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**SOURCE OF LIABILITY FOR PUBLICLY OWNED  
AIRPORT DIRECTORS: DOES MISCONDUCT IMPLY  
PUBLIC OR PRIVATE LAW? (\*)**

*Airport managers are generally publicly owned companies that perform activities for the benefit of both public and private entities, concurrently.*

*The presence of public shareholders in airport management companies and the exercise of the functions of public bodies by them demonstrate that in the past the recognition of the private legal personality of such companies was doubtful. Scholars and case law superseded on the consequences — in terms of personal liability — that any mismanagement by the airport manager's directors entailed.*

*This article aims at examining the liability regime applicable to directors that cause damage or loss to the airport management company by way of their misconduct or mismanagement. Furthermore, it aims at establishing whether such a legal framework changes depending on whether the company was a public entity rather than private.*

*As a matter of fact, any such person employed by a public entity or acting in the capacity of a public official is held liable under civil, criminal, administrative and also accounting law, if he breaches the law or commits a crime. Subsequently, in case any damage occurs, the person will be called upon to compensate for the losses suffered. According to the latest Italian law reform to public employment (Law n. 15/2009), the liability regime has been enhanced now with a new title of responsibility: the employee's disciplinary responsibility. This responsibility originates from the lack of accomplishment of his/her tasks, as established under the contract with the employer. Two consequences arise from the court's recognition of such type of liability:*

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firstly, loss of income in terms of a lower wage; and secondly, in worst-case scenarios of breach of law, a nonrenewal/termination of the employment contract.

The director's responsibility is grounded on article 28 of the Italian Constitution which establishes that «Officials of the State or public agencies shall be directly responsible under criminal, civil, and administrative law for acts committed in violation of rights. In such cases, civil liability shall extend to the State and to such public agency». Further measures have been laid out by article 23 of Presidential decree n. 3/1957, which delimitates the cases of damage attributable to the agent to those where there is violation of third-party rights caused by the agent's fraud or gross negligence.

With specific reference to the director's administrative responsibility, it should be differentiated from the so-called accounting responsibility; the former relates to the economic prejudice caused to the airport manager by an employee or public official, whereas the latter is triggered only in those cases where the person qualifies as an accounting agent. In order to better understand the discourse that follows hereunder, it is necessary to note that the economic prejudice suffered by the public administration and its entities («danno erariale») is evidenced by the deterioration and/or loss of goods or funds already suffered, or prospective losses. The definition of the losses recoverable by the public entity includes both the damage suffered and potential loss of profits or revenue.

The article will address the issue related to the liability regime applicable in such cases — either of civil or administrative law — triggered by the misconduct of the airport manager's directors, but leaving out the legal implications of such actions under criminal law.

In the following paragraphs, we will address judgments related to *Aéroports de Paris* and *Mitteldeutsche Flughafen AG*, in which the relevant court of justice recognizes the entrepreneurial nature of the activity pursued by the airport management company. Such an interpretation is also endorsed by Italian law.

SUMMARY — 1. Introduction: public entity participation in airport management; historical background and current developments — 2. The legal personality of airport management companies: private, public or a body governed by public law? — 2.1. The definition and qualification of the airport management company by the European Court of Justice — 2.2. Relevance of the interpretation of the airport charges — 2.3. The notion of body governed by public law — 3. Liability of public company directors under domestic law — 3.1. The Italian

case law — 3.2. The damage to state-owned companies is not overspending of public funds — 3.3. The civil action of the state company's shareholder — 3.4. The differences between accounting and civil liability — 4. Conclusions.

1. *Introduction: public entity participation in airport management; historical background and current developments* — Scholars and case law dealing with the liability regime applicable to airport management companies often focuses on the relationship of such companies towards third parties (airlines, handling companies and passengers). However, responsibility stemming from mismanagement on the part of the directors (*mala gestio* episodes) has never stirred much interest.

The problem arises as public entities or companies owned by private or public entities share management responsibilities in almost every airport management company <sup>(1)</sup>. The issue is at stake in cases where state-owned entities participate in airport management companies, which may appear, albeit formally, as private entities.

The participation of public entities in private companies is a phenomenon that has its origins in Germany and dates back to the second half of the Nineteenth Century. Later, it spread all over Europe. The innovation proved helpful in making municipalities and the Lander provide essential services to the general public — such as water and electric energy — which were originally being provided exclusively by private companies. Eventually, the system was adopted in Austria, Belgium and France. In Italy, companies with major public participation in their management reached their zenith with the industrial development of the sixties and seventies.

An examination of the historical evolution of this phenomenon leads us to the conclusion that states are inclined to provide services of general interest only by relying on the entrepreneurial and management skills of private legal entities, rather than providing it themselves <sup>(2)</sup>.

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<sup>(1)</sup> Major examples quotable from Italy are the Milan airport, the Verona airport (explained in further detail in this article) and the Venice airport. Examples from other countries include the Munich airport in Germany and the Paris *Charles de Gaulle* airport in France (also refer to *Tribunal de Conflits du 15 mars 1999, Mme Pristupa c. Aéroport de Paris* and *Loi n. 2005-357 du 20 avril 2005 relative aux aéroports*).

<sup>(2)</sup> With specific reference to the Italian cases, it must be said that the provisions enacted to regulate the activities of private companies that are partaken in by public entities are several. With respect to the aviation industry, it must be recalled here that the provision in favour of the Alitalia's small shareholders and bondholders under law n. 33 of 9 April 2009 and law n. 102 of 3 August 2009.

In Italy, the number of private companies with public participation is particularly high. Over 5.000 Italian companies fall under this category, 400 of which are directly or indirectly participated in by the state.

All said and done, it must be recalled that in public participation, a public entity is entitled to a share in limited responsibility companies. These companies operate in different sectors also in which the public administration delegates the exercise of managerial functions or subjects which perform entrepreneurial activity <sup>(3)</sup>. It is noteworthy that these types of companies are particularly relevant to the national economy due to their high gross turnover. Some of them are publicly traded companies.

The publicly owned private companies can be classified along the lines of companies that have the direct participation of the state, regions or municipalities. Such companies are of paramount importance because they concurrently play functions relevant to both public and private entities.

The co-existence of the main features relevant to both entities creates a cloud of haze as to what the law applicable is, in cases of the directors' liability. At first glance, it seems that both the civil ordinary statutory regime (usually applicable to the limited liability companies) and the administrative law regime (usually applicable when the company operates using public economic resources and funds) apply.

All this having being taken into account, for purposes of investigating a director's responsibility regime, it is necessary to understand if the airport management company — as long as public entities such as the state or municipalities participate in it — can be considered a private or public entity.

That distinction is extremely relevant because the competent jurisdiction to the case emanates from it: the civil ordinary jurisdiction is that of the Italian Courts and Courts of Appeal while the administrative jurisdiction is that of the Italian Administrative Courts and Court of Auditors («*Corte dei conti*») <sup>(4)</sup> Hence, it follows that

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<sup>(3)</sup> Examples of Italian private companies publicly owned by the Ministry of Economics and performing managerial or entrepreneurial activities are: *ANAS* (Italian management entity of highways), *Cassa depositi e prestiti* (Italian public fund for loans and deposits), *Enav* (National entity for in-flight assistance), *ENEL* (National entity for electric energy), *Ferrovie dello Stato* (National railway company), *Poste italiane* (Italian postal service).

<sup>(4)</sup> Please note that *Corte dei conti* is defined under articles 100 and 103 of the Italian Constitution. It is responsible for checking the legitimacy of the activities of

different rules, but specific to each procedure, should be taken into consideration to address the directors' liability. The issue will be better addressed in the following paragraphs.

2. *The legal personality of airport management companies: private, public or a body governed by public law?* — Scholars and case law often questioned the legal personality of the airport management company. It is debated whether it is to be considered as private company or a public company or even, a body governed by public law («*organismo di diritto pubblico*»).

The qualification as to the legal personality of such companies determines, firstly, the jurisdiction, then the applicable law for the matters of competition, state-aid and public procurement. It also determines whether the airport charges can be considered as fees rather than as taxes.

2.1. *The definition and qualification of the airport management company by the European Court of Justice* — EU case law defines a company as an entity that carries out an economic activity regardless of its legal personality, public or private ownerships or their funding sources. In fact, any activity that involves offering goods and services in a given market qualifies as an economic activity.

The EU Court of Justice repeatedly argued that the airport manager performs an entrepreneur's activity; thus, an economic activity. With the judgments of *Aéroports de Paris* and *Flughafen Leipzig-Halle* <sup>(5)</sup>, the Court held that the management of an airport necessarily implies the exercise of an economic activity. This was argued because the management of the airport infrastructure includes a wide array of airport services provided to airlines and to others.

The airport manager, in fact, provides services to operators that use the airport facility. However, since services are provided to us-

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the Government and of the Public Administration. It is also responsible for checking the management of the accounts of the State, of the Public Administrations generally and of the bodies subsidized by the State.

<sup>(5)</sup> Respectively, Case T-128/98, *Aéroports de Paris/Commission*, confirmed in the case C-82/01, and case T-455/08 *Flughafen Leipzig-Halle GmbH and Mitteldeutsche Flughafen AG v. Commission*.

ers of the facility, it definitely comes off an economic activity <sup>(6)</sup>. In the case of airlines, these services are given in exchange for airport charges. Also, the services provided to other airport users represent a business activity: the airport management company usually provides other business services to airlines and to other users of the facility (such as those ancillary services to passengers, shippers or other service providers: this is the case, for example, with shops, restaurants and car parks and leased facilities).

In particular, case law held that «in the field of competition law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed». The Court of Justice confirmed that «the provision of airport facilities to airlines and various service providers, in return for a fee at a rate independently fixed by the ADP, constitutes an economic activity. It is settled case law that any activity involving an offering of goods and services in a given market is an economic activity» <sup>(7)</sup>.

The same interpretation was confirmed later when the Court argued that the airport management company clearly engages in a wide array of economic activities. In fact, the management of the airport facility is an economic activity in the light of the fact that the company offers airport services in exchange for airport charges. With the above being said, as far as airport charges are concerned, the Court observed that these are indeed the main funds for carrying out the activities of the company and is a factor behind these activities being classified as economic activities <sup>(8)</sup>.

2.2. *Relevance of the interpretation of the airport charges* — The fact that an airport management company performs a business activity is also supported by the special interpretation of the classification of airport charges. Within the European Union, Member States opined differently on the nature of these charges, thus opening up a debate about its being classified as fees rather than taxes <sup>(9)</sup>.

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<sup>(6)</sup> The entity or group of entities performing the economic activity of providing airport services to airlines, (to ensure the handling of aircrafts from landing to take-off) and passengers so as to enable airlines to provide air transport services are called «airport managers».

<sup>(7)</sup> Judgment *Aéroports de Paris*, para 75-79.

<sup>(8)</sup> Judgment *Flughafen Leipzig-Halle*, para 93-94.

<sup>(9)</sup> On this matter, it must be said that the airport manager provides many services in exchange for payment of airport charges. Moreover, it must be recalled that the

In Italy, however, the Court stated that airport charges are to be considered as fees <sup>(10)</sup>. A «fee» is defined as payment for a service provided to the user, while «tax» is defined as a compulsory levy on the funds given to finance part of the services provided by the public administration. Subsequently, on the grounds that case law rules that airport charges are indeed fees, the services provided by the airport management companies have to be considered as commercial services in all respects. This confirms that the management of the airport is a commercial activity which tends to produce profits, but that it does not qualify as public function (which would aim merely at recovering the costs).

However, at the beginning of the proceedings, case law argued that airport charges were to be treated as a type of tax <sup>(11)</sup>, but it never addressed specifically the issue related to those charges payable in exchange for services provided by private companies. In that respect, it must be noted that these sums have to be considered for calculation of the value added tax. The VAT is a tax that is payable only on the fees levied on the supply of goods and services, and not on other taxes.

The legislator — with the rule of interpretation <sup>(12)</sup> — stated that from the services provided by the airport management companies «do not arise obligations of a fiscal nature». The Italian Supreme Court of Cassation, applying the rule into question, issued Order no. 379/2008 holding that «the obligation of the fee in question does not have a fiscal nature».

The majority of scholars agree with this interpretation for the following reasons. Firstly, the party that collects the airport fees is neither the state nor a public body with the power to impose tax, but a corporation, which is in fact, a private entity. Therefore, the obligatory relationship is between individuals, in the absence of a public entity with powers of taxation. Secondly, the airport management company has no obligation to repay it to the state. Instead, fees are part of revenues which flow into the financial statements of airport

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labeling of charges as «fees» or «taxes» varies across the EU countries, and the provision of airport services to airlines in exchange for airport charges involves an economic activity.

<sup>(10)</sup> See the Italian Supreme Court of Cassation, Sec. Un., 11 January 2008, n. 379 which applied provision of article 39-*bis* of law decree of 1 October 2007, n. 159.

<sup>(11)</sup> The Italian Court of Cassation, Sec. Un., 17 October 2006, n. 22245.

<sup>(12)</sup> Art. 39-*bis* of law decree 1 October 2007, n. 159, included by the adapting law of 29 November 2007, n. 222.

management companies and are not considered as any form of entry taxes levied in its name and on behalf of the entity levying.

In conclusion, the services given by the airport management companies are relevant for VAT purposes because for all intents and purposes, they are considered as services.

In the light of the above considerations, thanks to the EU case law which has established that the management of the airport necessarily implies the exercise of an economic activity and thanks to the nature of fees of the airport charges, it can be concluded that the airport management companies perform business activities.

Subsequently, with respect to directors' liability cases it appears that the Italian civil law regime («*regime ordinario*») could be the most suitable to them<sup>(13)</sup>. In fact, the same law regime applies to directors of companies subject to private law, and is thus deemed to have private legal personality.

On this matter, Italian case law has ruled in favor of civil ordinary jurisdiction<sup>(14)</sup>. As far as the liability regime is concerned, it has been observed that the airport management company must be treated in the same manner a private legal entity would be, regardless of the participation of public shareholders in its capital and the realization of state-owned facilities previously awarded in concession<sup>(15)</sup>.

Furthermore, case law established that the administrative jurisdiction has been set aside in all those cases where the public liability

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<sup>(13)</sup> For instance, in the case of *Aéroports de Paris*, the Court of Justice with decision of 24 October 2002, case C-82/01 established that the services of ground handling provided by airport managers represent an economic activity independent of the fact that the manager exercises public powers.

<sup>(14)</sup> The decision of the Italian Supreme Court of Cassation n. 26806 of 19 December 2009, rebutting previous case law positions on the applicability of the administrative regime to these type of cases is noteworthy here. In fact, in the case just mentioned, the Court found in favor of the ordinary jurisdiction since the nature of activities performed by the entity under scrutiny were of an economic nature. In particular, it was found that the company (part of ENEL — National Energy Entity — group) performed entrepreneurial activities (i) in free and competitive markets, (ii) was pursuing profits and (iii) was without any public law scope. Thus, in this particular case, the challenge to the administrative jurisdiction of the Court of Auditors brought forth by the applicant was not found admissible and grounded.

<sup>(15)</sup> Under Italian case law, it has now been confirmed that ordinary jurisdiction applies also in cases where a decision has to be taken on claim of damages caused to the company that is owned in part or fully by the state. See cases *Autovie venete SpA* and *Insiel SpA* addressed with order of the Italian Supreme Court of Cassation, 5 July 2011, n. 14655 and of 12 October 2011 n. 20941.



companies — besides being participated in by the state or state-owned entities — were characterized at the same time by entrepreneurial activities, and by the lack of elements qualifying in favor of public entity <sup>(16)</sup>.

2.3. *The notion of body governed by public law* — When it comes to public procurement, it is necessary to understand if the company is public or private. For this reason, it is crucial to understand whether the company meets the criteria of a body governed by public law <sup>(17)</sup>.

Regardless of the presence of public shareholders, airport management companies are called upon to comply with competitive bidding requirements for award of public contracts of works, services and supplies relating to air transport.

In such cases, the provisions laid down in Directive 2004/17/EC and entered into the Italian law with the Public Contract Code <sup>(18)</sup> will apply. According to those standards, «the provision of airports [...] to air carriers» is an activity to which the rules provided for in Title IV of Part III of the Act <sup>(19)</sup> apply (as long as it emanates from activities comprised between the so-called «special sectors»).

EU law doesn't have a unitary concept of a public entity, but there is another well-defined notion applying exclusively to public contracts of works, services and supplies: that of a body governed by public law <sup>(20)</sup>. This concept was developed in order to clearly define the type of entities that have to comply with the procedures for award of a public tender. In particular, the definition purports to

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<sup>(16)</sup> In that respect, see case of Court of Auditors, *Friuli-Venezia Giulia*, 21 September 2011, n. 169. In that instance, the judges found that the company was characterized by (i) a capital was not owned by state entities in the major part, (ii) clauses of explicit consent to allow new private shareholders, (iii) distribution of returns between the shareholders and (iv) entrepreneurial activities.

<sup>(17)</sup> The definition is given under art. 1, lett. *b*, dir. 92/50/CEE.

<sup>(18)</sup> Legislative Decree of 12 April 2006, n. 163.

<sup>(19)</sup> Same regulation as that of Directive 2004/17/CE.

<sup>(20)</sup> The concept of the body governed by public law was initially introduced into the Italian legal framework by law of 11 February 1994, n. 109 on public contracts of works, by legislative decree of March 17, 1995, n. 157 on services, and finally, by the legislative decree of April 12, 2006, n. 163 the Public Contracts Code. The sources of EU law on the criteria for the award of public tenders are enshrined in directives 2004/17/CE and 2004/18/CE.

identify the contracting authorities provided under the EU legal framework.

A body governed by public law is an entity that satisfies the following three conditions simultaneously <sup>(21)</sup>: (a) it has been established to meet specific needs of general interest and does not have any industrial or commercial purposes, (b) it is endowed with a legal personality, (c) it is financed majorly by the state, or public bodies or other bodies governed by public law, or its management is subject to control of the same entities mentioned above, or it has the administrative, management or supervisory body formed by a majority of members appointed by the parties mentioned above.

It is noteworthy that Directive 92/50 EEC had already provided that the procedure for awarding a public tender applies to all contracts concluded between a service provider and a contracting authority. The contracting authorities, as per the terms of the Directive, were the State, local authorities, the bodies governed by public law (as defined above) and the associations formed by such authorities or bodies governed by public law.

The above provisions were entered into the Italian legal framework with article 3 of the Public Contract Code: which is the same definition given by the EU legislator. Bodies governed by public law are considered equivalent to public administration bodies when it comes to award of contracts of works, services and supplies.

Also, case law established that such equivalence is effective exclusively for the purpose of applying the rules of public procurement to the body or to the company. In fact, the definition of a body governed by public law aims at establishing the circumstances in which a person has to comply with the EU rules on protection of competition and the market without taking into account its legal personality.

The airport management company does not qualify as a body governed by public law since it does not have the requirement of fulfillment of needs of general interest, which are unrelated to the above-mentioned industrial or commercial matters.

The general-interest needs that are not related to industrial or commercial matters are the ones satisfiable other than through the supply of goods or services in the market, and which, for reasons of public interest, the State chooses to provide itself with, or over

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(21) Art. 2 dir. 2004/18/CE.

which it maintains a strong influence. The existence of such needs of general interest should be assessed after taking into account all elements of law and determining factual circumstances on a case-by-case basis.

If the airport management company carries on its competitive business, then it satisfies a need of general interest related to industrial or commercial matters. In fact, if the entity makes profit or bears losses associated during the normal exercise of its activities, it is unlikely that the needs it aims to fulfill are of a non-industrial or non-commercial nature.

As a result, it can be argued that a company, such as an airport management company, even if it is majorly state-owned, is not a body governed by public law and therefore EU rules on public contracts are not applicable.

This conclusion is shared by the Authority for the Supervision of Public Contracts on works, services and supplies, which recently addressed the issue with respect to the Rome Airport SpA and the Verona Airport Villafranca - Valerio Catullo SpA. In these cases, the Authority confirmed that it is difficult to ascertain the existence of the «requirement of the corporate establishment of the entity in order to meet a general interest unrelated to industrial or commercial matters». It further stated that with «reference to institutions operating in the airport sector, case law [...] retains that it shares a non-unique orientation on this issue, given the peculiarities and the operative methods of each corporation» <sup>(22)</sup>.

The Authority also observed that «the industrial or commercial character of a particular interest cannot be determined therefore in a company that provides services that are not necessarily connected to public works [...] and that is not supported by public funding, except for the initial capitalization, and that is not connected in its activity to a planning policy related to social and economic development of the local community».

Therefore, in the case of Verona airport, the Authority concluded that «it can be assumed that the company in question carries out in public interest, activities devoid of any industrial or commercial character». This occurs when the company's activity pursues profits and bears the risk of losses. As for returns, article 28 of the articles

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<sup>(22)</sup> Opinion of the Authority of Supervision of public contracts on works, services and supply n. AG 3/2013 of 20 February 2013.

of association provides that if these are due on ordinary shares of the company, they will be reinvested in the company, and if due on preferred shares, distributed to the respective holders.

In that respect, the Council of the Administrative Justice of Sicily also denied the granting of status of a «body governed by public law» to a corporation whose article of association establishes the distribution of its income in relation to the shares held <sup>(23)</sup>.

In addition, from the legislation applying to national and EU airport management, it appears that these companies operate «to respond to the needs of an industrial or commercial character», as ruled by the Court of Justice in decisions handed down with respect to the differentiation between public companies and bodies governed by public law <sup>(24)</sup>.

In such cases, reference must be made to article 10 of the above-mentioned Ministerial Decree n. 521/1997 which identifies the criteria applicable to the airport management company and provides that the company «organizes and manages the airport manager, ensuring the optimization of resources available for the production of activities and services at the appropriate level of quality, in accordance with the principles of safety, efficiency, effectiveness and economy».

In a competitive market where the company pursues profits and bears risks, it is led by economic considerations in accordance with the laws of the market. This is also the approach endorsed by the Supreme Court of Cassation, which observes that it distinguished the commercial and industrial nature from the needs «which cannot be satisfied through production or exchange of goods or services, and characterized by entrepreneurship or profit» <sup>(25)</sup>.

Opposing the view of the Authority, Italian case law adopted a rather wavering orientation with respect to bodies governed by public law. In one instance, the plaintiff was considered a contracting authority just because it qualified as a body governed by public law. It qualified as such due to the fact that it was under the complete control of a state-owned company/public body and also because it exercised its activities by employing public capital in the public interest

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<sup>(23)</sup> Conc. Adm. Just. Sic. 06/11/1996 n. 323.

<sup>(24)</sup> Court of Justice CE, May 15, 2003, C-214/00, paragraph 44.

<sup>(25)</sup> Italian Supreme Court of Cassation Civ., on May 4, 2006, n. 10218; on February 8, 2006, n. 2637; on April 4, 2000, n. 97.

without seeking any utilitarian scope (which usually characterizes the business activity). The Council of State also noted that the limited liability company — supporting the economic sectors or delivery of social utility — just because of its legal personality, is not automatically exclude it from conducting a business that satisfies needs of general interest that are devoid of any industrial or commercial character <sup>(26)</sup>.

In another case, it was stated that a consortium of companies are private law entities even with a majority public capital or payment of public funds. In fact, the function, structure, activities and affairs of these companies are not enough to differentiate them from any other company or private enterprise that meets general interests having an industrial or commercial character <sup>(27)</sup>.

With respect to the airport management company, case law on administrative matters held that the Brescia Airport management company fell within the category of bodies governed by public law, as long as the activity being carried out by it was general management. In fact, the facility benefits from a plurality of activities, and the non-industrial or non-commercial character cannot be excluded either because of the management method or due to the presence of other players in the market <sup>(28)</sup>.

Instead, the rights of a body governed by public law were denied to Milan Airport Management Company on the grounds that it pursues entrepreneurial profit <sup>(29)</sup>. The judges observed that the air transport field is part of the excluded sectors, and therefore the laws governing such entities should apply in the case. However, those would not apply to contracts entered into for different activities, other than those merely related to air transport. Therefore, as long as these are different commercial activities such as food service and

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<sup>(26)</sup> Council of State, sec. VI, 7 June 2001, n. 3090.

<sup>(27)</sup> Italian Court of Cassation, sec. un., 2 March 1999, n. 107 and 6 May 1995, n. 4989.

<sup>(28)</sup> Administrative Regional Court of Lombardia, Brescia, 26 March 2004, n. 254. It confirmed the decision of the Administrative Regional Court of Veneto, sec. III, 26 May 2003, n. 3014 which established that the direct award of commercial areas of the airport to a corporation entirely controlled by the airport management company is illegitimate if, this being also a public limited company, it is a public law entity thus governed by public contracts law.

<sup>(29)</sup> Administrative Regional Court of Lombardia, Milano, sec. III, 15 February 2007, n. 266, which established that Sea Spa is not a body governed by public law as long as it has not been created to «satisfy public interest needs not having industrial or commercial character», for its intrinsic entrepreneurial and profitable character.

catering, the airport management company is not bound by the rules of public law.

Hence it seems necessary to conclude that while performing those commercial activities, the airport management company should not be considered as a body governed by public law.

3. *Liability of public company directors under domestic law* — In a case involving an airport management company, the Court of Auditors (*Corte dei conti*) denied its jurisdiction underlining that the company, albeit having a public participation, should have been regarded as a private entity for the purposes of assessing liability as it was being entrepreneurially managed and lacked the typical characteristics of the public companies<sup>(30)</sup>. In the case under consideration, the company could not be regarded as a public entity, since the specific criterion for considering the company as a public entity were missing: the share capital was not majorly held by the public, there were no approval clauses for the entrance of private shareholders, the profits were regularly allocated for distribution. In this matter, the Court held that the airport management company was not a public body, nor should it be regarded as the *longa manus* of the public shareholder. Instead, it was to be considered as a private company with strong characteristics of entrepreneurship, which can be inferred both from the articles of association and from the activities performed.

The Italian Supreme Court comes to the same conclusion in a case involving a company run with public participation. The company manages motorways<sup>(31)</sup>. The Attorney General at the Supreme Court of Cassation argued that the motorway operator pursues public tasks through the organizational model of the corporation, and therefore the substance of the activities should prevail over the form of the limited companies. However, the Judges ruled that the motorway operator should undergo ordinary jurisdiction in respect of directors' responsibilities.

The two cases examined here are very similar to each other. In both cases, the majority shareholder of the company is a public enti-

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<sup>(30)</sup> Court of Auditors, *Friuli Venezia Giulia*, 21 September 2011, n. 169.

<sup>(31)</sup> Supreme Court of Cassation, 5 July 2011, n. 14655. See also Supreme Court of Cassation, 19 December 2009, n. 26806.

ty; nevertheless, the company performs activities of a trading nature. It works *vis à vis* the various users of the infrastructure, whether it be an airport or a highway. Its relationship with the public body/owner of the infrastructure is governed by the public concession. The company would be identically managed in case the majority shareholder was a private entity aiming at maximizing profits under the conditions laid down by the public concession. The company's revenue is derived from the fees received for services provided to the users. The public shareholder receives its profit as dividends. It is therefore possible to conclude that in the aforementioned cases, the nature of the majority shareholder, be it public or private, does not affect the functioning of company. Therefore, on the issue of liability of the directors, the public nature of the majority shareholder does not change the nature of the organization, which remains a private entity.

3.1. *The Italian case law* — The debate over the nature of public companies, however, becomes less relevant in the light of the majority case law from Supreme Court of Cassation judgment no. 26806/2009. To the Supreme Court, the fundamental element to determine the exact type of liability is not the substance of the functions performed by the company, but rather the internal organization of the airport operator, and more generally, of the public companies. According to the European Court of Justice, the evaluation of the activities performed does prevail on the organization of the entity that performs it, especially in the field of state-aid and procurement.

It is worth noting that in Italian law there is no rule setting for administrators of public companies under the jurisdiction of the Court of Auditors. This resulted in many divergent legal opinions on the point, although current case law seems to follow a precise and common interpretation. The Supreme Court, innovating precedent case law, stated through judgment n. 26806/2009 that in accordance with the ordinary statutory regime, directors of private companies are liable for damages caused to the company. The public regime is responsible only for the damages caused directly to the public partner, such as damage to the image of the said public partner.

The Court, in its judgment, underlines that in the past the limits of the jurisdiction of the Court of Auditors and the administrative courts were easy to identify since there was a clear-cut distinction between what was public and what was private. Usually, business of

public interest was carried out by public administration. The recent evolution of public administration, leading up to the privatization of the airport management companies, has led to relevant changes under the aforementioned circumstances. Currently, the government pursues its objectives by using tools typically used by private entities. It often allows private entities to perform activities that were exclusive to the public administration in the past.

To avoid the risk of a substantial depletion or severe weakening of the jurisdiction of the Court of Auditors in matters regarding director's liability, the Supreme Court in the past had preferred a more substantial approach, grounding the jurisdiction of the Court of Auditors on an objective principle. This principle was represented by the public nature of the functions performed and the financial resources used to perform such functions <sup>(32)</sup>. According to this outdated interpretation, when a public entity entrusted the management of a public service to an external party under its control, the said entity is inserted in the functional organization of the public entity. Therefore, in the event of loss of revenue, it is also subject to the jurisdiction of the Court of Auditors. It has no relevance to the private nature of the entity, or to the private nature of the act that constitutes and governs the relationship between the company and the public entity.

Currently, however, the Supreme Court argues that private companies that are invested in by public entities will not lose their identification as private for the sole reason that their capital is injected by contributions from the state or other public bodies. This principle is also stated in article 2449 of Italian Civil Code, according to which even the directors appointed by the public shareholder «have the rights and obligations of the members appointed by shareholders' meeting». At the same time, the commentary to the Italian Civil Code states that it is «the State that submits its action to the law of private companies to ensure that its management has more streamlined shapes and new possibilities of achievement».

3.2. *The damage to state-owned companies is not overspending of public funds* — In conclusion, it can be argued that any damages arising out of bad management cannot be qualified as a loss to the

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<sup>(32)</sup> Supreme Court of Cassation, 22 December 2003, n. 19667 and 26 February 2004, n. 3899.



State's finances (which is to say the damage caused to the state's assets or to a public entity) because there is a distinction between the legal personality of the company and its shareholders.

As a result, the full economic independence of the company relative to its shareholders means that the damage is produced directly only to the shareholders' equity. Equity is and will remain private.

The damage to the company is obviously intended to affect its shareholders because it negatively affects the earnings from their shares. Under such circumstances, the shareholder (public shareholder included) may seek compensation for any direct damage incurred to his/her shareholding. The damage caused by a company's directors on shareholders' equity can be compensated through the action of social responsibility, and it does not cause overspending of public funds. Indeed the damage is inflicted on public finances, but on private property. The damage is attributable solely to the company's assets and not to the shareholders' assets whether public or private.

*3.3. The civil action of the state company's shareholder* — The state company's shareholder, however, is able to protect its own interests through ordinary civil actions. If it does not, the state company suffers damage, and the Court of Auditors may take action against the state company's shareholder for negligence of exercising its rights as shareholder.

Italian case law points out that the state company's shareholder has the duty to protect the value of its share capital, using the same actions established by the Italian Civil Code for a private company's shareholder.

In the event that the directors of a public body — comprising of the state company's shareholders, such as local municipalities — do not exercise civil actions against the directors liable for the protection of public participation, those shareholders are liable to the public body for damage of overspending of public funds. In this case, the damage caused by a shareholder who does not act against the directors of the state-owned company does not apply to private assets, but to the public assets that they represent in the state-owned company.

The damage is not caused by a director of a private company, but as a public administrator. In other words, the damage from failure to protect the value of the investment of the public entity is, in all respects, a loss or overspending of public funds.

Consequently, in this case in respect of public director's liability, Italian case law recognizes the jurisdiction of the Court of Auditors rather than the civil court's. This happens because they did not act against the state-owned company's negligent director.

3.4. *The differences between accounting and civil liability* — What are the consequences of the approach adopted by the Supreme Court and endorsed by the Court of Auditors in the above-mentioned Italian case law? To answer this question, it is necessary to compare the Italian accounting liability system with the civil liability system.

The action for accounting liability has, in fact, nothing in common with the action for civil liability, which is regulated by the Italian Civil Code. The two frameworks do not overlap.

Directors of state companies investigated for accounting liability are held responsible only if they acted with willful misconduct or gross negligence. Regarding civil action, it is possible to initiate it regardless of the degree of fault of the liable party. The action for accounting liability is mandatory and must be undertaken by the public prosecutor appointed by the Court of Auditors. The action has to be made autonomously within five years of information regarding the damage coming to light, and regardless of the initiative of the damaged party. Also, the director who voted in favor of its decision that resulted in the damages (but did not represent the state company) could be held liable under the accounting liability regime, and penalties could be applied to the liable party.

The characteristics of the action for liability established by the Italian Civil Code are, however, different. Such action must be taken by the party who has suffered the damage and the obligations of repairing the damage can be transferred to the heirs of the liable party. The statute of limitations is five years and shall run from the date on which the damage occurred, but the term is suspended as long as the director is in charge. In governing bodies, director is held responsible where dissent has not been recorded in the minutes. In addition, the director is also responsible for light negligence as well as for gross negligence and willful misconduct.

There is yet another important distinction between the two liability regimes, in terms of solidarity (or joint liability). According to the rules of accounting liability, it is the administrator who voted in favor of the resolution that caused the damage that would be pun-

ished. But according to the Italian Civil Code, a director who did not put in writing his or her dissent and notify it to the chairman of the board (committee) of auditors, shall be jointly and severally liable. The procedure to exempt themselves from liability in collective decisions, therefore, is more burdensome. This regime has, however, made it less burdensome because of the fact that civil action for liability for damages requires the vote of the assembly's shareholders, while action for accounting liability must be started by a public prosecutor appointed by the Court of Auditors when the latter receives a notice of breach of law.

The two actions are differently regulated. The civil action is based on the business judgment rule, which involves an *ex ante* evaluation, while the action for accounting liability requires compliance with public standards.

It can be hereby concluded by arguing that the two actions are interchangeable: the initiating of one rather than the other, inevitably leads to a different legal regime referred to different protection for the injured party.

Another difference between the two actions for damages is manifested by the destination of the compensation awarded. While the civil law action aims at reintegrating the share capital, with compensation going to all shareholders, the action brought by the public prosecutor for accounting liability aims at getting benefits only to the state treasury.

4. *Conclusions* — Even in cases of *mala gestio* of the airport management companies, they should be subject to the framework of the Italian Civil Code. According to the Italian case law, therefore, the difference between public entities and companies subject to the Italian civil code is clear. It is irrelevant that the latter are subsidiaries or controlled by public bodies. As observed before, rules of accounting responsibility are applicable to public entities, and the jurisdiction is exclusively that of the Court of Auditors. On the contrary, the rules established by the Civil Code shall apply to the company even if the state holds shares in it.

It follows that the damage caused to the assets of the company can be paid only if the company itself decides to initiate the action for damages against the directors responsible. The actions for damage, including those undertaken by the minority shareholders, are

indeed exercised on behalf of the company. It means that the manager who represents the state-owned shareholder can and must protect the integrity of corporate assets directly from within, in its capacity as a shareholder, without requiring the intervention of the public prosecutor appointed by the Court of Auditors. The state-owned shareholder can and should protect his/her interests through the exercise of voting rights at shareholders' meetings and through civil actions for damage. If he fails to exercise this right, he would be held responsible before the Court of Auditors although it might be the manager who, by virtue of his conduct, caused damage to the company.

When the government acts by civil law, it gives up a position of supremacy that is ensured by the administrative law (where instead it stands on an equal footing with the private entity). In this way, the state-owned shareholder submits to the legal framework established by the Italian Civil Code for private entities.

In summary, the airport management companies owned in part or full by public entities, are comparable to private companies, not only for purposes of the rules on competition and state aid, but also for the purpose of assessing directors' liability for damages caused to the company.

The only difference is the criterion used for the comparison in question. The airport management companies are subject to the same rules of competition and state-aid regulation applicable to companies owned entirely by private entities. This is because for European Community law, the activity carried out by a company is the decisive factor. The function of an airport management company is to provide services for remuneration; this means its activity is undoubtedly commercial. The structure or nature of the company that performs this task is neutral for the purposes of the application of EU law. In contrast, the Italian legal system is determining the legal form chosen to perform a particular task or activities in the market. In our case, the form of the corporation (the corporate name) is crucial in order to put it on the same level as public companies to private companies for the purposes of ascertaining directors' liability.

In this particular case, under Italian legal framework, the corporate name is not without consequences. On the contrary, it is a decisive factor. According to the Supreme Court of Cassation, whether the company carries on a business in the market or not is not crucial to decide which liability regime applies. Instead, it is relevant to

set it up as a company rather than a public entity or body. There are exceptions to this rule: these are only companies which are assigned specific tasks by the law or by their statutes of incorporation. Certainly, the fact that the airport management company carries out a commercial activity in the marketplace and not a public service further strengthens the position of current Italian law on liability for *mala gestio*.

In conclusion, the consequences of Italian case law interpretation — namely the application of ordinary civil liability established per the Italian Civil Code rather than the regulation for accounting liability — has different characteristics as mentioned above.

It is difficult to argue with any degree of certainty that the civil liability regime outlined by Italian case law introduces a tougher regime regarding the liability of the company's directors. On one hand, it seems less burdensome because no compulsory is undertaken by the prosecutor (as soon as news of a breach of law comes to the Court of Auditors), while, on the other hand, the director is liable even for negligence of lesser degree.

Finally, one last aspect that deserves to be mentioned, although this is not the appropriate forum for a detailed discussion, is that of possible criminal consequences of the public setting as opposed to the private one.

Indeed, considering the relationship between the administrator of public companies and companies themselves governed by public standards, could expose the former to being recognised as a public official or public services representative.

This would give rise to the subjective assumptions for criminal proceedings intended to pursue classical crimes against the public administration. It should be highlighted, however, that a recent judgment by the Supreme Court (Section IV, n. 6145 of 02.10.2014) rejected the legal representative of a limited company with public participation as a public official or public services representative of the company.

As is known, to be able to exclude that a certain behaviour of directors constitutes a crime against the public administration it is necessary to analyse a number of factors (including the private nature of the company) and to consider the case in question.

The specific case considered by the Supreme Court in its February 2014 judgment is in truth relatively marginal, given that it judges on a case relating to management of employees.

The alleged infringement by the administrator was deemed not to constitute the exercise or expression of public function. The Court points out that this last activity assumes the management, as it is known, of legislative, judicial or administrative roles or in any case, completes acts of authority which show the willingness of the public administration which in the specific case, were not detected.

In deciding the case, the Court cited that it had recently clarified that the member of a board of directors of a special airport company, whose objectives are to promote the completion of the airport structure and increase its touristic and commercial activities, did not fill the role of public official or public services representative.

Because of the private nature of the company, it is deprived of certification or authoritative powers (Supreme sect. VI, no. 6427, 15.1.2010); United Sections, no. 10086 of 07.13.1998).

To conclude, in order to have status as a public official, it is not the employee relationship of the public administration of the individual who has brought about the contested behaviour which must be considered, but rather the nature of the activity pursued (see also Section IV of the Supreme Court, no. 43363 12.4-10.23.2013).