REVOCATION OF ADMINISTRATORS' AND MANAGERS' MANDATE IN THE CORPORATE GOVERNANCE OF ROMANIAN STATE-OWNED ENTERPRISES. A LEGAL POINT OF VIEW

https://doi.org/10.47743/jopafl-2022-25-08

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Abstract: *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 Romania, in particular, former socialist state-owned enterprises have been going through a privatization process, that has often been failing and incomplete. Legislative instability has only exacerbated the economic problems. However, under pressure caused by the Romanian Government's commitments to the European Union and the International Monetary Fund, corporate legislation has been gradually modernized, by the succesive amendments of the Companies Law no.31/1990, as well as the Government Emergency Ordinance no.109/2011, which introduced the concept of corporate governance of Romanian public enterprises. These regulations lay the foundations for a more transparent relationship between the state and the administration and management of these entities. This relationship is based on a mandate contract, the execution of which is often affected by trust issues between the contracting parties. Thus, the administrators and executive directors often do not comply with the objectives set by the shareholders for the enterprise, which results in their accountability, correlated with the revocation of the mandate. This termination of office involves certain juridical issues, that we shall address in our study, such as the essentially revocable nature of the mandate contract or the agent's right to damages in case of unrighteous revocation.*
Keywords: *corporate governance; state-owned enterprises; autonomous enterprises; joint-stock companies; mandate; agent; principal; contractual responsibily; liability; ad nutum revocation; intuitu personae; damages; compensation.*

This Article was presented as a paper at the 14th edition of the Annual International Conference Globalization and Higher Education in Economics and Business Administration (GEBA 2021), which was held at the Alexandru Ioan Cuza University, Faculty of Economics and Business Administration in Iasi, Romania from the 20-22 October 2022.

Introduction

Corporate governance has become increasingly important for developing countries, as they struggle to adapt such systems to their own corporate structures and implementation capacities. 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, because, following a long and incomplete privatization process, there are many commercial enterprises belonging to the state, in which managerial control is rather a wish than a reality. Simultaneously with the legal regulation of the basic components of governance, action must also be taken to improve the business climate in the economy (Avram, 2003).

The turning point in regulating corporate governance structures for the Romanian state-owned enterprises was the Government Emergency Ordinance (GEO) no.109/2011, (subsequently amended by the Law no. 111/2016), which aimed to create the legislative and administrative premises leading to an increase in the efficiency of these economic operators.

One of the main challenges of Romanian companies, especially the ones with state-owned capital, is given by the mandate issues, that occur with the administration and management of the company. Because both parties (the principal and the agent) want to maximize their benefits, situations may arise in which the agent no longer acts in the best interest of the enterprise. In other situations, the managers, lacking the adequate training and support, just fail to meet the performance indicators agreed with the shareholders, in order to achieve the objectives of the company. According to relevant studies on this matter (Albu et al., 2013), the possible solutions that reduce these mandate issues are: proper management training, related to effective control policies, external audit, performance monitoring and diversification of the manager bonus package. Corporate governance offers a greater degree of assurance that an effective control system is implemented at the level of the entity, thus ensuring that the business is conducted efficiently and legally, in the interest of all stakeholders and shareholders.

A natural consequence of the loss of trust in the relationship between the enterprise and its management will be the revocation of the mandate given to the administration and executive management bodies. This withdrawal of trust raises certain legal issues, that we shall try to address in this article.

Execution of the mandate contract of the administrators and directors of public enterprises. The contractual liability

The GEO no.109/2011 sets the legal basis for corporate governance structures in two types of Romanian state-owned entities: (a) autonomous enterprises, established by the state or by an administrative-territorial unit and (b) national trading companies and enterprises, which are organised as joint stock companies in which eather 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. According to art.2 par.(11), for all these types of public enterprises, the relationship between the tutelary public authority or the shareholders and the administration and management of the company 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 they are mostly organised as joint stock companies. Therefore, it is important to underline the fact that the relationship between the public enterprise and the members of its administrative/management bodies will not be conducted under the provisions of the Labour Code, since an employment contract is incompatible with the corporate mandate relationship. Thus, the Companies Law no.31/1990, art.137[1] par.(3) expressely states that „during the term of office, the administrators may not conclude an employment contract with the company ", and „if the administrators were appointed from among the employees of the company, the individual employment contract is suspended for the term of the mandate".

The autonomous enterprises are organised as a one-tier system, with a Board of Administrators governing the enterprise. The parties to the mandate contract are the tutelary public authority (as the principal), and the members of the Board of Administrators (as the agents). The management responsibilities may be delegated by the Board to one or more directors, who will ensure the executive management of the enterprise. In this case, the executive directors themselves will conclude mandate contracts with the enterprise, represented by the Board of Administrators. Therefore, in the case of autonomous enterprises, 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 state-owned commercial companies may be managed in a one tier or a two tier system, as they are regulated by the Companies Law no.31/1990, as amended. 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, in turn, 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. Therefore, in the case of the joint stock companies, the mandate contract is formed between the company and the members of the Administrators'/Supervisory Board/the directors/members of the Board of Directors. The contract will be executed according to the GEO 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, since the mandate of the administrators of these entities is assimilated to that of the directors of private companies.

The GEO no.109/2011 clearly regulates the duties of the administrators and managers of state-owned enterprises: (1) the duty of prudence and diligence, (2) the duty of loyalty and (3) the duty to give an account (to report). They are similar to those imposed by the common Companies Law no.31/1990 to the managers of private companies, and to those that the Civil Code regulates for the common agent in a mandate contract, which represents the ground law for all agents, acting in different fields of activity. According to the GEO no.109/2011, art.4, the competence to make decisions, and implicitly the responsibility for them, belong to the administrators and the directors, who will act autonomously in the execution of their mandate, the tutelary public authority and the Ministry of Public Finance not being allowed to intervene in the administration and management activity. Failure to comply with the obligations entails disciplinary, civil, contraventional and even criminal liability of the members of the administration/management bodies, as well as revocation of the mandate entrusted to them, as a natural consequence of the loss of trust.

In the case of joint-stock companies, the Companies Law, art.155, states expressly that 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. If the General Assembly of Shareholders decides to initiate such action against the administrators/directors, their term of office shall cease the date that decision is made and in consequence, the General Assembly (for the administrators), respectively the Board of Administrators/Supervisory Board (for the directors) will replace them immediately.

As for the autonomous enterprises, since they are not commercial companies, the provisions of the Companies Law do not apply, and the GEO no.109/2011 does not specify anything about the effects produced by the tutelary public authority's decision to introduce such action. Therefore, in order to see if bringing of an action for liability against the administrators/directors entails a cessation of their mandate as well, one must study the provisions of the Civil Code, as they have general applicability for all legal persons. The answer can be found in art.220, entitled ”The responsibility of the members of the boards of a legal entity”. Paragraph (4) of this article states that „if it has been decided to bring an action for damages against the administrators, their term of office shall expire and the competent management body shall replace them.” Therefore, it provides for an ad nutum revocation of all legal entities' agents, at any time and without the need to enclose the revocation on the agenda of the General Assembly of Associates.

Therefore, one of the most signifficant direct effects of the decision of the tutelary public authority (in the autonomous enterprises) or of the General Assembly of Shareholders (in the joint stock companies) to bring an action against the administrators/directors, consists in the termination de jure of their mandate contract. As legal doctrine has pointed out (Catană, 2012), this is the equivalent of a de facto revocation of mandate by loss of trust. The moment the competent body decides to introduce legal action against an agent of the public enterprise, they withdraw the confidence invested in the agent, which means the delegation of the power to represent and act on behalf of the enterprise no longer exists; in the absence of this power, we don't have a mandate contract. In fact, the power to bring an action for liability belongs to the same bodies that can decide to revoke the mandate.

If the liability action against the administrators/directors necessarily entails the revocation of their mandate, the reciprocal assertion is not valid; in other words, the revocation of the mandate of the enterprise's agents can be done, as we shall see, without necessarily involving culpable acts, that would be likely to attract their judicial liability. In fact, as it is the case for all mandate contracts, the provisions of the Romanian Civil Code undeniably allow for the revocation to be made discretionarily.

The juridical regime of the mandate revocation. The mandate, an essentially revocable act. The ineffectiveness of the clauses of mandate irrevocability

As we have already stated, according to the GEO no.109/2011, art.2 par.(11), the mandate relationship between the public enterprise and the members of its administrative/management bodies will be conducted under the general provisions of the Romanian Civil Code, which is ground law for all mandate contracts. The regulations of the Companies Law will also apply on the matter, in the case of the joint-stock companies.

According to the Romanian civil law (Baias et al., 2012), the legal provisions of the Civil Code addressing the revocation of the mandate cannot be derogated through the clauses of the mandate contract. Therefore, articles 2030-2032 of the Civil Code will become applicable to the revocation of the administrators'/directors' mandate in state-owned enterprises. Nevertheless, some particularities are brought by the provisions of the GEO no. 109/2011, since it represents the specific legal regulation of the mandate contract for the public enterprises' agents. They concern the special case of revocation without the right to compensation, as we shall see in our study. Therefore, we will perform an analysis

of the revocation of the mandate of the administrators and directors of public enterprises, in the light of the general provisions of the Civil Code, but also with reference to the specific particularities brought to the matter by the Companies Law regulations (for the joint-stock companies) and by the GEO no.109/2011, as amended by the Law no.111/2016. The revocation of the mandate done by the principal is included by the Civil Code among the specific causes that put an end to this type of contract (art. 2030 par. 1.a).

According to art.2031 par.(1) of the Civil Code, „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." Therefore, the legislator establishes the essentially revocable character of the mandate contract. This unilateral act of will of the principal is not subject to any conditions or notice period; the revocation may be done in any form, even tacitly, by giving the proxy to carry out the same business to another agent (art. 2031 par. 2 of the Civil Code), or by the principal carrying it out himself; moreover, the revocation may be done even against the agreement of the contracting parties, in those cases in which they have declared the contrract „irrevocable", thus establishing a legal exemption from the principle of the binding force of the contract, enshrined in art. 1270 of the Civil Code. Therefore, the principal's right to terminate the contract unilaterally appears as one that can be exercised discretionarily. The revocation is ad nutum, which means that it can be done at any time, in any form and independently of any fault of the agent, such as breaching the contractual duties. Ad nutum is a Latin expression, which means that the one who entrusted a mandate to another has the right to withdraw the powers conferred on the agent, without jutifying the reasons behind this decision and without giving notice, even if the mandate was concluded for an indefinite period of time and without the obligation to pay a compensation, under the condition that he did not abuse this right (Merle, 2008).

This legal regulation is based on the intuitu personae character of the mandate: it aims to fulfill the interests of the principal, through a person who works for him and who is appointed as a representative due to the trust that they inspire the principal, related to their ability to achieve the mission entrusted in optimal conditions; should this trust be lost, the principal may withdraw the proxy, as it was given in his sole interest.

We can find similar provisions in other European legislations, such as the British, the German or the French ones. The UK Companies Act (2006), s. 168 (1), states that „a company may by ordinary resolution at a meeting remove a director before the expiration of his period of office, notwithstanding anything in any agreement between it and him.". The German Stock Corporations Act, s. 103, allows the General Assembly of Shareholders to remove from office the members of the Supervisory Board prior to the end of their office, with a majority of three quarters of vote (Wirth et al., 2010). In the French commercial companies law, although the members of the Board of Directors can only be revoked for „righteous reasons", the members of the Supervisory Board may be removed from office ad nutum.

The legal literature has established the idea that the revocation of the mandate is based on the loss of the principal's trust in the agent, or on the assessment of the manner in which he manages the principal's affairs as being inappropriate.

In reality, the principal's right to revoke the mandate is not conditioned by the proof of any fault of the agent in the execution of the entrusted tasks. In fact, as it is legally regulated, the right of revocation may be exercised at the discretion of the principal,

regardless of the reasons that trigger the revocation. The principal will not have to justify himself to the agent in this regard. Therefore, the mandate is a revocable contract: neither can the principal be bound by a stipulation of irrevocability of the power of attorney, nor can the agent be obliged by a commitment to not give up his mission. The mandate is revocable by its very essence, keeping this character despite any stipulation to the contrary. It cannot lose this character without undergoing a mutation itself, becoming another contract; in this case, we are rather talking about a pre-contractual agreement.

In French doctrine, some authors (Planiol et al., 1932) have stated that the contracting parties have the possibility to derogate from the rule of the mandate revocability, stipulating an express irrevocability clause, which will be effective, provided that it is not excessive, thus absolutely depriving the principal of the right to revocation; for this purpose, the irrevocability will have to be limited by the parties to a given object and a limited period of time. In an attempt to explain the existence of the irrevocable mandate, doctrine and jurisprudence have developed various theories, such as that of the abuse of right, which argues that the revocation, if abusive, will not have the effect of terminating the contractual relations by the unilateral will of the principal. These theories are based on the equity principle („jus est ars boni et equi"). Given the principle of freedom of will of the contracting parties, it has been argued that the irrevocability of the mandate can be based on the very will of the parties, embodied in an irrevocability clause stipulated in the mandate contract.

The legislative consecration of the possible irrevocability of the mandate is found in the Anglo-Saxon-inspired legislations. For example, art.2179 of the Québec Civil Code provides that „(1) The principal may, for a fixed term or to ensure the performance of a particular obligation, renounce his right to revoke the mandate unilaterally. (2) The agent may, in the same manner, undertake not to exercise his right of renunciation. (3) Unilateral revocation or renunciation by, as the case may be, the principal or the agent, despite his undertaking, terminates the mandate." In other words, this text of law recognizes the right of the parties to the mandate contract to stipulate an irrevocability clause, but only for a specific object and period of time, and the parties' non-compliance with it will only give the right to claim damages, as the mandate remains revocable at the mere unilateral expression of will. In these circumstances, one might wonder what role does the stipulation of this clause have, since the principal owes a compensation anyway, in case the untimely or unjustified revocation causes damages to the agent?

The possibility for the parties to stipulate such clauses of irrevocability has without a doubt been taken into account by the Romanian legislator as well, the Civil Code including explicit provisions regarding the situation of the mandate declared „irrevocable" by the parties, namely art.2031 par.(1), art.2032 par.(2). The stipulation of the irrevocability of the mandate will generate, according to the provisions of the Romanaian Civil Code, the same consequences as those stipulated by the Civil Code of Québec, namely the revocation, if it takes place, produces its specific effect anyway, putting an end to the contract, but the condition of the principal who violated the agreement of the parties will be more severely assessed, he being presumed guilty of unjustified revocation, should he fail to prove that the revocation was caused by the fault of the agent himself or by a fortuitous case or force majeure (art. 2032 par. 2). Therefore, the existence of such a clause of irrevocability of the mandate does not deprive the principal of the power to revoke the mandate, only shifts the burden of proving the reasons behind the revocation from the agent

upon himself, in case the agent seeks damages for unjustified revocation. Despite the stipulation of the irrevocability clause, the agent will not be able to request the execution in kind of the commitment assumed by the principal, that is not to unilaterally terminate the contract.

In our opinion, the way the revocability of the mandate is regulated by the Romanian Civil Code, as a discretionary right of the principal that can be exercised even against the explicit will of the parties, who declared the mandate „irrevocable", these clauses are ineffective, in other words they do not produce their specific effect, the only difference in the legal regime of the revocation being that in the presence of such a clause, the revocation against the will of the contracting parties will be presumed unjustified until proven otherwise, according to art. 2032 par. (2); thus, in order to be released from the obligation to pay damages to the agent, the principal will have to find evidence that this revocation was caused by the agent's fault, or by a fortuitous event or the force majeure. Therefore, the damages regime is more onerous for the principal, his obligation arising from the revocation without the claimant, in this case the agent, having to prove the fault of the principal, consisting in the „unjustified" or „untimely" character of the revocation, as would occur in the absence of the irrevocability clause. However, this difference in treatment is attributed by the legislator to the situation in which the principal violated the explicit will of the parties by the revocation, and it does not derive from the consent of the parties expressed in the clause; the will of the parties who agreed upon the clause was that the revocation could not be decided unilaterally; this effect obviously does not occur.

The doctrine expressed the opinion that the stipulation of an exclusivity clause in the mandate contract would be the equivalent of a clause of irrevocability of the mandate, since the principal would not be able to appoint a new agent (Quenaudon, 2002). We think that the mere stipulation of exclusivity in favour of the agent does not imply in any case that the mandate cannot be revoked, since the revocation can occur, as we have shown, in any situation, with the correlative right of the agent to be compensated by the principal in case of unjustified or untimely revocation. Again, as in the case of the irrevocability clause, in the hypothesis of the exclusivity clause, the will of the contracting parties, even if explicite, canot derogate from the public order provision of the law establishing the principal's right to revoke the mandate „at any time" (art.2031 par.1 of the Civil Code). Art.2032 par.(1) of the Civil Code requires that the principal fulfills his obligations towards the agent and repairs any damages that would result from an unjustified or untimely revocation. Thus, in a decision (no.34/2007) of Cluj Court of Appeal it is stated that „the unilateral revocation right exists, the revocability being justified by the fact that the mandate is concluded in consideration of the qualities of the agent and it is presumed to be given in the interest of the principal. The only possibility given to the agent is to file an action for damages, in the situation when the revocation of the mandate is considered abusive or arbitrary."

According to the Romanian legal doctrine (Baias et al., 2012), the discretionary revocation of the mandate applies to all the mandate contracts particularly regulated by law. Therefore, 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. This is because the agents "serve at the pleasure of shareholders" (Moye, 2004). It is for this reason that the substance of a decision to revoke an administrator/director is not

subject to review by court. In other words, it is not open to the courts to invalidate the decision of revocation and order the reinstatement of the agent. Such reinstallation is specific to labour contracts, not to the mandate.

But who can decide the revocation of the administrators'/directors' mandate in Romanian state-owned enterprises? According to the GEO no. 109/2011, the decision to order the termination of the mandate belongs to the same bodies that also have the competence to appoint the representatives. Thus, in autonomous enterprises, the members of the Board of Administrators will be revoked by the tutelary public authority, whereas the decision to revoke the executive directors belongs to the Board of Administrators. In the case of joint-stock companies, the General Assembly of Shareholders will decide the revocation of the members of the Board of Administrators or the Supervisory Board; the directors/members of the Board of Directors will be revocated by the decision of the Board of Administrators/the Supervisory Board.

Regarding the revocation procedure, the GEO no. 109/2011 does not establish any specific form in which it must be implemented or a deadline in which the decision to end the mandate can be made. Therefore, the mandate may be revoked at any time, even if its duration is determined. Thus, the French Court of Cassation ruled in a case from 2003 that, "despite its predetermined term, the administrator's mandate may be revoked at any moment", but the administrator was granted damages to cover the indemnity he was thus deprived of. As the revocation of the mandate is ad nutum, it must not take any special form, regardless of the form in which the mandate contract was concluded. Therefore, the revocation may result from an express agreement of the contracting parties, recorded in writing or just verbally, or it may even operate tacitly, in this case arising from any actions of the principal from which one can deduce the undeniable intention to revoke the mandate.

The legislator does not subject the express revocation of the mandate to any special formal requirement, as long as the manifestation of will is unquestionable. The Civil Code does not impose the requirement of notifying the agent about the revocation, which produces its effects, according to the more general regulation contained in art. 2036, from the day the representative knew or could have know the cause of the mandate termination, everything that the agent had previously done remaining valid (the ex nunc effect of the termination of the mandate). The principal's capacity to tacitly revoke the mandate is expressly enshrined by the Civil Code, art. 2031 par. (1), the legislator exemplifying, in par. (2), a case of tacit revocation: "the power of attorney given to a new agent for the same business revokes the original mandate". Therefore, the situation in which the principal designates another agent for the same legal operation is explicitly qualified by the legislator as (tacit) revocation of the mandate (art. 2031 par. 2 of the Civil Code).

The revocation will therefore produce its specific effect, that is the termination of the contractual relations between the parties, from the moment the agent is aware of it, or could have known it, regardless of the form in which it was issued, or of the fact that the principal notified the agent about it, or the trustee became aware of it, or could have known it, in another way (as it results from the corroborated interpretation of art. 2036 and art. 2031 of the Civil Code). In order for the revocation of the mandate to become opposable to third parties, they, in turn, must be aware of it, or must have been able to know it; otherwise, if a third party, in good faith, contracts with the agent, without being able to know that he no longer has the power to conclude the act on behalf of the principal, the operation thus concluded may be opposed to the principal, if the requirements of the

existence of an apparent mandate are met. However, in the particular case of state-owned enterprises, there is no possibility that third parties may not be able to know who exactly is a member of the administration or management bodies, since both the autonomous enterprise and the joint-stock company, through the care of the chairman of the Board of Administrators/Supervisory Board, has a legal obligation to make the list of their members public, as well as the CV of each member, by publishing them on the website of the public enterprise, all throughout their term of office (art.5 par.10, art.18 par.9, art.29 par.12 and art.35 par.10 of the GEO no.109/2011).

The revocation, as any other cause of mandate termination, will produce effects only for the future, ex nunc. Therefore, the effects of the mandate already produced between the parties remain valid: the legal operations that the agent managed to carry out for the principal before knowing or being able to know the revocation will produce their effects between the parties, obliging the principal towards contracting third parties. Art.2036 of the Civil Code explicitly mentions the fact that "all that the agent accomplished, in the name of the principal, before knowing or being able to know the cause of the termination of mandate, is considered validly done in the execution of the mandate." Therefore, the revocation of the mandate does not produce effects for the past, but only for the future, which means that the mandate ceases from the date of revocation, so that only from this day the agent may no longer act in the name and on behalf of the principal, while the acts previously accomplished remain valid. The proxy holder shall retain all rights deriving from the mandate until the time of revocation, including the recovery of all reasonable expenses paid for the principal, together with the related interest, as well as the cover of any losses caused by the execution of the mandate and the collection of the fee agreed by the parties.

The unrighteous revocation and the right to damages

If the revocation is considered unjustified or untimely, it will entitle the agent to receive damages, in order to repair the loss thus suffered (art.2032 par.1 of the Civil Code). Therefore, it is essential for the agent's right to compensation to establish the fair or abusive nature of the revocation, because, without denying the principal's right to revoke the mandate at any time, it still should be noted that, pursuant to art.2032 par.(1) of the Civil Code, the principal will be liable for the damages caused to the agent by unrighteous revocation. Therefore, the revocation itself does not give the agent the right to receive damages, since it is just the exercise of a legally established right of the principal; the fear of having to pay an indemnity would harm the principal's freedom to make the decision of revocation. Such an obligation to pay damages would have a deterrent effect on the discretionary revocation and would constitute a significant limitation for the imperative principle of ad nutum revocation. However, if the principal abused his legal right, by exercising it untimely or without a just cause, which generated damage for the agent, the latter will have the right to compensation provided that he proves this abusive nature of the revocation. If the parties declared the mandate „irrevocable", the principal's responsibility is aggravated, the revocation being presumed by the legislator as „unjustified", should the principal not be able to prove otherwise, meaning the agent's fault, or a fortuitous case or force majeure, which were at the basis of the revocation decision (art.2032 par.2 of the Civil Code).

The GEO no.109/2011 states that the members of the Board of Administrators of autonomous enterprises (art. 12 par. 3), respectively of joint-stock companies (art.30 par.8), may be revoked according to the law, under the conditions established in the mandate contract. In case the revocation occurs without just cause, the administrator is entitled to damages, in accordance with the provisions of the mandate contract. The same regime of revocation applies to the directors/members of the Board of Directors, according to art. 21 par.(3) (for autonomous enterprises), respectively art.36 par.(6) (for joint-stock companies). Therefore, although discretionary, the revocation cannot be arbitrary or abusive, therefore independent of any statutory provisions, or else it shall entitle the agent to ask for compensation damages. The GEO no. 109/2011 does not explain what revocation ”without righteous cause” means, nor does the Companies Law. Although the legislator does not bring light upon this matter, jurisprudence has decided that an unjust or abusive revocation of mandate would be one that was done unexpectedly, without giving any defence opportunity or caused by subjective, personal reasons, such as vexation (Fross, 2010). However, as we have already shown, the revocation will be justified in the case of bringing an action against the administrators or directors for the damages caused to the public enterprise. In such situations, the decision of the tutelary public authority (in autonomous enterprises) or of the General Assembly of Shareholders (in joint stock companies) to bring the action against the administrators/directors, will imply the termination de jure of their mandate contract.

At the same time, the GEO no.109/2011, art.30, par.(9), states that the administrators' revocation in joint-stock companies will occur, so it will have „just cause”, when, for imputable reasons, the administrators do not meet the perfromance 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). In these conditions, 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 fraudoulous acts against the enterprise.

Who makes this evaluation of the execution of mandate?

According to the GEO no. 109/2011, art. 17, in autonomous enterprises, the administrators' evaluation will be made in an annual report of the tutelary public authority and it regards the fulfillment of the obligations, according to the mandate contract and the accomplishment of the objectives and of financial and non-financial performance indicators, approved by the authority. The tutelary public authority may be assisted by an independent expert or by a committee of independent experts to carry out this evaluation. As for the directors, art. 22 par. (5) establishes that the annual evaluation will be made by the Board of Administrators and it will cover both the execution of the mandate contract, and the management component of the administration plan. In state-owned joint-stock companies, the evaluation of the administrators' activity is done annually by the General Assembly of Shareholders, with the support of experts in such evaluations, and it concerns both the execution of the mandate contract, and of the management plan (art. 30 par. 7).

According to art. 36 par. (5), the activity of the directors/members of the Board of Directors will be evaluated annually by the Board of Administrators/Supervisory Board.

What are the criteria for evaluating the agents' activity?

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, or on risk management. The indicators of ethics and integrity are of particular importance, such as: (1) compliance with the Code of Ethics of the public enterprise, applicable not only to employees, but also to the Board members; (2) denunciation of conflicts of interests, as defined by the law and by the internal regulations of the public enterprise; (3) the behavior in the Board in case of a conflict of interests; (4) the obligation to respect confidential information, according to the mandate contract; (5) maintaining an excellent professional reputation.

According to the GEO no. 109/2011, art. 9 par. (1), the evaluation of the efficiency of the administrators' activity in public enterprises is done on the basis of the fulfillment of the objectives included in the management plan and of the financial anad non-financial performance indicators included in the mandate contract. The 2016 Norm of Enforcement, Annex 1b, of the GEO no. 109/2011, specifies that the mandate contract of the autonomous enterprises' administrators will include as mandatory clauses, the conditions for termination of the mandate, in case of non-compliance with the financial and non-financial performance indicators included in the contract, for reasons attributable to the administrator or due to the breach of integrity criteria stipulated in the mandate, including by avoiding and not denouncing conflicts of interests or non-compliance with the Code of Ethics of the public enterprise. Considering that these performance indicators were negociated with the tutelary public authority (in the case of autonomous enterprises), respectively with the General Assembly of Shareholders (for joint-stock companies), being included after approval as annexes to the mandate contract, one can appreciate that the administrators' failure to fulfill them represents a violation of their contractual obligations and therefore a just cause for their revocation.

The revocation compensation

The problem that most often arises in the case of mandate revocation is that of the indemnity that the revoked agent claims. Of course, this claim of the trustee will have to be assessed differently, depending on the circumstances under which the revocation was made. Thus, the Romanian Civil Code, art.2032 par.(1) confers on the agent the right to compensation for the damages suffered as a result of unjustified or untimely revocation, and the Companies Law, art.137¹ par.(4), recognizes the right of the joint-stock companies' administrators, whose mandate has been revoked without just cause, to claim damages. In the particular case of public enterprises, as we have seen, the GEO no.109/2011 also grants the administrators/directors the right to damages, should their revocation be without just cause. According to art.2032 of the Civil Code, in case of unjustified or untimely revocation, the principal will be compelled to pay the agent the remuneration (art.2032 par. 1 thesis I, related to art.2027), as well as the reparation of the damages caused as a result of the revocation itself (art.2032 par.1 thesis II). In addition, if the agent had suffered damage resulting from the acts of mandate execution, until the moment the mandate was

revoked, it would also have to be repaired by the principal (art.2032 par.1 thesis I related to art.2026).

A question arises regarding the validity of the clauses through which the mandate contract parties establish a conventional evaluation of the compensation. Such clauses perform an anticipated assessment of the loss encountered by the agent as a consequence of unjust revocation and as a consequence, they establish significant compensation to the benefit of the removed agent. In the particular case of state-owned enterprises, the GEO no.109/2011 does not consider such clauses on compensation for loss of office as prohibitive, since they are quite common in the occupational settings where the managers are recruited from, that is the private commercial companies environment. Nevertheless, as an author has pointed out (Catană, 2012), such clauses would have a deterrent effect on the discretionary power of revocation; as a consequence, the courts of justice could declare them null and void, if considered abusive, because they were materially excessive.

Such a solution is also agreed by the French doctrine and jurisprudence (see, for instance, Cass. Com. 14 Juin 2005, no.02/17719, Bulletin JOLY Sociétés 2006, no.1. p. 98), which admit that if the conventionally established compensation is a significant one, likely to affect the principal's freedom of choice related to the revocation of the mandate, it contradicts the principle of the ad nutum revocation of the mandate, which is an imperative one. The solution suggested by the French doctrinaires (Paisant, note on Cass. 3e civ., the 5th of Dec. 1984, cited by Y. Dagorne-Labbe, note on Cass. 1re civ., the 6th of March 2001, in La Semaine Juridique Éd.Générale, no. 18/2002, p. 828) is to submit the indemnity to judicial control, if it is used as a means of putting pressure on the principal. Thus, an author (Dagorne-Labbe, 2002) shows that in absence of the possibility of judicial revision of the excessive revocation compensation, the principal's right to choose the termination of the mandate remains completely illusory, taking into account the financial consequences that the exercise of the right to revocation would entail. The French jurisprudence (Cass. 3e civ., the 5th of Dec. 1984, D. 1985, jurispr., p. 544) admits the possibility of reducing these excessive indemnities. The Romanian doctrine also agrees with the idea of judicial revision of the clauses on compensation evaluation, stating that, in such a hypothesis, „the indemnity is established by the Court and it is not necessary to coincide with the compensation provided in the contract" (Deak, 1999).

The French doctrine has also expressed the view that the agent may waive in advance, by an express clause of the contract, any compensation in case of revocation of the mandate (Planiol et al., 1932). Thus, invoking decisions of the Court of Cassation, French authors have shown that, no matter how sudden the revocation is or for what specific reasons it may occur, the trustee, even if remunerated, will not be entitled to any compensation, if he had given it up by an express clause. Such a clause would be the expression of the common law on the matter, that is the absolute freedom of the parties to waive the mandate contract. However, the authors admit that such a clause allows the principal to be exonerated for his fault, which, as they point out, is not unlawful, the jurisprudence showing that the contracting parties are allowed to stipulate clauses of immunity from contractual fault.

Regarding the clause of the agent's damages waiver in case of mandate revocation by the principal, we consider that it will be legally stipulated and producing effects between the parties only within the limits of the law. The common law on the matter is art. 1355 of the Civil Code, which clearly states that „it may not be excluded or limited by conventions

or unilateral acts, the responsibility for the material damage caused to another by a deed committed with intent or gross negligence". What do the intent (guile) or gross negligence of the principal in revoking the mandate mean in the context? We appreciate that it can only be about those situations that the special regulation of the Civil Code refers to, stating that „the principal is obliged to repair the damages suffered by the agent because of the unjustified or untimely revocation" (art. 2032 par. 1). Therefore, the agent will always retain the right to claim compensation if the revocation is unjustified or untimely, which causes him damages, even if he had explicitly waived compensation by a clause prior to his revocation. Of course, nothing prevents the agent from giving up compensation once he has already been revoked.

The contractual revocation indemnity is not a penalty clause. Art. 2031 par. (1) of the Civil Code establishes the discretionary right of the principal to revoke the mandate at his own will (ad nutum). As a consequence, if the agent fails to prove the abusive nature of the revocation (an unjustified or untimely revocation, according to the Romanian legislator – art. 2032 par. 1 of the Civil Code), he will not be entitled to any revocation compensation. Therefore, we think that no amount will be owed by the principal as a result of the mere fact of revocation, without proof of its abusive and prejudicial nature, regardless of what the parties have established in the contract. Besides the application of the common civil law regime on administration/management revocation, the state-owned enterprises have a particularity established by the provisions of the GEO no.109/2011, namely the situations of revocation without the right to compensation.

The first situation that entails the revocation without compensation is the one in which the revised Management Plan submitted by the Board is not approved, which implies that the administrators' mandate is terminated ex officio.

According to the GEO no.109/2011, art.2 par. (8), the fulfillment of the obligations related to the mandate of the administrators and directors of public enterprises will be made on the basis of a Management Plan, which is a document prepared to determine the objectives of the public enterprise during the term of office, structured on two components: the administration plan, drawn up by the Board of Administrators/Supervisory Board, and the management plan, drawn up by the directors/members of the Board of Directors. It is correlated with the Letter of Expectations, by which the tutelary public authority sets the performances expected from the administration and management bodies. The Plan establishes the mission, objectives, actions, resources and financial/non-financial performance indicators for the term of the mandate, which may not exceed 4 years. The Plan, approved by the Board of Administrators/Supervisory Board, provides financial and non-financial performance indicators, to be achieved by the administrators and directors in the course of their mandate and according to which the variable component of their remuneration will be calculated. The Plan is sent to the tutelary public authority (in the case of autonomous enterprises), respectively to the General Assembly of Shareholders (for the joint-stock companies), for negociation and approval, after which the approved performance indicators become annexes to the administrators'/directors' mandate contracts.

In the case of autonomous enterprises, art.13 par. (5) establishes that if the negociation of the Management Plan fails in two rounds, the members of the Board of Administrators are revoked, without being entitled to claim damages. However, the result of the negociation must be motivated and published on the webpage of the tutelary public authority, as well as that of the autonomous enterprise. Therefore, in such situation, the

administrators' mandate will be terminated ex officio and without the right to compensation and the tutelary public authority will appoint a new Board. Similarly, for the joint stock companies, art. 30 par. (5) of the GEO no. 109/2011 states that if the negociation of the performance indicators resulting from the Management Plan fails in two rounds, the General Assembly of Shareholders revokes the members of the Board of Administrators/Supervisory Board, without being entitled to damages, and the Assembly will immediately appoint new administrators. In this case, too, the result of the negociation must be motivated and published on the company's own website. As for the directors, the same revocation without compensation will apply in both autonomous enterprises and joint-stock companies, should the revised Management Plan not be approved by the Board of Administrators/Supervisory Board.

A second situation in which the revocation of the mandate occurs without compensation is regulated by the GEO no. 109/2011 in the case of the members of the Board of Administrators/Supervisory Board of joint-stock companies. Thus, according to art. 32, at the request of the shareholders representing, individually or together, at least 5% of the subscribed and paid-in share capital, the Board of Administrators or the Board of Directors convenes a General Meeting of Shareholders, with the purpose of electing the members of the Board of Administrators /Supervisory Board by applying the method of cumulative voting. By this method, each shareholder has the right to allocate the cumulative votes - obtained after multiplying the votes held by any shareholder, according to the participation in the share capital, with the number of the members who are about to form the Board of Administrators or, as the case may be, the Supervisory Board – to one or more persons proposed to be elected in the Board of Administrators/Supervisory Board. In exercising the cumulative vote, the shareholders may grant all the cumulative votes to a single candidate or to several candidates.

In the case of applying the cumulative voting method, the members of the Board of Administrators/Supervisory Board in office at the date of the General Meeting, will be registered on the list of candidates for the election of the Board members, together with the candidates nominated by the shareholders. Those who are not reconfirmed by a cumulative vote as members of the Board, are considered removed from office by the decision of the General Meeting. In case of the administrators' revocation by applying the method of cumulative voting, the revocation will not be considered without just cause and the comapny will not be obliged to pay damages. Therefore, in this case, we also deal with a revocation ex officio of the mandate, without the right to compensation.

References

1. Albu, N., Durica, A., Grigore, N., Grigoraș, D., Mateescu, R. and Ichim, A., (2013). Corporative Governance in Romania. Perceptives and Perspectives, in Contabilitatea, expertiza si auditul afacerilor
2. Avram, V., (2003). Managementul procesului de creare a valorii in contextul guvernarii intreprinderii, Ed. Economica, Bucuresti
3. Baias, Fl., Chelaru, E., Constantinovici R. and Macovei, I., (2012). The New Civil Code. Commentary by articles: articles 1-2664, C. H. Beck
4. Catană, R. N., (2012a). Shortcomings of The Recent Reform of State-Owned Enterprises' Corporate Governance in Romania, Curentul Juridic, no. 51
5. Catană, R. N., (2012b). The Reform of Corporate Governance of State Owned Enterprises in Romania. A Critical Analysis, Universul Juridic, București

6. Dagorne-Labbe, Y., note on Cass. 1re civ., the 6th of March 2001, in La Semaine Juridique Éd. Générale, no. 18/2002, p. 828
7. Deak, Fr., (1999). Civil Law Treaty. Special Contracts, 2nd edition, Actami Ed., Bucharest
8. French, D., Mayson S. And Ryan, C., (2010-2011). Mayson, French & Ryan on Company Law, Oxford University Press, 27th ed.
9. Fross, W. A., (2010). Corporate Governance: Principles and Practices, Wolters Kluwer, Aspen Publishers
10. Merle, Ph., (2008). Droit commercial. Sociétés commerciales, 13 éd., Dalloz, Paris
11. Moye, J., (2004). The Law of Business Organisations
12. Planiol, M., Ripert, G. and Savatier, R., (1932). Traité pratique de droit civil français, tome XI, Ed. L.G.D.J., Paris
13. Quenaudon, R., (2002). Mandat. Fin du mandat, in Juris-Classeur Civil Code, fasc. 60 (2/2002)
14. Wirth, G., Arnold, M. and Morshaeuser, R., (2010). Corporate Law in Germany, 2nd ed. Rev., Verlag C. H. Beck, Mueunchen