

THE CORPORATE GOVERNANCE OF ROMANIAN STATE-OWNED ENTERPRISES: THE MANDATE CONTRACT

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Abstract: *Using the O.E.C.D. Guidelines, Romania introduced the corporate governance for state-owned enterprises through the Government Emergency Ordinance no.109/2011, which, with its subsequent amendment provided by the Law no.111/2016, has modernized their management and administration system, ensuring greater transparency and increased control over the operations of public enterprises. One of the main challenges of these entities is given by the mandate issues, that occur with their administration and management. The relationship between the tutelary public authority or the General Assembly of Shareholders and the administrative/management team is very sensitive, considering that it is based on trust and expectations that the designated agents would act in the best and sole interest of the enterprise and they would execute their mission in a manner that is legal, correct and transparent, as well as efficient and profitable. In our study, we shall analyse the content and of the mandate agreement on which the relationship between the public enterprise and its administration/management agents is based, with its mandatory clauses, provided by the incidental regulations from Romanian legislation.*

Keywords: *corporate governance, state-owned enterprise, autonomous enterprise, joint-stock company, mandate*

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INTRODUCTION: THE LEGAL FRAMEWORK OF CORPORATE GOVERNANCE IN ROMANIA

Following the fall of the Communist regime, the economies of Eastern European states entered a difficult and long transition period towards free market economy. In order to ensure the introduction of corporate governance in these countries, the OECD, together with the World Bank, organized a global forum related to corporate governance.

In Romania, the introduction of the principles of corporate governance in order to increase the economic performance of enterprises proved to be an absolute necessity. The legal regulation of state-owned enterprises after the anti-communist revolution of December 1989 was precarious, causing them to remain at the mercy of political decision makers, since there were no clear criteria for selecting the legal structures of these entities. The GEO no.109/2011 introduced a private management of these public enterprises, whose full privatization was rejected by the Romanian legislator, on grounds of national security that required state ownership over common goods. Thus, under the provision of the GEO no.109/2011, the members of the Board of Administrators and the General Manager can

be recruited in a transparent manner, according to professional criteria, at the advice of experts.

According to the regulations that the Romanian legislator adopted in the process of transitioning from socialist economy to a free market system, all Romanian public enterprises were governed in the one-tier system.

In 1990, the Law no.15 introduced the autonomous Government-owned enterprises, that were derived from the reorganization of the former socialist state economic enterprises. The law only comprised brief regulations concerning the legal structure of these entities, the most of their organization and functioning being established by administrative acts of the Government and the local public authorities. The members of the Board of Administrators were appointed by order of the competent minister, or the decision of the head of local public administration authority; the General Manager was appointed by the Board, but only with the approval of the competent minister/local public administration authority (art.12 par.2, art.15).

In 1993, the Government Ordinance no.15 regulated certain measures which aimed to restructure the activity of the autonomous enterprises. The same year, the legislator passed the Law no.66 regarding the management contract, which set the basis for a contractual relationship between the state-owned enterprise and its managers. It applied to commercial companies in which the state owned over 50% of the shares and it entrusted the managers' selection to the State Property Fund, which owned 70% of the state share capital in the enterprises that were reorganized as trading companies by the Law no.15/1990.

In 1997, the Government Emergency Ordinance no.30 introduced the reorganisation of autonomous enterprises into companies, with the aim to submit them to a privatisation process. It transferred the autonomous Government owned enterprises under the authority of different public administration bodies. It didn't establish any new regulations concerning their corporate governance though, nor did the subsequent GEO no.88/1997, whose provisions concerned the privatisation process.

In 2001, the Organisation for Economic Cooperation and Development drafted a specific program to improve corporate governance in Romania, according to its Principles of Corporate Governance (2000). The major improvements on corporate governance legislation were driven by Romania's effort to join the European Union. The Romanian Ministry of Justice encouraged the reform of the companies legislation, in order to incorporate the OECD corporate governance principles. It submitted to public discussion a series of legislative changes, in order to adapt the Companies Law no. 31/1990 to the OECD principles of corporate governance and to the European Union regulations on the matter.

The state-owned joint-stock companies had been functioning under the provisions of the general companies legislation, namely the Companies Law no.31/1990, as amended, with few attempts to adapt this legislation to the specificity of state-owned companies. The Companies Law sets the framework for all legal company forms and contains provisions regarding the management of the company, the appointment and dismissal of administrators and directors, the composition and functioning of the management bodies, the remuneration of their members, their responsibility, revocation and liability towards the company. The obligation to comply with the European Commission's recommendations

on corporate governance materialized in the revision from 2004, 2006 and 2007 of the Companies Law no.31/1990.

The corporate governance principles proposed by the OECD were introduced in the ordinary companies legislation by the Law no.441/2006, which represented an important reform of the Law no.31/1990. The most important changes for joint-stock companies regarded the ordinary and extraordinary General Meetings of Shareholders and the Board. This legal act introduced two alternative corporate management systems: the one-tier system, in which the company is managed by a sole Administrator/Board of Administrators, and the two-tier system, under which the company is managed by the Board of Directors and the Supervisory Board. The Law no.441/2006 also brought significant changes to the rights, duties, attributions and powers granted to the members of the management bodies of the companies.

The main amendments of 2006 and 2007 of the Companies Law aimed at enhancing corporate governance rules, regard the following: the independence of one/more members of the Board of Administrators, the requirement for the managers to inform the Board of Administrators of their actions on a regular basis, the clear separation between executive and non-executive administrators, the right that any administrator of the company has to ask the directors for information on the daily management of the company, the requirement that at least one member of the Board committees should be a non-executive independent administrator, the obligation of the Board members to act in good faith, prudently and with the diligence of a good administrator, the possibility of the Board to create consultative audit, nomination and remuneration committees, the duty of loyalty for both administrators and directors. In 2007, the GEO no.58 regulated the possibility to revoke the members of the Board of Administrators in autonomous enterprises, as well as their right to ask for compensation in the case of revocation without righteous cause.

As for the companies listed on the regulated capital market or a recognized alternative trading system, they are acting under the Capital Market Law no.297/2004 (as amended by the GEO no.32/2012 and the subsequent Law no.24/2017 regarding the issuers of financial instruments and market operations and Law no.158/2020). The main provisions of the Law no.297/2004 on Capital Market refer to the fact that the listed issuers should ensure equal treatment for all shareholders holding the same position. In addition, companies whose securities are traded on the Bucharest Stock Exchange can adopt the Corporate Governance Code of this market, which provides regulations that ensure an administration that is more transparent towards investors and a better functioning relationship between the bodies of the joint-stock company. This was the first Code of Corporate Governance in Romania, adopted in 2001. In the following years, the Bucharest Stock Exchange created the Corporate Governance Institute, which was an active participant in identifying the best corporate governance practices, which contributed to the adoption of the White Paper of Corporate Governance in South-Eastern European countries. In 2008, the Bucharest Stock Exchange drafted a new Corporate Governance Code, which was harmonized with the European legislation applicable to listed companies, following Romania's accession to the European Union in 2007. The 2008 version of the Code created a flexible corporate governance framework, in line with the EU recommendations, as well as the OECD Principles of Corporate Governance. The main principle was that the issuers should adopt a clear and transparent corporate governance framework, adequately disclosed to the general public. Since 2016, the listed companies have been applying the

new Corporate Governance Code of the Bucharest Stock Exchange, which aims to create in Romania an internationally attractive capital market, based on the best practices, on transparency and trust. The new Code encourages companies to build a strong relationship with their shareholders and stakeholders, to efficiently and transparently communicate and show interest in all potential investors. This new Code replaces the initial one, issued in 2001 and amended in 2008 and it attempts to make the listed issuers more trust-worthy, by promoting improved corporate governance standards, considering the lessons learnt from applying the previous versions of the Code and according to the latest changes in Romanian and European legislation. The main elements of this Code are the investors' access to information and the shareholders' rights protection.

In December 2011, the Romanian Government Emergency Ordinance no.109 reformed the corporate governance of state-owned enterprises, which were granted with corporate governance mechanisms founded on the OECD Guidelines (2005). These regard the managers' status and the structure of the Board, the remuneration and appointment of the executive directors, the audit and the shareholders' rights.

The basis for the legislative reforms on state-owned enterprises were mainly regarding the increase of their economic efficiency, the reduction of political interference in their administration and the increase of the transparency, as corporate governance standards had never been integrated in the organisation of state-owned enterprises, despite the guidelines drafted by the OECD. Thus, for the autonomous enterprises, there weren't any statutory provisions or any code of good practices, while the state-owned companies were acting under the inadequate corporate governance regulations of private companies, with no concern or adaptation for the particularities of public ownership of these entities. The declared purpose of this regulation was to introduce a particular corporate governance system, adapted to state-owned enterprises, leading to an increase in the efficiency of these economic operators. It introduced the possibility of the shareholders of the joint-stock companies owning at least 5% of the registered capital to submit an initiative for the company to choose a two-tier administration system, which makes their governance similar to that of the privately owned companies, as regulated by the provisions of the Companies Law no.31/1990. On the other hand, the GEO no. 109/2011 does not allow the autonomous enterprises to choose the two-tier governance system, art.5 par.(1) clearly stating that these entities are administrated by a Board of Administrators.

We can conclude that Romania has made significant progress in including in its legislation regulations that ensure the corporate governance of both private and state-owned companies. Amendments to the commercial legislation were made, as well as substantial reforms of the legal framework applicable to investments, which led to an improved business climate, more favourable to investors.

2. THE MANDATE CONTRACT BETWEEN THE STATE-OWNED ENTERPRISE AND ITS AGENTS: THE MANDATORY CLAUSES

The Government Emergency Ordinance (GEO) no.109/2011 regulates the framework of corporate governance in two types of Romanian state-owned entities: autonomous enterprises, created by the decision of central or local administrative government authorities and national trading companies and enterprises (joint-stock companies), in which either the state or an administrative-territorial unit or an autonomous

enterprise or another national trading company/enterprise is the sole, majority shareholder or in which it holds control. In both cases, the regulation (art.2 par.11) clearly states that the relationship between the tutelary public authority and the bodies that exercise the administration and management of the public enterprise is based on a mandate contract, as defined and regulated by the Romanian Civil Code and, in addition, for the national trading companies and enterprises, by the Companies Law no.31/1990, since these entities are organised as joint stock companies. We believe it is also essential to underline the fact that, since there is an incompatibility between the corporate mandate and the employment relationship, there is no possibility for the administrators/directors to find themselves in a relation specific to the labor law with the enterprise.

The autonomous enterprises are organised as a one-tier system, with a Board of Administrators governing the enterprise and having the option to delegate executive powers to one or more directors. The mandate will be regulated by the special provisions of the GEO no.109/2011, as amended by the Law no.111/2016, and, in addition, by the general norms of the Civil Code (art. 2009-2038). The agency contract will be an annex of the administrative act appointing the administrators (art.12 par.1) and will be governed by the regulations of the GEO no.109/2011 and by those of the Civil Code.

The state-owned commercial companies may be managed in a one tier or a two tier system, since they are regulated by the Companies Law no.31/1990, as amended. The choice of the governance system of the company belongs to the tutelary public authority or to the public enterprise that holds control, through its representatives in the General Assembly of Shareholders. Subsequently, the change of the administration system may also be asked for by the shareholders who own 5% of the share capital; this is more likely to happen when a strategic investor holds a minority stake against the state as majority shareholder (Catană, 2012b: 83). In the one tier system, the General Assembly of Shareholders appoints the members of the Board of Administrators, by concluding mandate contracts with them. The Board is compelled to delegate the management powers to one or more executive directors, who will also execute their mission according to a mandate contract. In the two tier system, the administrative responsibilities belong to the members of the Supervisory Board, who will appoint the members of the Board of Directors. The mandate contract will be executed according to the GEO no.109/2011, as amended by the Law no.111/2016, as specialized norm, and, in addition, by the Civil Code regulations and the Companies Law no.31/1990.

The mandate is defined by art.2009 of the Romanian Civil Code as *"the contract by which one party, called the agent, undertakes to conclude one or more legal acts on behalf of the other party, named the principal."*

The mandate contract will be concluded on the date of the administrators'/directors' appointment. In the case of the autonomous enterprises, GEO no.109/2011, art.12 par.(5) states that the form and the clauses of the mandate contract that is concluded between the tutelary public authority and the members of the Board of Administrators will be established by the tutelary public authority, with the agreement of the Ministry of Public Finances. As one author (Catană, 2012b: 100) has pointed out, for these public enterprises, the administrative character of the mandate is predominant to the civil one, the mandate contract being formally an appendix to the administrative act issued by the head of the tutelary public authority for appointing the administrators. As for the joint-stock

companies, art.29 par.(11) establishes that the form of the administrators' mandate contract will be approved by the General Assembly of Shareholders.

The mandate contract will be completed by an additional act, establishing the variable component of the remuneration, the quantifiable objectives and the financial and non-financial performance indicators established by the tutelary public authority (in the case of the autonomous enterprises) or the General Assembly of Shareholders (in the case of the joint-stock companies).

The variable component of the remuneration will be set accordingly to the performance indicators that had been negotiated with and approved by the tutelary public authority/the General Assembly of Shareholders and will be subjected to annual revision, depending on the achievement of the objectives set in the Administration Plan and on the fulfillment of the performance indicators. According to art.22 of the GEO no.109/2011 Norm of Enforcement, the general principles for establishing the administrators' remuneration policies are the following: a) attracting, retaining and motivating the best administrators; b) ensuring long-term sustainability of the profit of public enterprises and generating durable value c) rewarding the achievement of the set objectives; d) maintaining competitiveness on the remuneration market; e) aligning remuneration with the recommendations on good governance; f) promoting transparency regarding the remuneration and the criteria for establishing it; g) maintaining a correct balance between the fixed remuneration and its variable component.

The additional act to the mandate contract will also necessarily establish quantifiable objectives regarding the reduction of outstanding obligations, the management of receivables and their recovery, the implementation of the investment plan and the cash-flow for the activities carried out.

The performance indicators, that are also mandatory in the additional act, are derived from the performances required in the Letter of Expectations. According to the GEO no.109/2011 Norm of Enforcement, they represent instruments of quantitative and qualitative measurement of the financial and non-financial performance, that indicate the achievement of quantifiable objectives related to specific performance targets. The corporate governance structures in every tutelary public authority suggest to its management appropriate financial and non-financial performance indicators, in accordance with the interests of the public enterprise. The selected indicators will be submitted to the approval of the tutelary public authority or of the General Assembly of Shareholders, as the case may be. The approved performance indicators will be mandatory clauses of the mandate contract additional act and the basis for determining the variable component of the remuneration. The tutelary public authority can be assisted in determining the performance indicators and the variable component of remuneration by independent experts, specialized in measuring performance, as well as by the nomination/remuneration committees or by the Board of Administrators/Board of Directors as a whole.

The GEO no.109/2011 Norm of Enforcement from 2016, Annex 1b establishes the mandatory clauses of the mandate contract that the public enterprise concludes with its administrators/directors. We shall analyse these clauses, insisting on the specific elements imposed by the legislator as obligatory stipulations of the agreement.

2.1 The contracting parties

In the case of the autonomous enterprise, the principal is the tutelary public authority, and the agent is the administrator (member of the Board of Administrators). Should the Board delegate management powers to one or more directors, they will also conclude mandate contracts with the autonomous enterprise, through the Board of Administrators.

In the case of the joint-stock company, the mandate contract is concluded by the General Assembly of Shareholders, through its designated representative, with the members of the Board of Administrators and the executive directors (in the one-tier system), respectively with the members of the Supervisory Board and the Board of Directors (in the two-tier system).

2.2. The term of office

The contract will mention the date the contract will begin to produce its effects, as well as the term of office, which is set in accordance with the Articles of Incorporation of the public enterprise and may not exceed 4 years, with the exception of the administrator selected following the vacancy position of a member of the Board, who will perform only for the remaining term of office of their predecessor. In the case of temporary administrators, the duration of their mandate shall also be specified, in accordance with the law.

2.3. The object of the mandate

The administrator participates in the adoption by the Board, as a whole, of the decisions regarding the administration of the public enterprise, in accordance with the law, the Articles of Incorporation/the Statute of the public enterprise and with the mandate contract, within the limits of the object of activity of the public enterprise. They must also respect the exclusive competencies provided by the legislation in force, as well as the recommendations of the applicable corporate governance guidelines and codes. The executive administrator will perform any necessary and useful acts in order to achieve the object of activity of the public enterprise, exercising the powers and fulfilling the obligations conferred by the mandate contract and by the applicable legal regulations.

2.4. The administrator's rights and obligations

The administrator's rights mainly regard the following:

- a) the payment of a remuneration consisting of a fixed indemnity and a variable component, according to the mandate contract and the legislation in force;
- b) the monthly payment of the fixed indemnity, and of the variable component, according to the contract;
- c) reimbursement of the justified expenses that were made in the interest of fulfilling the mandate;
- d) the administrator's right to benefit, together with the other administrators, from specialized assistance for substantiating the decisions taken within the Board;
- e) the benefit of professional liability insurance;
- f) the payment of damages established according to the mandate contract, in case of revocation without just cause.

The administrator's obligations are also mentioned in mandatory contractual clauses, as they have particular importance, and refer mainly to the following:

a) exercising the mandate with the loyalty, prudence and diligence of a good administrator, in the exclusive interest of the public enterprise;

The GEO no.109/2011, art.14, states that the members of the Board of Administrators of the autonomous enterprise shall exercise their mandate with the prudence and diligence of a good administrator, specifying that the administrator does not violate this obligation, if at the moment they make the business decision, they are reasonably entitled to think that they act in the best interest of the enterprise and on the basis of adequate information. According to art.24, the same obligation falls on the directors of the enterprise, as well. For the state-owned trading companies, the corresponding provisions of the Companies Law will apply, namely art.144¹, which states that the members of the Board of Administration will exercise their mandate with the prudence and diligence of a good administrator. Art.144¹ par. (2) of the Companies Law introduces the same business judgement rule, setting a liability exemption for the administrators, if they were acting in good faith and did not have a conflict of interest with the company and if their decision was based upon adequate information.

The duty of loyalty means that the administrators/directors should act in honesty when executing their mandate, promoting exclusively the interests of the enterprise and avoiding any conflicts of interests. The agents have the duty to inform the company about any existing conflicts of interests and in such cases, to refrain from making decisions in the exercise of their duties.

b) the duty to participate in a professional training program with a minimum duration of one week/year, in which to have training sessions in the field of corporate governance, legal, as well as in other fields chosen by the shareholders;

c) the rigorous preparation of the Board meetings, with the dedication of at least 3 working days per month for this purpose, the participation in the Board meetings, as well as in the specialized committees;

d) participation in one or more advisory committees set up at Board level;

e) declaring, according to the internal regulations and the legislation in force, any existing conflicts of interest and, in situations of conflicts of interests, abstaining from decisions within the Board/the advisory committees/in exercising the attributions of executive administrator;

The obligation to inform the enterprise about any conflicts of interests applies to all those who exercise administration/management functions in state-owned enterprises, and it also entails an obligation to report: the annual/half-yearly reports of the Board of Administrators/Board of Directors will mention, in a special chapter, the legal acts concluded in such conditions, specifying the following elements: the parties to the act, the date the act was concluded and its nature, the description of its object, its total value, the reciprocal claims, the guarantees, terms and conditions of payment, as well as other essential and significant aspects in connection with these legal acts.

The fraud on the interests of the public enterprise committed by the members of its administration/management, by concluding acts in which they are in a conflict of interests with the enterprise, is sanctioned with their annulment. As to the liability of the fraudulent managers, their sanction is the obligation to pay damages, in order to cover all the losses that the public enterprise suffered from that operation. Criminal liability may also be

pursued, if the breach of confidence was in bad faith, according to art.272 of the Companies Law no.31/1990.

- f) exercising the attributions provided by the legislation in force and by the statute of the public enterprise;
- g) the adoption of control policies and systems provided by their attributions;
- h) approving the budget of the public enterprise;
- i) achievement of the objectives and performance indicators provided in the Annex to the contract;

The performance indicators are set for a period of maximum 4 years and are financial and non-financial.

The financial performance indicators measure the efficiency of resource use in order to generate revenue, cover costs and make a profit; they respond to expectations regarding the reduction of expenses, fiscal and budget stability and prudence, dividend policy and net profit payments, the investment policy and the general capital expenses.

The non-financial performance indicators are instruments of measuring performance that determine how well the public enterprise uses its resources, mainly for the efficiency of the internal activity, providing external services for customers and fulfilling legal requirements. They are usually derived from the policy of the enterprise, clients' satisfaction level, the market share of the public enterprise. They are operational performance indicators, as well as corporate governance indicators and will be set so that the incentives given do not distort the objectives of the public enterprise, nor do they negatively affect the financial operations.

- j) elaboration, together with the other administrators, and the half-yearly transmission of the reports regarding the activity of the public enterprise and the stage of the achievement of the performance objectives, as well as, as the case may be, of the information regarding the directors' mandate contracts;

The GEO no.109/2011 dedicates Chapter V to the duties of report and the transparency of the corporate governance of public enterprises. In applying the „*comply or explain*” principle, the Board of Administrators/Board of Directors have the obligation to prepare annual reports, in which they present the manner and the extent to which the principles and recommendations of corporate governance are accomplished, as well as the measures taken to comply with the recommendations that are not fully met. The obligation to inform the tutelary public authority or the General Assembly of Shareholders on the activity of the corporate governance structures is a continuous one. Failure to comply with the obligation of complete, fair and timely reporting, shall bring disciplinary, civil, contraventional or criminal liability, in accordance with the law, as well as the revocation of the mandate of the liable ones.

- k) approving the development strategy of the public enterprise;
- l) the selection, appointment and revocation of the directors/members of the Board of Directors, the evaluation of their activity and the approval of their remuneration;
- m) approving the recruitment and revocation of the head of the internal audit and receiving from him, whenever the administrator requests, reports regarding the activity of the public enterprise;
- n) participation in continuous professional development programs, in order to carry out an optimal activity within the Board;
- o) elaboration of the Management Plan in collaboration with the directors;

The fulfillment of the mandate duties will be done accordingly to a Management Plan, which, according to art.2 par.(8) of the GEO no.109/2011, is a working tool of the administrators and directors, embodied in a document drawn up to determine the progress of the public enterprise during their term of office. It is structured in two components: an administration plan, which is prepared by the Board of Administrators/Supervisory Board, and a management plan, prepared by the directors/members of the Board of Directors. It is linked to the Letter of Expectations, by which the tutelary public authority, in consultation with any shareholders representing, individually or together, 5% of the share capital of the public enterprise, establishes the expected performances from the administration and management bodies of the public enterprise, as well as the policy of the tutelary public authority, for a period of at least 4 years. The Management Plan sets out the mission, objectives, actions, resources and financial/non-financial performance indicators for carrying out a specific activity over a future period which may not exceed 4 years.

p) checking the functioning of the internal and managerial control system;

r) negotiation of financial and non-financial performance indicators with the tutelary public authority or the shareholders of the company, as the case may be;

After the approval of the Management Plan by the Board of Administrators/Supervisory Board, the performance indicators that it proposes will be transmitted to the tutelary public authority (in the autonomous enterprises) or the General Assembly of Shareholders (in joint-stock companies) for negotiation and approval; subsequently, they will become an annex to the mandate contract.

s) monitoring and managing potential conflicts of interests at the level of the administration and management bodies;

In order for the administrators to comply with this obligation, the enterprise shall establish a policy regarding the conflicts of interests and the systems for its implementation. The Board of Administrators shall adopt a Code of Ethics, annually reviewed, if necessary, with the prior approval of the internal auditor.

t) other obligations provided by law and the internal regulations adopted at the level of the public enterprise.

2.5. The rights and obligations of the public enterprise

The mandate contract includes obligations regarding the payment of the administrator's remuneration, ensuring the conditions for the administrator to carry out his activity through his full freedom in exercising the mandate, but also rights regarding the request for information from the administrators related to the exercise of the mandate and the evaluation of their activity.

2.6. Liability of the parties

The mandate contract will include provisions regarding the contractual civil liability of the parties. Failure to comply with the contractual obligations shall bring disciplinary, civil, contraventional or even criminal liability of the members of the administration/management bodies. Also, the revocation of the mandate entrusted to them by the tutelary public authority /the trading company will occur, as a natural consequence of the loss of trust in the agent.

Should the administrator/director breach his duty to exercise the mandate with the loyalty, prudence and diligence of a good administrator, in the exclusive interest of the

public enterprise, the extent of their civil liability is objectively determined, depending only on the damage suffered by the public enterprise, which will have to be fully remedied, as long as a direct causal link is established between the agent's wrongdoing and the damage suffered by the enterprise. The administrators' liability will be incurred both for the damages caused to the enterprise as a result of their own decisions, as well as for the prejudicial acts of the directors, if the damage did not occur should they have exercised the due supervision required by their position (art. 16 par. 2 of the GEO no. 109/2011). The members of the Board of Administrators also have a joint responsibility for the acts of their immediate predecessors, if, having knowledge of the irregularities committed by the latter, they do not communicate them to the internal auditors, the financial auditor, nor to the tutelary public authority (art. 16 par. 3).

The decision to bring an action for damages against the administrators/directors is the equivalent to the termination *de jure, ex officio* of their mandate. Their term of office shall cease the date that decision is made and in consequence, they will be replaced from office immediately.

2.7. The attributions of the Board and of its members in the administration of the public enterprise

The mandate contract will provide attributions related to the following:

- a) the administration of the public enterprise, by supervising the functioning of prudent and effective control systems, which allow the assessment and management of risks;
- b) approving the development strategy of the public enterprise, by ensuring the existence of the necessary financial and human resources for achieving the strategic objectives and supervising the executive management of the public enterprise;
- c) ensuring that the public enterprise fulfills its legal obligations towards the stakeholders as well;
- d) monitoring the performance of the executive management;
- e) ensuring that the financial information produced by the public enterprise is correct and that the financial control and risk management systems are effective;
- f) establishing and approving the remuneration of the directors/members of the Board of Directors and fulfilling the obligations provided by law regarding the recruitment, appointment, evaluation and, as the case may be, the revocation of the other directors of the public enterprise, with whom it has concluded mandate contracts;
- g) elaboration of annual reports and other reports, in accordance with the law.

2.8. The conditions for termination, revision or extension of the mandate

- a) the conditions for termination of the mandate, in case of non-fulfillment of the financial and non-financial performance indicators included in the mandate contract, for reasons imputable to the administrator or due to violation of the integrity criteria stipulated in the mandate, including avoiding and not denouncing conflicts of interest or the breach of the Code of Ethics of the public enterprise;

GEO no.109/2011, art.30, par.(9), states that the administrators' revocation in joint-stock companies will occur when, for imputable reasons, the administrators do not meet the performance indicators established in the mandate contracts; the dismissed administrators can no longer run for office for 5 years from the date of the decision in

Boards of Administrators of other public enterprises. The same reasons justify the revocation of directors, according to art.36 par.(7).

An aspect that we think is very important to underline is the fact that the revocation of the mandate of the enterprise's agents can be done without necessarily involving culpable acts. The provisions of the Romanian Civil Code (art. 2031 par. 1) allow for the revocation of all mandate contracts to be made discretionarily: „*the principal may at any given time revoke the mandate, whether it is express or tacit, regardless of the form in which the contract was concluded and even if it was declared irrevocable.*” The revocation is *ad nutum*, which means that it is not subject to any conditions or notice period; it may be done even against the agreement of the contracting parties, in those cases in which they have declared the contract „*irrevocable*”.

The administrators/directors of Romanian state-owned enterprises can only ask for damages if the revocation of their mandate was abusive or without righteous cause, but under no circumstance could they claim reinstatement to continue the terms of their office. Although discretionary, the revocation cannot be arbitrary or abusive, because in case of unjustified or untimely revocation, the principal will be compelled to pay the agent the remuneration, as well as the reparation of the damages caused as a result of the revocation itself. However, the GEO no.109/2011 establishes two situations in which the revocation does not give the right to compensation: when the revised Management Plan submitted by the Board is not approved, which implies that the administrators' mandate is terminated *ex officio*, and when the members of the Board of Administrators/Supervisory Board of joint-stock companies are not reconfirmed in office by applying the method of cumulative voting.

- b) the conditions for modifying the mandate contract, as well as the agreement of the parties or the legislative changes likely to affect the contractual provisions in force;
- c) the mandate can be extended, following an evaluation process carried out by the tutelary public authority or the shareholders, as the case may be, at the end of the mandate term of maximum 4 years.

2.9. Quantifiable performance objectives and financial and non-financial performance indicators, including those for determining the variable component of the remuneration

The targets and the performance indicators are mentioned in the Additional Act to the mandate contract, as well as the conditions for their revision.

2.10. Integrity and ethics criteria

The agreement of the parties shall mention matters relating to the following:

- a) compliance with the Code of Ethics of the public enterprise, applicable not only to its employees, but also to the members of the Board;
- b) denunciation of conflicts of interest, defined according to the legislation in force and according to the internal regulations of the public enterprises;
- c) the behaviour necessary to be exercised within the Board in case of situations that could put the administrator in a situation of conflict of interests;
- d) obligations related to the treatment of confidential and sensitive information with due discretion and in accordance with the provisions of the mandate contract, but also to the possession and maintenance of an excellent professional reputation;

e) the conditions for suspending the mandate in case of starting a criminal investigation for the offenses provided in the art. 6 of the Companies Law no. 31/1990, as amended.

2.11. The remuneration of Board members with a fixed allowance and a variable component

a) the amount of the fixed monthly allowance, different depending on the number of committees in which the administrator participates and on other attributions specified in the mandate contract

b) the method of calculating and granting the variable component of the remuneration, based on the selection by the tutelary public authority of the most appropriate financial and non-financial performance indicators for determining this component, in accordance with the methodology for establishing financial and non-financial performance indicators and the variable component of remuneration.

The GEO no.109/2011 provides similar criteria for establishing the remuneration of administrators/directors in autonomous enterprises and joint-stock companies. They regard the number of meetings that the executives attend, their attributions as members of consultative committees, other prerogatives, as well as the performance objectives agreed upon in the mandate contract. As an author (Catană, 2012b: 117) has pointed out, the tutelary public authority/the General Assembly of Shareholders dispose of a significant evaluation margin when deciding on the performance criteria upon which the remuneration will be determined.

However, given the fact that the transparency and efficiency of public money use must be ensured, the GEO no.109/2011 provides clear criteria and limits for establishing it. The remuneration and benefits given to the executives will also have to be recorded in the annual financial statements and on the webpage of the public enterprise. The main issue when establishing the remuneration is adapting its level and components in order to attract qualified individuals from the private sector to public enterprises, considering the fact that wages are usually lower in the public sector, since most states in Central and Eastern Europe, including Romania, have imposed maximal remuneration levels for the members of the administrative bodies.

The remuneration of the members of the Board of Administrators/Supervisory Board is established by the tutelary public authority (in autonomous enterprises), respectively by the General Assembly of Shareholders (in joint-stock companies), through the mandate contract, in the structure and limits provided by the GEO no.109/2011, art.8, respectively art.37. The remuneration shall consist of a fixed monthly allowance and a variable component. The composition of the remuneration and the amount will be decided by direct negotiation with the members of the Board and will be included in the mandate contract.

The fixed allowance is established in correlation with the the average monthly gross salary received for the last 12 months for the activity carried out according to the main object of activity registered by the enterprise at class level, according to the classification of activities in the national economy, communicated by the National Institute of Statistics prior to their appointment. It is bigger for the executive members of the Boards (a maximum of 6 times the average monthly gross salary) than for the non-executive members (a maximum of 2 times the average monthly gross salary). The fixed monthly allowance of the members of the Boards may be differentiated according to the number of

meetings in which they participate, the attributions in advisory committees and other specific attributions established by the mandate contract.

The variable component is set on the basis of financial and non-financial performance indicators negotiated and approved by the tutelary public authority/the General Assembly of Shareholders, which aim at the long-term sustainability of the autonomous enterprise and at ensuring compliance with the principles of good governance. These performance indicators are different for the executive members of the Board, as opposed to the non-executive ones; for the non-executive members, the amount of the variable component may not exceed a maximum of 12 fixed monthly allowances, whereas for the executive members the legislator does not impose such a limitation. The variable component of the remuneration is reviewed annually, depending on the level of achievement of the objectives included in the Management Plan and the degree of fulfillment of the financial and non-financial performance indicators approved by the tutelary public authority/General Assembly of Shareholders, annexed to the mandate contract.

The remuneration of the directors/members of the Board of Directors is set by the Board of Administrators (in the one-tier system) or by the Supervisory Board (in the two-tier system). The fixed allowance will be set within the limits established for the executive administrators. As for the variable component, it may consist of a share of the net profit of the enterprise, of shares, stock-options, a pension plan or another form of remuneration, based on the fulfillment of the performance indicators. The total amount of the directors' remuneration may not exceed the one set for the executive members of the Board of Administrators.

2.12. Recovery of the variable component of the remuneration

- a) If situations arise that may significantly change the results and sustainability in the medium or long term or if the payment of the variable component of the remuneration jeopardizes the capitalization of the public enterprise, it is entitled not to pay the part calculated for previous years.
- b) If all or part of the variable component is provided on the basis of data which subsequently proves to be incorrect, public enterprises shall be required to request that part of the variable component be returned.

2.13. Confidentiality clauses, during and after the exercise of the mandate

The mandate contract shall specify clauses regarding the waiting period after the term of office ended, before obtaining an administrative or a management position in a public enterprise in direct competition with the public enterprise in which the mandate had been exercised, as well as the obligation to respect, after the end of the mandate, confidentiality accessed information.

Art.14 of the GEO no.109/2011 states that the members of the Board of Administrators, who have the duty to exercise their mandate loyally, in the interest of the autonomous enterprise, shall not disclose the confidential information and the trade secrets of the enterprise, to which they have access as administrators. This obligation will continue after the termination of their mandate, too. The precise content and the duration of the confidentiality obligation will be detailed in the mandate contract. According to art. 24, the directors of the autonomous enterprise also have a similar obligation.

2.14. Administrators' evaluation method

References are made to two types of evaluations that are made on Board members:

a) the internal self-assessment of the Board, of its committees and of each member of the Board. The purpose of this evaluation is to enable the Board to identify the strengths and potential for collective and individual development, in order to fulfill the functions of the Board, as well as the auxiliary conditions, but also the processes and competencies necessary for these functions;

b) the evaluation of the collective performances of the Board as a whole compared to the matrix of the Board profile performed by the tutelary public authority. The results of this evaluation provide information on the variable component part of the remuneration in the mandate contract, the key performance indicators used, as well as on the development activities that will inform the future compositions of the Board and the criteria used for this purpose.

The Board will have to transmit to the tutelary public authority/the General Assembly of Shareholders, on yearly basis, a corporate governance compliance statement, specifying which of the recommendations were actually implemented and in what manner. If the principles and recommendations contain provisions related to the companies, administrators, auditors, shareholders or other corporate bodies, each company has to provide accurate, correct, precise and easy to understand information on the manner in which these recommendations were practically implemented during the period to which the report refers. Should the enterprises fail to implement, totally or partially, one or more of the recommendations, they have to provide adequate information regarding the grounds for the partial compliance or the non-compliance with these recommendations.

The periodic evaluation of the administrators'/directors' activity in public enterprises has special importance, since its results determine the calculation of the variable component of their remuneration and, in case they fail to meet the performance indicators negotiated in the management plan, the revocation of their mandate, or even the decision of the tutelary public authority/of the General Assembly of Shareholders to pursue legal action against the agents, should they be guilty of fraudulent acts against the enterprise. The Guide for Good Practices in Corporate Governance published by the Romanian Ministry of Public Finances provides with examples of evaluation indicators for the assessment of the members of the Boards of Administrators in state-owned trading companies. This includes indicators on financial-accounting skills, on risk management or on ethics and integrity.

2.15. Expectations regarding the initiation and participation in the specialized advisory committees, set up at Board level

Requirements include the establishment, where they do not exist, of audit committees and nomination and remuneration committees at Board level, as well as other committees, depending on the specifics of the public enterprise.

2.16. Conflict of interests clauses

This section of the mandate contract refers to the applicable legal provisions on conflicts of interests and the procedure to be followed by the administrator in order to inform the public enterprise of the existence of a potential conflict of interests. It specifies in detail how the administrator refrains from making those decisions within the Board,

which put him in a conflict of interests. Other obligations of the administrator shall also be provided, in order to ensure compliance/monitoring/management of legal provisions on the prevention of conflicts of interests.

Art.15 of the GEO no.109/2011 states that the administrator who has in a certain operation, directly or indirectly, interests contrary to those of the enterprise, must inform the other administrators and the internal auditors about it and not take part in any deliberation regarding that operation. The administrator has the same obligation if his spouse or relatives up to the fourth degree have interests in a certain transaction. Art. 24 states that the same obligation falls on the directors of the autonomous enterprise. In the case of breaching this obligation, the transactions can be declared null and void, and the administrators/directors will be liable for the loss caused to the autonomous enterprise.

2.17. Clauses regarding the independence and qualification of the administrator as independent or not

The contract shall specify whether the administrator is independent or not, based on the provisions of the Companies Law no.31/1990. Thus, art.138² of the Law no.31/1990 states that when appointing the independent administrator, the General Assembly of Shareholders will take into account the following criteria:

- a) not to be a director of the company or of a company controlled by it and not to have fulfilled such a function for the last 5 years;
- b) not to have been an employee of the company or of a company controlled by it or to have had such an employment relationship for the last 5 years;
- c) not to receive or to have received from the company or from a company controlled by it an additional remuneration or other advantages, other than those corresponding to his quality of non-executive administrator;
- d) not to be a significant shareholder of the company;
- e) not to have or have had in the last year business relations with the company or with a company controlled by it, either personally or as an associate, shareholder, administrator, director or employee of a company that has such relations with the company, if, by their substantial character, they are such as to affect their objectivity;
- f) not to have been in the last 3 years financial auditor or employee associate of the current financial auditor of the company or of a company controlled by it;
- g) to be a director in another company in which a director of the company is a non-executive administrator;
- h) not to have been a non-executive administrator of the company for more than 3 terms of office;
- i) not to have family relations with a person in one of the situations previously provided.

2.18. Conditions for contracting assistance at Board level

It specifies the possibility for the Board to ask the public enterprise to contract specialized assistance to substantiate its decisions, for example, but not limited to: audits, anti-fraud investigations, market analysis and others.

2.19. Force majeure

It specifies the rights and obligations of the parties in case of an event or circumstance that can be qualified as force majeure.

2.20. How to solve disputes

Clarifications are made regarding the way of resolving disputes amicably or by submitting them to the competent Romanian courts of justice.

2.21. Other clauses

The legislator recommends to insert the following clauses in the contract:

- a) the method of contracting and paying a professional liability insurance, including the maximum insured amount;
- b) benefits granted to the administrator, such as: coverage of expenses for representation, transportation, meals and accomodation and others;
- c) non-compete obligations.

The non-compete obligation, which derives from the agent's duty of loyalty, means that the administrator/director is restricted from concluding operations in his own interest, in direct competition with the managed enterprise, thus endangering its interests. According to the Norm of Enforcement from 2016, Annex 1b, par. (21), of the GEO no. 109/2011, the non-compete obligations are only recommended clauses of the mandate contracts of the administrators of public enterprises, without being mandatory. However, we believe that the duty of loyalty and the duty of confidentiality necessarily imply the administrator's abstention from acts of unfair competition.

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