

## Newsalert

Corporate Department

The Italian Court of Auditors once again addressed the notion of state-owned companies pursuant to Legislative Decree No. 175/2016 and its uncertain boundaries

With resolution No. 11/SSRRCO/QMIG/19 (the “**Resolution No. 11/2019**”) of the United Chambers of the Court of Auditors (*Corte dei Conti*) sitting in its audit capacity <sup>(1)</sup>, the Court once again addressed the notion of *state-owned company* pursuant to Article 2 of Legislative Decree of 19 August 2016, No. 175 (the Italian Consolidated Law on Companies with Public Shareholders – “**TUSP**”), stating on the following matter of legal principle brought by the Regional Audit Chambers for Umbria: “*whether or not companies with a public majority held by one or more public entities, each of one holding less than 50 per cent of the shares, are to be considered as state-owned companies*”.

The matter is of particular importance, since if a company is to be qualified as a state-owned company a number of provisions entailing a significant impact on its articles of association and governance (and in some cases on its very existence) will apply.

The United Chambers decision, which follows by less than one month decision No. 16/2019/EL of the United Chambers of the Court of Auditors sitting in its judicial capacity and with specially designated members ( “**Decision No. 16/2019**”) <sup>(2)</sup>, should clarify – or at least is aimed at clarifying – the different interpretations surrounding the notion of *state-owned companies* following the entry into force of the TUSP; such interpretations can be found, *inter alia*, in some decisions of the Regional Audit Chambers of the Court of Auditors, in the views provided by the unit of the Ministry of Economy and Finance responsible for monitoring the provisions of TUSP, and in a decision of the Italian Anti-corruption Authority <sup>(3)</sup>.

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<sup>(1)</sup> Filed on 20 June 2019.

<sup>(2)</sup> Filed on 22 May 2019.

<sup>(3)</sup> Reference is made, *inter alia*, to: Regional Audit Chambers of the Court of Auditors for Liguria, Resolution No. 3/2018/PAR, 11 January 2018, available on [www.cortedeiconti.it](http://www.cortedeiconti.it); Bolzano Audit Chambers of the Court of Auditors for Trentino-Alto Adige/Südtirol, Resolution No. 8/2018/PAR, 10 December 2018, available on [www.cortedeiconti.it](http://www.cortedeiconti.it); Regional Audit Chambers of the Court of Auditors for Umbria, Resolution No. 5/2019/VSGO, 11 January, 2019, available on [www.moltocomuni.it](http://www.moltocomuni.it); Ministry of Economy and Finance – Directorate VIII Actions to Optimise Public Property Value, *Orientamento (ai sensi dell’art. 15, comma 2, del D. Lgs. n. 175/2016)*, 15 February 2018, available on [www.dt.tesoro.it](http://www.dt.tesoro.it); Italian Anti-corruption Authority, *Nuove linee guida per l’attuazione della normativa in materia di prevenzione della corruzione e trasparenza da parte delle società e degli enti di diritto privato controllati e partecipati dalle pubbliche amministrazioni e dagli enti pubblici economici*, 20 November 2017, available on [www.anticorruzione.it](http://www.anticorruzione.it).

The starting point is the notion of *state-owned company* resulting from the combined provisions of letters m) and b) of Article 2, paragraph 1, of the TUSP. In particular, pursuant to letter m), *state-owned* those companies are described as those “*in which one or more public administrations exercise have a controlling interest pursuant to letter b)*”, where “*controlling interest*” means, under the mentioned letter b), “*the condition described in Article 2359 of the Italian Civil Code*”; under the same letter b), a *controlling interest* may also exist when “*pursuant to law, the articles of association or shareholders’ agreements, the unanimous consent of all the parties sharing the controlling interest is required for taking strategic financial and management decisions relating to the company’s activities*”.

The most delicate and controversial issue relating to how this notion is construed concerns the boundaries of *joint* or *shared* control by several public administrations. Such issue arises in relation to - rather frequent - cases in which the shareholding structure is quite fragmented and is characterised by the presence, on the one hand, of a private shareholder with a significant portion of the share capital and, on the other hand, of several public shareholders who jointly hold a (relative or absolute) majority share in the capital itself.

Such case, if interpreted within the framework of the ordinary categories of *controlling interest* under Article 2359 of the Italian Civil Code (*i.e.*, *de facto* or statutory control, or external control provided for under an agreement), does not usually entail any kind of control by public shareholders. According to the prevailing interpretation of Article 2359, control may be solely exercised by a *single* entity.

However, the TUSP provides for a further type, which is found when, “*for strategic financial and management decisions relating to the company’s activities*”, the unanimous consent of “*all the parties sharing a controlling interest*” is required pursuant to law, the articles of association or shareholders’ agreements.

Compared to the regulatory framework described above, the Regional Audit Chambers of the Italian Court of Auditors and the other Authorities that chanced upon the matter have pushed the boundaries of the *letter of the law* in order to state, based on various arguments, that whenever the majority of the share capital is held by one or more public administrations – even in the absence of provisions provided for by law, the articles of association or shareholders’ agreements imposing a shared controlling interest over “*strategic financial and management decisions relating to the company’s activities*” – the company ought to be qualified as a *state owned company* and consequently be subject to the special regime provided for by the TUSP <sup>(4)</sup>. This would also apply regardless of the company’s articles of association and governance structure and the powers that may be granted to a private shareholder or to directors which are expression of the latter.

In this context, which is mainly leaning towards extensive public law-oriented interpretations, a clear countertrend was established with the aforementioned Decision no. 16/2019/EL, in which the United Chambers of the Italian Court of Auditors sitting in its judicial capacity stated that:

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<sup>(4)</sup> Various arguments are conducted in this regard: (i) companies in which one or more public administrations have the powers or votes referred to in the combined provisions of Article 2359 of the Italian Civil Code and Article 2, letters b) and m), of the TUSP are regarded as being *state owned*; (ii) the conclusive behaviors on the part of public shareholders highlighting a shared controlling interest over the company, regardless of the existence of a formalised coordination, should be assessed and taken in consideration; (iii) any veto rights or powers on the part of public shareholders preventing the private shareholder from taking certain decisions on its own should be considered; (iv) in some other cases, it is stated that distinct public shareholders should be considered jointly as a “single entity”, since they are all called upon to pursue a shared public interest.

- (i) the status of state-owned company pursuant to the TUSP cannot “be inferred from parameters consisting of the majority of shares and directors in the board of directors, but requires a targeted investigation aimed at verifying whether, in practice, the conditions set forth under Article 2, letter b), of the TUSP are met”; therefore, it is crucial to conduct “an analysis of the provisions of the articles of association and of the shareholders’ agreements in order to assess to what extent the public administrations (local bodies) holding shareholdings are able to influence the ‘strategic financial and management decisions relating to the company’s activity’”. With particular reference to the case brought to the attention of the United Chambers, the Court considered that the presence in the articles of association of various clauses granting the private shareholder powers aimed at protecting their position – such as the necessary vote in favour of the private shareholder for any amendment to the articles of association – made it possible to rule out, in practice, that the public shareholders were able to influence the “strategic financial and management decisions relating to the company’s activity” pursuant to Article 2, letter b), of the TUSP, without the consent of that private shareholder;
- (ii) the different categories of controlling interest must be interpreted through the combined reading of letters b) and m) of paragraph 1 of Article 2 of the TUSP, with the consequence that a company may be classified as state owned in case “one or more public administrations exercise control pursuant to letter b), or when, pursuant to law, the articles of association or shareholders’ agreements, strategic company decisions require the unanimous consent of the public administrations with a controlling interest”; therefore, the status of state-owned company “cannot be assumed in the presence of ‘unambiguous or conclusive behaviours’”, but must emerge “exclusively out of laws, the articles of association or shareholders’ agreements which, by requiring the unanimous consent of all the public administrations holding a shareholding, are capable of influencing the financial and strategic decisions of the company”.

Resolution no. 11/2019 addressed the matter anew and spurred a reconsideration of the same.

In response to the matter of legal principle brought by the Regional Audit Chambers for Umbria, the United Chambers of the Italian Court of Auditors sitting in its audit capacity stated that “it is sufficient, in order to detect a case of ‘state-owned company’ [...], that one or more public administrations hold, in the general annual shareholders’ meeting, the votes required under Article 2359 of the Italian Civil Code”.

In the paragraphs preceding such resolution, which seems likely to pave the way once again towards more extensive interpretations, the Court lingered on two non-easily reconcilable aspects, which are particularly interesting.

The Court, on the one hand, (i) reiterated that, “as already underlined by the recent rulings of the United Chambers of this Court sitting in its judicial capacity (No. 16/2019/EL), the previous criteria for identification, based on the literal application of the combined provisions of letters b) and m) of Article 2 of the TUSP, must be reconsidered when, on the basis of shareholders’ agreements (Article 2314-bis [rectius 2341-bis] of the Italian Civil Code) or specific provisions of the articles of association or clauses of an agreement (also deriving, for example, in the specific case of companies with both public and private shareholders, in service contracts entered into following a “dual-purpose tendering procedure”), there is evidence of a dominant influence on the part of the private shareholder or of several private shareholders (possibly, also jointly with some of the public shareholders), even though one or more public entities hold the majority of

*the company's shares"; on the other hand, (ii) the Court stated that "in the event of companies the entire share capital of which, or a majority share in which, is owned by public bodies [...], the latter are obliged to implement, and formalise coordinated control measures and instruments (through the execution of appropriate shareholders' agreements and/or by amending the articles of association) in order to exercise a dominant influence over the company".*

Despite recent decisions and resolutions, it thus appears that the boundaries of the notion of *state-owned companies* pursuant to the TUSP, as well as the related responsibilities of the corporate bodies and public shareholders, remain uncertain.

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*Should you require any further clarification or information, please contact your usual person of reference in Chiomenti.*