, by virtue of which alongside the State, the public body par excellence and other subjects operate and are endowed, as well as of private juridical capacity, also of public juridical capacity, which pursue aims of public interest.



**Figure 1.**  
Public companies currently controlled by the Ministry of the Economy and Finance.



**Figure 2.**  
Number of public enterprises by year of establishment from 1990 to 2015.

The penetrating intervention of the State in the economy has led to an uncontrollable increase in public debt, imposing a peculiar process of liberalization and privatization in order to reduce it. **Figures 1** and **2** show a quantitative analysis of the public investee companies in Italy, illustrating the public companies currently controlled by the Ministry of the Economy and Finance and the number of public companies established between 1990 and 2015.

#### 4. Legal profiles and disciplinary aspects of public enterprises

With the privatization process, there have arisen problems of formal classification of the discipline; in fact, within the syntagma “public companies” can be, in practice, surrounded by deeply heterogeneous figures. It is for this reason that it cannot be further supported by a static concept of a public body, indeed, must give notice of the fact that recently the Stato Council (judgment no. 2660/2015<sup>1</sup>) is oriented toward a “functional and iridescent notion of public body: the same subject may have the nature of public body for certain purposes and with respect to certain institutions and may, however, not have it for other purposes, preserving, respect to other institutions, and regulatory regimes of a private nature.”

Far from being a merely classificatory matter, the public qualification of an institution involves significant practical consequences on the *disciplinary* level.

A first limit is found in the controls, of various kinds (on the deeds, on the management bodies, internal or external, accounting), which are the object of all public bodies, aimed at assessing the legitimacy of the institution’s activity and compliance in the public interest.

A strong limitation is, moreover, by the absence of a complete and perfect negotiating freedom, characterized by a number of constraints, rules, and publicistic limits, aimed at transparent proceduralisation of a contractual choice, with regard to *an*, the content of the contract and the choice of the negotiating partner. It is

<sup>1</sup> <https://www.giustizia-amministrativa.it/cdsintra/cdsintra/AmministrazionePortale/DocumentViewer/index.html?ddocname=7CQIJE5IDUT64IMHJ4XI75AXDE&q>.

therefore an activity that is always functional and not free, characterized, that is, by a teleological constraint susceptible of control and syndication in the jurisdictional seat.

With regard to the configurability of public bodies to a corporate structure, the debate has polarized around the question of whether the public finalization of the corporate body and the alteration of the typical corporate model can lead to affirming the attraction of the so-called investee companies to the public sphere.

This assimilation took place fundamentally for reasons of public finance protection, given that often the private module constitutes an elusive means of provisions that are undoubtedly binding on the (public) participating bodies but not also for the private entities constituted or participated by them. In general, it should be noted that nowadays there is a tendency to identify between public bodies and institutions included in the consolidated account of the public administration.

The growing attention on the system of public investments, at central and territorial level, is a consequence of the previous use of the corporate instrument as a way of avoiding the constraints of public finance. In compliance with the new rules on budget balances, the legislator has set up a coherent system of measures, directed toward the common objective of restoring efficiency to companies in public participation, including through the strengthening of corporate governance and to consider the “public administration group” (GAP) in a unified manner, with particular reference to the effects on institutions of the results of the exercise of the investee organizations.

The lack of homogeneity of the financial statements, determined by the phenomenon of outsourcing, involved an incomplete and not representative representation of the financial, economic, and equity situation of the GAP and the overall functions performed by the entity through its organizational structures, its instrumental entities, and its investee companies.

With a view to greater transparency and accountability of the various levels of government, Legislative Decree June 23, 2011, n. 118, in harmonizing the accounting systems and financial statements of the regions, provinces, and local authorities, establishes the consolidation of the accounts between the institutions and their participated bodies.

The “centrality of the consolidated financial statements” is functional to compliance with the public finance constraints, since it allows to achieve the objective of “neutrality” of the budget with respect to the phenomenon of outsourcing and is approved by 30 September of the year following the reference year (accounting principle applied consolidated financial statements). The scope of consolidation extends to cases in which the dominant influence is exercised by virtue of particular contractual restrictions, even in the absence of participation. The obligation of consolidation, long postponed, from September 30, 2017, is mandatory for all institutions with a population of more than 5000 inhabitants. In force since 2018, the financial statements that present, for each of the three parameters (total assets, net assets, and total revenues), are less than 3% compared to the parent company’s economic and financial position.

The valuation of irrelevance must be formulated both with reference to the single entity or company and to the set of entities and companies considered to be scarcely significant, as the consideration of more modest situations could be of interest for consolidation purposes. It must be avoided that the exclusion of so many autonomously insignificant realities subtracts important information from the group budget. Consider, for example, the limit case of a corporate group consisting of a considerable number of institutions and companies, all of a small size such as to allow exclusion if considered individually.

Therefore, for the purposes of exclusion for irrelevance, starting from the financial year 2018, the sum of the percentages of the financial statements



considered as irrelevant must present, for each of the parameters indicated above, an incidence of less than 10% compared to the equity, economic, and financial management of the parent company. If these sums have a value equal to or greater than 10%, the parent company identifies the financial statements of the individually irrelevant entities to be included in the consolidated financial statements, until the sum of the percentages of the accounts excluded for irrelevance is reduced to less than 10%.

On the other hand, the entities and companies wholly owned by the parent company and the *in-house* companies and the investee entities holding direct assignment by the members of the group, irrespective of the shareholding, are considered significant.

In the case of direct assignment, the shareholdings of less than 1% of the investee company's capital are considered irrelevant and not subject to consolidation.

The amplitude of the scope of consolidation makes it possible to achieve a unitary economic result of the "public administration group," which takes into account both the result of the institution's exercise and the profits and losses of the investee organizations.

The proliferation of participating companies is now a phenomenon subject to attention by the Court of Auditors, which has identified the critical profiles of the use of the corporate instrument for the pursuit of the institutional goals of public bodies. The Autonomous Section of the Court of Auditors<sup>2</sup> in resolution no. 24/2015 highlighted the fact that only 35.72% of the participated bodies operate in the local public services sector, with a clear predominance of *in-house* assignments *with* respect to assignments through public tenders. From the point of view of financial management, the Court of Auditors highlighted the strong prevalence of debts on loans in the relations between local authorities and investee companies.

The regulatory framework, in the field of public companies, presented a strong regulatory disorder that negatively characterized the regulation of corporate holdings held by public administrations.

In consideration of this, it was necessary to introduce a unitary discipline aimed at resolving the classification problems and legal regime of these subjects.

It is for this reason that the Parliament, with the law of August 7, 2015, has delegated the government to adopt a decree reforming the public administration as a whole.

The purpose of the reform, as stated by the Council of State in its opinion no. 968/2016<sup>3</sup>, is to "*simplify and rationalize the rules in force in this area, through the reorganization of national provisions and the creation of an organic general discipline.*"

## 5. The reform of public enterprises as an instrument for rationalizing public spending in Italy

These are the essential points of the intervention delegated by the Madia reform:

- Firstly, limit the establishment of new public companies, make the financial statements of companies in public control transparent, reduce the number of public companies, and prevent the proliferation of unnecessary societies.

<sup>2</sup> [http://www.corteconti.it/export/sites/portalecdc/\\_documenti/controllo/sez\\_autonomie/2015/20150720\\_20150722\\_Deln024\\_FRG\\_Organismi\\_Partecipati\\_Linkrelto.pdf](http://www.corteconti.it/export/sites/portalecdc/_documenti/controllo/sez_autonomie/2015/20150720_20150722_Deln024_FRG_Organismi_Partecipati_Linkrelto.pdf).

<sup>3</sup> <https://www.giustizia-amministrativa.it/cdsintra/cdsintra/Notiziasingola/Ilcodicedicontratti pubblici/PareriresidalConsigliodiStato/Parere21aprile2016968/index.html>.

- Secondly, reduce the areas of intervention of public companies, eliminate or limit public companies that are not in economic equilibrium, redefine the personnel management system of publicly controlled companies, and ensure that the activities of publicly owned companies are more efficient.
- Finally, improve the services provided to citizens and businesses, giving greater credibility and transparency to the public administration and favoring the best use of public resources, through the efficient allocation of resources and the removal of waste sources.

This is the framework in which the Legislative Decree 175/2016 laying down “Consolidated Law on the subject of companies owned by the public administration,” then amended by Legislative Decree, 100/2017.

The Consolidation Act is essentially divided into four types of intervention:

- Introductory provisions containing the indication of the object and scope of the TU, the formulation of definitions, and the identification of the types of companies in which public participation is admitted
- Provisions aimed at establishing the conditions and limits of public shareholdings, as well as redefining the rules for the incorporation of companies or for the taking up or maintenance of shareholdings by public authorities and for the sale of public holdings
- Provisions concerning the administrative and control bodies of publicly controlled companies
- Provisions aimed at encouraging economic efficiency and efficiency through the introduction of procedures for periodic rationalization and extraordinary auditing, personnel management, specific financial rules for the local authorities’ subsidiaries and the promotion of transparency

The Consolidation Act draws the “perimeter” within which a public administration can decide to set up a company (in the forms, governed by the Civil Code, of joint-stock companies or limited liability companies), specifying in Art. 4, paragraph 1, that “le Public administrations cannot directly or indirectly constitute companies having as their object activities of production of goods and services not strictly necessary for the pursuit of its institutional purposes or acquire or to maintain holdings, including minorities, in these companies.”

This is the so-called **restriction of purpose**, drawn up by the jurisprudence and implemented by the delegated legislator, which places a limit on the participation of the public administration in companies, so that they pursue a purpose compatible with the institutional purpose of the participating administration.

Paragraph 2, of the Art. 4, also introduces an **activity constraint**: companies in which public administrations can participate and perform “exclusively” certain activities, strictly listed (e.g., production of a service of general interest, design and construction of a work published on the basis of a program agreement, self-production of goods or services instrumental to the participating institution or public bodies, etc.).

The most important aspects of Legislative Decree 175/2016 then amended by the Legislative Decree, 100/2017, are essentially concern with:

- Art 20–24 rationalization plans
- Art 14 recapitalization
- Art 21 financial rules

The main instrument through which the need to reduce public spending has been pursued is the obligation to periodically rationalize public holdings, to which the administrations are held annually.

The rationalization plans concern all public administrations and are designed to highlight the following situations:

- a. Company shareholdings that are not included among those “indispensables” for the purposes of pursuing institutional goals.
- b. Companies that do not have employees or have more directors than employees.
- c. Investments in companies that perform similar activities to those carried out by other investee companies or by instrumental public bodies (the so-called dual company).
- d. Investments in companies which, in the previous 3 years, have achieved an average turnover not exceeding 1 million euro<sup>4</sup>.
- e. Investments in companies other than those established for the management of a service of general interest that has produced a negative result for four of the previous 5 years.
- f. Investments in companies with a need to contain operating costs.
- g. Investments in companies that need to be aggregated regarding the activities permitted pursuant to Art. 4 (see Article 20, paragraph 2).

The real novelty of the Consolidated Law consists in the provision of a periodic revision alongside the extraordinary one, providing that the public administrations carry out, annually (from 2018, by December 31) and the analysis of the investments held and prepare rationalization plans, according to the criteria enunciated by the aforementioned Art. 20.

To complete the reorganization procedure, the **Art. 24** of the disciplinary decree regulates the procedure for the extraordinary compulsory review of investments held, directly or indirectly, by public administrations, for the disposal or rationalization of certain types of companies.

The section of the autonomies, with resolution n. 19/SEZAUT/2017/INPR<sup>5</sup> issued guidelines aimed at favoring the correct fulfillment of the provisions,

<sup>4</sup> With the modification provided by the Art. 17, co. 1, lett. (f), Legislative Decree no. 100/2017, the turnover threshold, during the transition period, has been reduced to 500,000.00 euros. See Art. 26, co. 12-quinquies, Legislative Decree no. 175/2016: “For the purposes of applying the criterion referred to in Article 20, paragraph 2, letter (d), the first 3-year period is the 3-year period 2017–2019. Pending the first application of the aforementioned criterion for the 3-year period 2017–2019, the average turnover threshold not exceeding 500,000 euro applies for the 3 years preceding the entry into force of this decree for the purpose of adopting the extraordinary audit plans in Article 24 and for the 3-year periods 2015–2017 and 2016–2018 for the purposes of the adoption of the rationalization plans referred to in Article 20.”

<sup>5</sup> [http://www.corteconti.it/export/sites/portalecdc/\\_documenti/controllo/sez\\_autonomie/2017/delibera\\_19\\_sezaut\\_inpr\\_2017\\_e\\_linee\\_guida.pdf](http://www.corteconti.it/export/sites/portalecdc/_documenti/controllo/sez_autonomie/2017/delibera_19_sezaut_inpr_2017_e_linee_guida.pdf).

underlining the obligatory nature of the recognition of the investments held, so that the recognition is always necessary and also to certify the absence of shareholdings.

The rationalization plan includes:

- The recognition of holdings held.
- Decision of those not necessary for the pursuit of the corporate purpose.

The results of the survey are left to the discretion of the participating administrations, which are required to expressly motivate the choice made that may consist of a reorganization measure (alienation /rationalization/merger) and the maintenance of participation without intervention. In any case, a motivation is required, both for dismissing and for maintaining the company.

In summary, the aforementioned regulation provides two dismissal obligations:

- a. The prohibition of maintaining companies that are not consistent with their institutional aims (principle of functionalization);
- b. The prohibition to maintain companies, which are consistent with the institutional aims of the institution, are not indispensable for their prosecution (see Corte conti Lombardia Section control, resolution of May 13, 2015, No. 195; Corte conti-Basilicata Sez control, resolution of 14 June 2017, No. 40; Corte conti-Piemonte Control Section, Resolution No. 28 of January 28, 2016; and Court of Auditors-Emilia Romagna Control Section, Resolution 12 January 2016, No. 4).

## **6. The accounting tools for covering losses of public companies**

Among the fundamental principles that characterize the accounting harmonization reform, there is the recourse to adequate allocations to specific provisions for risks and charges (in the past often hidden among the residual liabilities) destined to safeguard the present and future balance of the financial statements. With this in mind, the provision for the investee loss provision is envisaged, in addition to the tied multiyear fund and the doubtful loan fund.

First envisaged by Art. 1, cc. 550 et seq of Law 147/2013 (2014 Stability Law) and, currently, governed by Art. 21, Legislative Decree no. 175/2016, the obligation is foreseen (which will come into force at full capacity from 2018 but provides for a transitional regime of first application already in the 3-year period 2015–2017) for local public administrations to set up a fixed fund to cover the losses of participated bodies not immediately cleared up.

The establishment of the captive fund to cover the losses of investee organizations will make it possible to include in the financial statements of local authorities the effects of losses incurred by these entities, and not immediately repaid. As emphasized by the Court<sup>6</sup>, the fund:

- Avoids, in the forecast budget, that the failure to take into account any losses reported by the body could have a negative impact on future budget balances.

<sup>6</sup> [http://www.corteconti.it/export/sites/portalecdc/\\_documenti/controllo/campania/pareri/2016/de libera\\_333\\_2016.pdf](http://www.corteconti.it/export/sites/portalecdc/_documenti/controllo/campania/pareri/2016/de libera_333_2016.pdf).



- Favors the progressive managerial accountability of the member bodies, through a stringent correlation between the economic-financial dynamics of the investee organizations and those of the entrusting members.

The obligation to create the fixed fund for the losses of the participated bodies concerns all local public administrations included in the ISTAT list referred to in Article 1, paragraph 3 of Law 196/09. Therefore, in addition to regions, provinces, and municipalities, the provision calls into question, among others, mountain communities, unions of municipalities, consortia between local authorities, chambers of commerce, and local health authorities.

The “participatory bodies” that the Art. 1, c. 550<sup>7</sup> considers for the purpose of determining the provision to the fund are special companies, institutions, and investee companies. The financial intermediaries referred to Art. 106 of Legislative Decree 385/93 (Consolidated Law on Banking and Credit Law), as well as companies issuing financial instruments listed on regulated markets and their subsidiaries. It should also be noted that the provision is made if the investee organizations present, in the last available financial year, a financial result or a negative financial balance, not immediately paid by the participating entity (Article 1, paragraph 551).

Article 21 d. Legislative Decree 175/2016, as amended by Legislative Decree 100/2017, establishes that in the event that companies in which local public administrations have a negative operating result, the participating local public administrations, which adopt financial accounting, set aside subsequent year in an appropriate *restricted fund* an amount equal to the negative result, in proportion to the shareholding.

It should be noted that the Art. 21 of Legislative Decree. 175/2016 is also concerned with standardizing the cases in which the entities holding the loss-making interest are not in financial accounting but adopt a civil accounting system. In such cases, they adjust the value of the investment, during the following year, to the amount corresponding to the fraction of the equity of the investee company where the negative result is not immediately settled and constitutes a lasting loss in value.

For companies that prepare consolidated financial statements, the operating result to be considered is that relating to these financial statements.

The amount set aside returns to availability to the public administration budget, always in proportion to the participation fee, in the following cases:

- The participant body stores the loss or retires the participation.
- The participant is placed in liquidation.
- The investee companies, with their own resources, pay in full or in part the losses achieved in previous years.

Apart from these cases, the provision allocated to the budget is included in the statement of the share of the administrative result and therefore remains essentially unavailable for purposes of expenditure other than those for which it was established.

<sup>7</sup> Art. 1 c. 550 applies to special companies, institutions, and companies owned by local public administrations indicated in the list referred to in Art. 1, of Law 196/2009. Financial intermediaries pursuant to Art. 106 of the consolidated text referred to in d. lgs n. 385/1993, as well as companies issuing financial instruments listed on regulated markets and their subsidiaries.

In the first application, for the years 2015, 2016, and 2017, the legislator has provided a transitional period in which the provision is gradually increasing, with an important distinction between the participation in bodies that, despite having reported a loss in last available budget, the accounts worsened and those that improved them compared to the average of the previous 3 years.

The first situation includes the hypotheses of the bodies that recorded a loss after previous financial statements in profit or which reported a negative result above the average of the previous 3-year period. In these cases, the portion to be allocated in the 2015 financial statements of the participating entity is equal to 25% of the negative result achieved in the previous year by the body. The provisions will be set at 50% for 2016 and at 75% for 2017, again with reference to the losses reported by the investee in the previous year.

If, on the other hand, the loss in the last available balance sheet is lower than the average of the previous 3 years (showing an improvement in the accounts), the provision in the 2015 estimated budget must be made equal to the difference between the result achieved in previous year and the 2011–2013 average result improved by 25% for 2014. In the following financial years, the amount should be calculated as a slide considering that the average result must be improved by 50% for 2015 and by 75% for 2016.

The Autonomy Section of the Court of Auditors, which with Resolution no. 4 of 17 February 2015,<sup>8</sup> highlights that provisions to the fund must be coordinated with the provisions of the Italian Civil Code on the automatic dissolution of the company whose capital has fallen below the legal limit, which entitles the entity to decide, based on a prognostic judgment on the future profitability of the company, whether to provide for the reintegration of the share capital or to take note of the automatic liquidation of the body (Articles 2484, paragraph 1, No. 4 and 2447 CC).

To be specific, the Art. 14 d. Decree 175/2016 establishes the prohibition for public authorities to carry out capital increases, extraordinary transfers, credit facilities, or issue guarantees in favor of subsidiaries, with the exception of listed companies and banks, who have registered for three consecutive financial statements and losses for the year or that have used reserves available for the settlement of losses also during the year.

The local partner institution can intervene in the area of losses:

- Only within the limits of its participation in the share capital and cannot provide additional resources.
- Only if the financial intervention is compatible with the provisions of the Community law **on state aid**.

Local administrations will be able to intervene for losses only against companies responsible for the performance of the *service of general economic interest*.

Therefore, the local public administration can make the losses of an investee company with the resources set aside in the restricted fund, within the limits of its shareholding and only after the compatibility with the state aid legislation has been assessed.

It should, however, be kept in mind that **the provision for losses** is a prudential budget rule, so that the entities that have set aside resources cannot, however, freely repay the losses of the investee companies and must instead comply with the requirements indicated in the same paragraph 5 of the aforementioned article 14 of

<sup>8</sup> <http://www.quotidianoentilocali.ilsole24ore.com/pa24.php?idDoc=16742623&idDocType=3>.

the single text, so any intervention in this sense can only take place within a restructuring plan that guarantees the future balance of the subsidiary's accounts.

Legislative Decree n. 100/2017, conforming to the indications given by the Council of State in its opinion, has also added a paragraph 3-bis to the aforementioned article 21 of d. lgs. n. 175/2016, under which the participating local public administrations can proceed to the level of the losses suffered by the investee company with the sum set aside, within the limits of their shareholding and in compliance with the principles and legislation of the European Union in terms of **state aid**. This means that, on the one hand, the local partner body (beyond the amount of amounts entrusted to an investee for the performance of certain services) can intervene in the level of losses only within the limits of its participation in the share capital and cannot provide additional resources and, on the other hand, that a local public administration can proceed only if the financial intervention is compatible with the provisions of the Community law on state aid: this compatibility is defined by the decision of the EU Commission of December 20, 2011, which codifies the principles established by the ruling judgment on the Altmark case to exclude that a public intervention is an improper aid, conflicting with Article 107 of the EU Treaty.

Consequently, local administrations will be able to intervene for losses only against companies responsible for the performance of the **service of general economic interest** (e.g., transport companies), to offset the service obligations imposed on them and only to condition that the four principles of the Altmark judgment are respected:

- a. The recipient undertaking must have been effectively entrusted with the fulfillment of public service obligations, and those obligations must be clearly defined.
- b. The parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner.
- c. The compensation cannot exceed what is necessary to cover all or part of the costs arising from the fulfillment of the public service obligations, taking into account the relevant revenue and a reasonable profit.
- d. The choice of the company to be entrusted with the fulfillment of public service obligations must be made in the context of a public procedure that allows to select the candidate able to provide these services at the **lowest cost for the community**. If the choice of the company, in a specific case, takes place outside of such a procedure, the compensation must be determined on the basis of a cost analysis that should be borne by a medium-sized company, efficiently managed and adequately equipped with means to carry out the service.

With regard to the methods for **hedging the financial resources** allocated to recapitalization and/or loss coverage of investee companies: Art. 3 paragraph 18 of the Budget Law 2004 stipulates that the bodies *No on can borrow to finance contributions aimed at the recapitalization of companies or companies aimed at covering of losses.*

The Court of Auditors<sup>9</sup> (Regional section Abruzzo, sent. No. 1/08) stated that the costs of covering of losses and recapitalizations of participatory bodies should be considered **current expenditure**, and, as such, be taken into account in the calculation of the fund balances.

<sup>9</sup> [http://www.corteconti.it/export/sites/portalecdc/\\_documenti/controllo/abruzzo/pronunce/2017/delibera\\_115\\_2017\\_e\\_relazione.pdf](http://www.corteconti.it/export/sites/portalecdc/_documenti/controllo/abruzzo/pronunce/2017/delibera_115_2017_e_relazione.pdf).

## 7. Conclusions

The use of corporations by local administrations has been consolidated since the beginning of the nineties of the last century. Since the beginning of the twentieth century, the phenomenon of public intervention in the country's economy had spread, as the corporate phenomenon developed in public administrations, in the absence of specific rules, the belief that the joint-stock company as an organism governed by the civil code was exempted from the application of accounting rules and public finance of public bodies.

The results of the deductive phase have shown that the public investee companies are called to identify new methodologies to direct and control the action of their actions in order to prevent company crises and reorganization.

The provisions of Legislative Decree 175/2016 urge the governance bodies of the public investee companies to use the best and most adequate instruments for monitoring and evaluation with a view to promptly emerge the business crisis. From an economic-business point of view, it can be seen that insolvency can be ascertained mainly ex-post also from outside and through accounting and/or final data 91; on the contrary, the crisis, which has not yet crystallized, giving rise to insolvency, presupposes a vision that is no longer historical but prospective, aimed at identifying the incapacity in the future of fulfilling not only the obligations already assumed but also those foreseeable in the normal course of business.

This suggests considering the possibility of using accounting and/or historical data but with a view to their ability to signal future imbalances, since the accounting indicators examined individually are not very significant for this purpose, that is, without adequate spatial comparison, time and a joint analysis with *ratios*, and operating results in the multiple economic-financial-equity aspects of the investee company.

Consistently with what is outlined by the economic-business doctrine on the uncertainty that distinguishes the identification of an actual state of crisis, there is a need to always combine qualitative information with the most immediate accounting quantitative data and to accompany simple historical analysis, results with a thorough examination of the future action plans, and the related forecast financial and economic flows.

The analysis shows that the legislator has provided a fairly adequate instrumentation (fund for investee losses) only after the losses have been produced. Here it is considered that preference should be given to a prospective and planning perspective. Basically, only a medium-term planning can effectively detect a state of crisis, confirming its finality or anticipating the outcomes; therefore, the introduction of such an approach would give rise to an extremely useful planning logic for the public investee companies.



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