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Emőd Veress

THE STATE'S ROLE AS OWNER OF ENTERPRISES: MANDATORY RULES OF CORPORATE GOVERNANCE IN ROMANIA

Prof. Dr. Emőd Veress, Sapientia University, Cluj-Napoca, Department of Law,
emod.veress@sapientia.ro

The role of state-owned enterprises in the post-socialist countries, after a complicated and painful historical experience is a central issue, because state-owned enterprises still represent and will represent a relevant sector of the economy in the new capitalist context. In 2011, Romania has adopted a hard law of corporate governance, based at least partially on the OECD Guidelines. This is the Emergency Ordinance 109/2011, which created the Romanian regulatory corporate governance of state owned enterprises. The Emergency Ordinance is a great step in the good direction but its implementation is still partial. The corporate government system created by the Ordinance seems clear and well-functioning enough to lead in time, if applied correctly, to a reasonable depoliticization, professionalization and also to the stability of boards, essential to a proper management of state-owned enterprises.

Keywords:
company law, business law, corporate governance, state-owned company, Romania, Emergency Ordinance

1. RELATIONSHIP BETWEEN THE OECD GUIDELINES ON CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES AND NATIONAL RULES

The Organization for Economic Co-operation and Development (OECD), in the context of its policy to improve the economic and social well-being of people, prepared and adopted in 2005 and updated in 2015 the Guidelines on Corporate Governance of State-Owned Enterprises (the Guidelines).[1] State-owned enterprises (SOEs) represent a very important economic sector in size and also in activities (in many cases performing public services), so their importance is self-evident and the corporate governance of such enterprises attracts international political and scientific attention.[2] The role of state-owned enterprises in the post-socialist countries, like Romania, after a complicated and painful historical experience – the nationalization of private (i.e. not state-owned) enterprises by the communist dictatorial regimes[3] and the complicated privatization process following the overthrown of such dictatorships – is a central issue, because state-owned enterprises still represent and will represent a relevant sector of the economy.[4] In the new capitalist context, the state-owned enterprise raises questions of political philosophy (what is the role of the state in the economy in general?) and also practical ones (what should be the extent of privatization and which companies must remain state-owned and how an efficient management of such entities can be achieved?).[5]

The Guidelines represent a set recommendations directed towards the governments, intended to serve as internationally agreed standards, created to ensure the efficient, transparent and accountable operation of state owned enterprises. The aim – according to

1 The reason for updating, as stated in the text of the Guidelines was "to reflect a decade of experience with their implementation and address new issues that have arisen concerning SOEs in the domestic and international context".

2 For example, beside the OECD, the World Bank is also active in this field. See *Corporate Governance of State-Owned Enterprises. A Toolkit*, World Bank, 2014.

3 Veress, Emőd (2014): Towards a Legal Theory of Nationalization. Controversies of Company Law History in Central and Eastern Europe. *Romanian Journal of Comparative Law, 2014/2. 185–201.;* Veress Emőd (2015): From Capitalism to Utopia – Communist Nationalization of Companies in Central and Eastern Europe. *Acta Universitatis Sapientiae,* 2015/2. 125–137.

4 The state-owned enterprises in Romania generate 8% of total output of non-financial corporations and employing close to 4% of the Romanian workforce. Based on the financial reporting submitted to the Ministry of Public Finance, there were 247 central-government-owned enterprises and a total of 1177 local-government-owned enterprises at the end of 2013. For detailed data, see Marrez, Helena (2015): The role of state-owned enterprises in Romania. *ECFIN Country Focus,* Vol. 12. Issue 1. January 2015. It is also important to know that in 2013, the aggregate SOE sector became profitable following several years of losses. See *International Monetary Fund Country Report no. 15/80. Romania*, March 2015, 20. But the same report states also the following remark which is slightly shading the image: "However, a closer look reveals that when five SOEs are excluded from the analysis the picture changes drastically. These are the state-owned gas, nuclear and hydroelectricity producers which benefited from deregulation in 2013, the gas transportation network which enjoys monopolistic conditions, and the Road Company which acts more like a project implementation unit. The remaining SOE sector was still loss making, albeit with a declining trend."

5 For the rationale of existence of state-owned enterprises, see *Corporate Governance of State-Owned Enterprises. A Survey of OECD Countries*, OECD Publishing, 2005, 20.

the Guidelines – is to establish a balance on "how governments should exercise the state ownership function to avoid the pitfalls of both passive ownership and excessive state intervention". In this context, the Guidelines practically tries to ensure the general conditions under which the sensitive balance between state passivity and encroachment could be achieved through best practices. As expressly stated, the Guidelines are recommendations, which can be qualified from a legal point of view at most as a soft law. Soft law was defined as "rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects".[6] Soft law is covering such instruments as recommendations, guidelines, notices, communications, declarations and codes of conduct. Soft law can be used in various situations, presenting advantages and disadvantages. One of the greatest challenges to soft law is that "in the case of conflicting approaches, choices made at the drafting stage might result in wording that would not necessarily be representative of any leading approach" and "a soft law instrument might have to be formulated so generally to be representative of all various approaches that it could not induce harmonization when specific questions have to be decided".[7] Soft law is used frequently to articulate universal (global) rules and standards. Soft law is much likely to attract consensus in international relations compared to harder forms of regulation, which cannot be agreed.[8]

Practically, based on the Guidelines, the best harmonization approach appears to adopt a national soft law instrument or a set of national recommendations, reflecting maybe the national specificities as well but in concordance with the aims and values revealed by the Guidelines.

Romania has chosen a different path: in 2011, a hard law of corporate governance was adopted, based at least partially on the OECD Guidelines. This is the Emergency Ordinance 109/2011,[9] which created the Romanian regulatory corporate governance of state owned enterprises.[10] An emergency ordinance is a regulation with legal force enacted by the Government under extraordinary circumstances and approved/modified/rejected *post factum* by the Parliament. The emergency, in general, was motivated by the need of reform and the necessity to avoid the perpetuation of the dysfunctionalities of state-owned enterprises. Starting with the overthrow of the communist regime 20 years of silence followed after which sudden emergency appeared. Nevertheless, the Constitutional Court of Romania confirmed that the constitutional requirements on emergency were met and the adoption of Emergency Ordinance 109/2011 is therefore not in breach of the fundamental law.[11]

6 Senden, Linda (2004): *Soft Law in European Community Law*. Oxford–Portland, Hart Publishing. 3.

7 Bjorklund, Andrea K. – Reinisch, August eds. (2012): *International Investment Law and Soft Law*. Cheltenham (UK) – Northampton (USA), Edward Elgar Publishing. 3.

8 Weeks, Greg (2016): *Soft Law and Public Authorities. Remedies and Reform*. Oxford, Hart Publishing. 8. The author also shows that *"the role, meaning and very existence of international soft law are all still contested". Ibid.*

9 Published in the Official Journal of Romania no. 883 at 14.12.2011.

10 For a general overview, see: Catană, Radu (2012): *The Reform of Corporate Governance of State-Owned Enterprises in Romania. A Critical Analysis*. București, Universul Juridic.

11 Decision no. 44/2013.

Emergency Ordinance 109/2011 represents hard law, created by the Government. Since its adoption it has been changed three times by the way of other ordinances (twice in 2013 and once in 2015)[12] and finally approved by the Parliament through a law adopted in 2016,[13] which introduced also a great set of modifications to the normative text, contributing negatively to the legislative stability and predictability (one of the main general adverse effects of legislating through ordinances) but correcting and updating some rules.

The scope of this article is to confront the requirements stated in the second chapter of the Guidelines entitled The State's Role as an Owner, on one hand, and the mandatory provisions of the Emergency Ordinance 109/2011, on the other hand.

Chapter II of the Guidelines requires generally that the state should be "an informed and active owner", ensuring that the corporate governance of the state owned enterprise is "transparent and accountable", acting "with a high degree of professionalism and effectiveness". These are very general terms, specific to soft law instruments, representing much more principles than norms. Nevertheless, under these principles there are six requirements (A–F), which can form the basis of the comparative analysis.

2. LEGAL FORMS OF STATE OWNED ENTERPRISES

The OECD Guidelines require that "Governments should simplify and standardize the legal forms under which SOEs operate. Their operational practices should follow commonly accepted corporate norms."[14]

Legal forms of state-owned enterprises represent a central issue because the legal form serves as the functional framework of such a corporation. Simplification, standardization and operational practices in concordance with the corporate norms applicable also for the private sector companies are desirable goals of corporate governance of state owned enterprises.

The scope of Emergency Ordinance 109/2011 covers, according to the legal text, "the public enterprises which are Romanian legal persons".[15] The notion of enterprise is not really helpful from this point of view, due to the fact that in the Romanian legal language enterprise means not a legal form but instead an economic activity, which may be realized in several forms recognized by the law.[16]

If we want to understand the present-day situation, we have to start with the communist notion of "state enterprise", which, compared to the existing notion of state-owned enterprise, was a legal form of economic activity more comparable to an administrative organ of the state than to a company. The state enterprise created in order to organize the direct economic presence of the state, which, during that period, covered almost the whole of the economic

12 Emergency Ordinance no. 51/2013, Ordinance no. 26/2013 and Emergency Ordinance no. 10/2015.
13 Law no. 111/2016, in force from 4 June 2016.
14 Guidelines, II, A.
15 Art. 1 from Emergency Ordinance 109/2011.
16 Art. 3 of the Civil code.

spectrum due to the nationalization and etatization of virtually all of the industrial and commercial activities in order to create a utopian and egalitarian society.[17]

After the change of the regime in 1989, a slow paced privatization process started (not ended even today). At the starting moment, it was a must to transform the state enterprises into commercial companies, to create the special relations between the owner and the company represented generally by shares, which also can be sold. A conversion of a non-privatizable legal form, i.e. the state enterprise into one that can be privatized occurred.

First, the state enterprises that the Government intended to privatize were transformed into commercial companies. Second, based on the French model of *régie autonome* ("autonomous holdings") in Romania so called *regii autonome* were also created, a perfect tool to salvage the state enterprise and maintain a very similar organizational structure.[18] In addition, the *regii autonome* were exempted from the application of insolvency rules until 2014.[19] The number of *regii autonome* decreased in time because a high number of such structures were transformed into commercial companies (for example, in the energy sector RENEL, PETROM, ROMGAZ etc. were established initially as *regii autonome* with the aim of "perpetual" state ownership). At that time, the widespread use of *regii autonome* was criticized: "Firms have not been chosen to be *régies autonomes* according to well-defined criteria, raising doubts as to whether many *régies autonomes* are engaged in activities that could be better handled by commercial companies and eventually the private sector. Neither legislation nor the constitution clearly specifies what enterprises should be *régies autonomes*. On the other hand, economic criteria, such as if the enterprise in a natural monopoly, provides a public good, or if there is a low demand elasticity for the product of *régies autonomes* in the Romanian economy creates doubts among domestic entrepreneurs and foreign investors about the sincerity of Romania's commitment to a market economy."[20] The directors of these structures were appointed by the relevant branch ministries and the Ministry of Finance.[21] Today the role and importance of *regii autonome* diminished, but there are some important economic structures still organized under this form at central or local level (there are 15 *regii autonome* at central and about 100 at local level).

Right after the collapse of the communist regime the general rules of company law were also adopted,[22] which contained just a minimal set of special rules regarding state-owned companies (for example, the derogatory rule that the state or the local government can be a single shareholder of a joint stock company, meanwhile for a private sector joint

17 For details on the state enterprise, see Pop, Aurel – Beleiu, Gheorghe (1983): *Drept economic socialist român*, vol. I. București, Universitatea din București, Facultatea de Drept. 148–153.

18 For details, see Law no. 15/1990 on conversion of state enterprises into autonomous holdings and commercial companies, Law no. 66/1993 on management contracts, Emergency Ordinance no. 30/1997 on the reorganization of autonomous holdings etc.

19 Art. 3 (2) from Law no. 85/2014 on procedures for insolvency prevention and insolvency.

20 Pannier, Dominique ed. (1996): *Corporate Governance of Public Enterprises in Transitional Economies*, World Bank Technical Paper Number 323. Washington D.C., World Bank. 49.

21 Art. 12 from Law. no. 15/1990.

22 Law no. 31/1990 on commercial companies (still in force, with its title changed to Law on companies due to the implementation of the monist system of private law in 2011).

stock company at least five shareholders were needed and from 2006 two shareholders are necessary for the establishment of such a company).

Later it was considered that state-owned enterprises are also best managed in form of joint stock companies, so two kinds of structures were created: national companies and national enterprises, both of which are organized as joint stock companies. The name in those cases never covered any genuine, special and comprehensive set of rules, instead it meant that these companies are of strategic importance and their privatization is not necessary, and in case of privatization, the state can opt to keep the control of these companies. This was the case for example of the Petrom National Company, the Romanian oil company owning refineries and the largest network of gas stations, but later this company was privatized as well in the staggered privatization process of Romania. In the case of "commercial" companies, the state exercised its influence as a shareholder, meaning an almost absolute and highly politically influenced control. Otherwise, the rules applicable for state-owned enterprises organized as joint stock companies were the same as the ones in force for the private sector. Therefore in Romania there were no clear and specific set of rules on how to operate state-owned enterprises and also it was evident that the general rules were not enough to ensure the proper functioning of such economic entities.

Emergency Ordinance no. 109/2011 was proposed in this context as a remedy for the poor performance of such entities, creating special rules for the corporate governance of state-owned enterprises, which have a complementary and derogatory character compared to the general norms as stated by Law no. 31/1990 for companies.

In the initial version of Emergency Ordinance no. 109/2011 the banking and insurance companies were excepted alongside with the companies performing activities of national interest for defense, public order and national security purposes. In 2016 the scope of the ordinance was extended and only two structures, respectively *Regia Autonomă "Rasirom"* and *"Romtehnica" S.A. National Company*, both active in the industry of military technologies were left out. The path created by the regulatory and mandatory instrument of corporate governance, which is Emergency Ordinance no. 109/2011, seems to be perceived and accepted as the viable solution for the future management of state-owned enterprises.

Emergency Ordinance no. 109/2011 defines the notion of public enterprises, as:

a) autonomous holdings (*regii autonome*) set up by the state or an administrative-territorial unit (local government);
b) national companies, national enterprises and companies having the State or an administrative-territorial unit (local government) as sole, majority or controlling shareholder;
c) companies in which one or more public enterprises as referred above hold a majority or controlling participation.[23]

Romania still has a dispersed regulation of the legal forms of the state-owned enterprises and the clarification and standardization process of state-owned enterprises has not finished

23 Art. 2.

and it will be raised also in the preparation phase of the necessary general reform of the company law which seems to start after the elections in December 2016.

3. FULL OPERATIONAL AUTONOMY AND INDEPENDENCE OF THE BOARDS

The Guidelines require that "the government should allow SOEs full operational autonomy to achieve their defined objectives and refrain from intervening in SOE management. The government as a shareholder should avoid redefining SOE objectives in a non-transparent manner".[24] The Guidelines also demand that "the state should let SOE boards exercise their responsibilities and should respect their independence".[25] These requirements on full operational autonomy and independence of the boards represent the second and the third precept from Chapter II of the Guidelines and are assayed together because of the close relation between the two issues: independence of the activity and of the board are interconnected.

However, these requirements are principled and generous but also unfeasible, idealistic and chimerical. A legal (regulative) reaction to the soft law principles cannot be anything else than a specific readback of the Guidelines. Emergency Ordinance no. 109/2011 states that the tutelary authority and the Ministry of Finance as monitoring authority cannot intervene in the management and leadership of the state-owned enterprise.[26]

In contrast, the International Monetary Fund reported on the reality that "the process of selection of candidates for the management positions was not always fully exempt from line ministries' interference and many appointments were subsequently reversed. Notorious examples include several SOEs operating in the transport sector where implementation of GEO 109 started in late 2012. In CFR Infrastructura, the management was dismissed three times since then, every time coinciding with the new transport minister appointment. In SOE Tarom, the composition of the board changed four times during two years… There is no clearly defined SOE ownership policy and the tutelary authority interference is extensive. This creates a potential for conflicts of interest in the SOEs governance framework, as the line authorities (usually line ministries) that exercise ownership role in SOEs are also responsible for establishing sectoral strategies, implementing government's policies and conducting privatizations. Consequently, they often have conflicting interests over various issues and may sacrifice good corporate governance objectives over other priorities including political expediency. In such cases, line ministries' interference, especially when done through the issuance of ministerial orders, can be quite disruptive for SOEs effective management".[27]

24 Guidelines, II, B.
25 Guidelines, II, C.
26 rt. 4.
27 *International Monetary Fund Country Report no. 15/80. Romania*, March 2015, 22–23.

4. EXERCISE OF OWNERSHIP RIGHTS

According to the Guidelines, "the exercise of ownership rights should be clearly identified within the state administration. The exercise of ownership rights should be centralized in a single ownership entity, or, if this is not possible, carried out by a co-ordinating body. This "ownership entity" should have the capacity and competencies to effectively carry out its duties".[28] In addition, the Guidelines state that "the ownership entity should be held accountable to the relevant representative bodies and have clearly defined relationships with relevant public bodies, including the state supreme audit institutions".[29]

This requirement is not fully achieved in the case of Romania and the Emergency Ordinance no. 109/2011 was not intended to introduce reform in this field. The Emergency Ordinance no. 109/2011 has in its scope to determine the relationship between any so-called tutelary authority and the state-owned enterprises and does not interfere with the problem of which state authorities should be or should be not tutelary authorities. Several authorities serve, beside the Authority for Administration of State Assets,[30] as tutelary structures of state-owned enterprises, especially ministries and other central administrative authorities as well, so there is no single ownership entity. Moreover, the Authority for Administration of State Assets had 10 state-owned enterprises under its tutelary supervision, while the Ministry of Transports 27, the Ministry for Economy 42, the Ministry of Education 60, and the Department for Energy 25 etc.

The International Monetary Fund concluded that "centralizing the ownership function may deliver separation of ownership interests and policy objectives thus constraining the line ministries' influence on SOEs governance. However, experience… suggests that without political will the institutional setup alone cannot ensure such a separation."[31] But this falls outside the purposes of Emergency Ordinance no. 109/2011. Romania fails to create a single professional and commercially oriented ownership entity and also Emergency Ordinance no. 109/2011, as a coordination mechanism, is not enough to eliminate the divergence of corporate governance standards applied by different public ownership entities.[32] An effective owner is also assertive for the accountability of state owned enterprises.

5. THE STATE AS AN INFORMED AND ACTIVE OWNER

The Guidelines' sixth and last requirement creates a set of rules, according to which "the state should act as an informed and active owner and should exercise its ownership

28 Guidelines, II, D.

29 Guidelines, II, E.

30 Between 1992–2000 State Ownership Fund (Fondul Proprietății de Stat), between 2000–2004 Authority for Privatization and Administration of State Property (Autoritatea pentru Privatizare și Administrarea Proprietății Statului), between 2004–2012, Authority for State Assets Recovery (Autoritatea pentru Valorificarea Activelor Statului), and from 2012, Authority for Administration of States Assets (Autoritatea pentru Administrarea Activelor Statului).

31 International Monetary Fund Country Report no. 15/80. Romania, March 2015, 26.

32 Monks, Robert A. G. – Minow, Nell (2011): *Corporate Governance*, fifth edition. Chichester, *John Wiley & Sons. 463.*

rights according to the legal structure of each enterprise. Its prime responsibilities include:

1. Being represented at the general shareholders meetings and effectively exercising voting rights;
2. Establishing well-structured, merit-based and transparent board nomination processes in fully- or majority-owned SOEs, actively participating in the nomination of all SOEs' boards and contributing to board diversity;
3. Setting and monitoring the implementation of board mandates and objectives for SOEs, including financial targets, capital structure objectives and risk tolerance levels;
4. Setting up reporting systems that allow the ownership entity to regularly monitor, audit and assess SOE performance, and oversee and monitor their compliance with applicable corporate governance standards;
5. Developing a disclosure policy for SOEs that identifies what information should be publicly disclosed, the appropriate channels for disclosure, and mechanisms for ensuring quality of information;
6. When appropriate and permitted by the legal system and the state's level of ownership, maintaining continuous dialogue with external auditors and specific state control organs;
7. Establishing a clear remuneration policy for SOE boards that fosters the long- and medium-term interest of the enterprise and can attract and motivate qualified professionals."

These points represent a much more detailed approach and influence, in a great part, the regulation adopted through Emergency Ordinance 109/2011. A complete and detailed analysis of the Romanian legal text is not possible in the context of an article. But at least the main elements and peculiarities of the Romanian system of mandatory corporate governance can be identified, with a focus on companies.[33]

Ad 1. There were no problems with the state as "active owner" (historically the state being a too active owner in most of the cases). The tutelary authority has the attribution to nominate the representatives of the state or of the administrative-territorial unit (local government) to the general meetings of shareholders and to approve their mandate.[34] According to the reform completed in 2016 with the parliamentary approval of the Emergency Ordinance 109/2011, the number of representatives of the state or of the administrative-territorial units (local governments) in the general meetings of shareholders is maximum two.[35] Also, a certain person (civil servant, contractual employee or public dignitary) can represent the tutelary authority in maximum two state-owned enterprises. The regulations regarding incompatibilities and conflicts of interest are applicable.[36]

In case of local governments the local council shall exercise on behalf of the administrative-territorial unit all rights and obligations arising from the shareholding in companies and

33 For autonomous holdings, see art. 5–24 from the Emergency Ordinance 109/2011.
34 Art. 3 from the Emergency Ordinance 109/2011.
35 Art. 64/3 (1) from the Emergency Ordinance 109/2011.
36 Law no. 161/2003.

from the control over the *regii autonome* (autonomous holdings) of local interest. Persons empowered to represent the interests of the administrative-territorial units in companies and autonomous holdings are designated by local council decision, with respect to the political configuration resulted from the latest local elections.[37] This mechanism is seen as a democratic one, because this text leads in general to the conclusion that in case of the enterprises owned by local governments the two biggest political parties delegate one representative each (local councillor) ensuring mutual political control[38] like the two consuls of Republican Rome having a veto right ("*intercessio*") over the actions of the other. Also, there is a greater chance of inability to make decisions and of impasse. Before 2016, the maximum number of representatives was not limited, and there are known cases when all members of the local council were elected as representatives and practically the composition of the general meeting of the company and of the local council was identical.

Ad 2 and 3. Regarding board nomination and mandates, the Emergency Ordinance 109/2011 contains detailed rules and this constitutes the heart of the regulation in the sense that the outcome of the reforms is expected to be produced by the procedures of management selection.

One-tier (unitary) and two-tier (dualist) board systems are both available.[39]

(a) One-tier (unitary) board system

The board (*consiliul de administrație*) consists of 3–7 members, natural or legal persons, with experience in performance improvement of companies or autonomous holdings that they have administered or managed.

In case of companies which fulfil certain conditions, namely if the state owned enterprise has an annual turnover exceeding 7,300,000 euros and has at least 50 employees, the board has 5–9 members.

At least two members must have economic or legal studies and 5 years of professional experience. Since 2016, in the first case (smaller state owned enterprises) only one member of the board can be a public servant or employee of the tutelary authority or other public authority and institution; and in the second case maximum two members.[40] The majority of the board consist of non-executive and independent members.[41]

The mandate of the board members may not exceed four years. Appointment of the board members who have properly fulfilled their duties may be renewed following an evaluation process, if the articles of association do not providing otherwise. Appointment of the board

37 Art. 37 from the Law 215/2001 on local public administration.

38 Otherwise is not possible to respect the "political configuration" resulting from the local elections, for example by nominating civil servants.

39 The SE (Societas Europaea) Regulation (Council Regulation (EC) 2157/2001) allows also for both one-tier and two-tier structures.

40 Reality: from other state institutions.

41 Art. 138/2 from Law no. 31/1990.

members following the cessation of any form of an original member's mandate coincide with the remainder time of the mandate of the discharged person.

Members of the board are appointed by the general meeting of shareholders based on the proposal made by the functioning board or by shareholders. The candidates proposed by the board of the company are evaluated and selected in advance and recommended by the nomination committee of the board. The nomination committee consists of non-executive board members, of which at least one is independent. A board decision may determine that in the evaluation process the nominating committee is assisted by an independent expert specialized in recruiting human resources whose services are contracted by the company under the law.

There is a previous compulsory selection of candidates by an independent human resources recruitment expert in case when the tutelary authority, as shareholder is proposing candidates for the board.

The tutelary authority may decide that the selection committee should be assisted or the selection should be carried out by an independent human resources recruitment expert whose services are contracted by the public authority or by the state owned company. In this second case, the public authority will pay the costs of the expertise. The selection of candidates must be done by an independent human resources recruitment expert if the state owned enterprise has an annual turnover exceeding 7,300,000 euros and has at least 50 employees.

The selection criteria for board members are set based on a unitary methodology[42] jointly approved by the Ministry of Public Finance and other ministries which are also tutelary authorities, by members of the nominating committee and/or the independent expert, as appropriate, taking into account the specificity and complexity of the company's business and the requirements of the letter of expectations. The letter of expectations is a working document issued by the tutelary authority, in consultation with any shareholder representing individually or jointly 5% of the share capital of the public enterprise, which determine the expected performance of the management and the public policy aims of the tutelary authority for a period of at least 4 years.

The announcement on the selection of board members shall be published at least in two economic newspapers and on the website of the state owned company. It should include the conditions to be met by candidates and their evaluation criteria. The selection is based on principles of non-discrimination, equal treatment and transparency and taking into account the specific activity of the state-owned enterprise, while ensuring a diversification of skills within the board. The publication of the announcement must take place at least 30 days before the closing date for applications.

The appointment of board members is voted by the general meeting of shareholders based on a short list, comprising maximum 5 candidates for each membership position of the board. The shortlist is made by the tutelary authority, nomination committee or the independent human resources expert. The short list contains the score obtained by each candidate.

42 Published in the *Monitorul Oficial* no. 803 din October 12, 2016.

If the candidates proposed by the Board are board members, an application for renewal is addressed to the general meeting of shareholders.

For companies managed according to the one-tier system, the board delegates the management of the company to one or more directors, nominating one of them as general director. This is mandatory requirement of Emergency Ordinance 109/2011.[43] The directors may be appointed from inside or from outside of the board (this fact being the major difference compared to the two-tier system where a supervisory board member cannot be nominated as member of the directorate). The chairman of the board of the company cannot be nominated as general director, contrary to the highly common practice in the private sector companies. Directors are appointed by the board upon the recommendation of the nomination committee following a selection procedure for the position, held after the appointment of board members. The board may decide to be assisted or that the selection be carried out by an independent person or entity specialized in recruiting human resources. The publication of the selection announcement must take place at least 30 days before the closing date for applications.

(b) Two-tier (dualist) board system

For companies managed according to the two-tier system, the supervisory board can have between 5 and 9 members, and the directorate (the actual management board) between 3 and 7 members. Supervisory board members are appointed by the general meeting of shareholders in a similar procedure applicable to board members in the unitary system of management of the company. Also for the selection of the directorate, the procedures analysed above for selection for directors in case of one-tier system are applicable.

(c) Common rules for the one-tier and two-tier board systems

At the request of shareholders representing, individually or together, at least 5% of the subscribed and paid share capital, the board or the directorate must convene a general meeting of shareholders with the agenda of electing the members of the management or supervisory board by cumulative voting. If the request is made by a shareholder holding more than 10% of the share capital of the state-owned enterprise, the cumulative voting method is mandatory.

An individual cannot exercise more than three mandates as a board or supervisory board member in state-owned enterprises whose headquarters are in Romania (in the initial text of Emergency Ordinance 109/2011 five such mandates were possible). The rule is applicable for representatives of legal persons, members in the board or in the supervisory board.

Ad. 4. Emergency Ordinance 109/2011 sets up a reporting system, which allows the shareholders to monitor the management performance regularly.

43 Art. 35.

The board and the supervisory board in case of the two-tier system draw up a proposal for the polity component of the management plan, in order to achieve the financial and non-financial performance indicators. The directors draw up a proposal for the management component of the management plan. The management plan is approved by the board or the supervisory board (in case of the two-tier management system).

In five days from the approval of the management plan, the general meeting of shareholders is summoned to negotiate and vote on the financial and non-financial performance indicators. The negotiation process is based on the letter of expectations and on the management plan and there is a 45 days period to reach an agreement. The deadline may be extended once by a maximum of 30 days at the request of any of the parties. In case of failed negotiations in the two rounds, the board or the supervisory board are removed without being entitled to payment of damages. In this case, the failure of negotiations must be justified and published on the company's own website.

Evaluation of board members is made annually by the general meeting of shareholders, as applicable, with the support of experts in such evaluation addressing the implementation of their mandate contract and of the management plan. The board members may be dismissed by the general meeting of shareholders according to the law, as determined in the mandate contract. If an unjust revocation occurs, the board member shall be entitled to payment of damages, according to the contract of mandate.

If, due to an attributable reason the board members do not meet performance indicators established by the mandate contracts, the general meeting of shareholders has to cancel their mandate. Board members who were revoked for non-performance cannot run for 5 years from the date the decision becomes definitive for other boards of state-owned enterprises. The legal text is not really clear. The revocation is an attribution and practically an obligation of the general assembly. The interdiction to be effective seems to require a "definitive or final decision", which can be granted only by the courts. The only plausible interpretation of the text is that the board member can be revoked by the general assembly, but the state-owned enterprise must request from the court the application of the interdiction and therefore the effect of the interdiction is not certain.

The annual evaluation, the possibility of revocation of the mandate and the interdiction on the candidacy for similar functions is applicable also for the directors and for the members of the directorate.

The board or the general director, or, where appropriate, the directorate shall submit to the Ministry of Finance, to the tutelary authority and to shareholders holding more than 5% of share capital, quarterly and whenever required, reports, analyzes, statements and other information on the activity of the state-owned enterprise. The corporate governance structures in the tutelary authority report quarterly the monitored performance indicators to the Ministry of Finance. The monitored performance indicators are established by the tutelary authority in the contract of mandate of directors.

Ad 5. Disclosure of information in the case of state-owned enterprises is a question of public accountability and also a tool for protection of minority shareholders. "An effective

reporting regime requires SOEs… to produce financial statements according to high-quality accounting standards; to increase the effectiveness of nonfinancial reporting; and to disclose publicly both financial and nonfinancial information."[44]

Under the Emergency Ordinance 109/2011, first of all, the state owned enterprise must operate a website and ensure the access of the shareholders and general public (practically the stakeholders) to the documents and information which disclosure is required by law.[45]

In case of shareholder general meetings, the agenda and the documents to be presented to the meeting must be published through the website of the company at least 30 days before the date established for the meeting. In case of publicly traded companies, the special capital market disclosure regime is mandatory.[46]

The shareholders and the stakeholders must have access to the following documents and information by the way of the website of the company:[47]

a) the decisions of the general meetings of the shareholders, in 48 hours after the general meeting;
b) the annual financial statements, in 48 hours after their approval;
c) semestrial reports on the accounts of the company, in 45 days from the end of the semester;
d) the annual audit report;
e) the names, the biographies and the remuneration of the management of the company;
f) the reports of the management of the company;
g) the annual report on the remuneration and other advantages given to management members;
h) the annual activity report of the company.[48]

The annual financial statements, the semestrial reports on the accounts of the company, the annual audit report and the reports of the management has to be available online at least for a 3 years period.

In addition, the president of the board or of the supervisory board can be fined by the Ministry of Public Finances if the disclosure obligations of the company are not respected.[49]

Ad 6. A continuous dialogue between external auditors and specific state control organs is an aim not really fulfilled in practice and also it is hard to achieve through regulatory means. This type of dialogue exists mainly during the period of controls. The annual financial

44 *Corporate Governance of State-Owned Enterprises. A Toolkit*, World Bank, 2014, 215. See also *Accountability and Transparency: A Guide for State Ownership*, OECD Publishing, 2010.

45 Art. 40 from the Emergency Ordinance 109/2011.

46 There are nine publicly traded companies in which the State is a majority shareholder (Antibiotice SA, CONPET SA, Electrica SA, Oil Terminal SA, Oltchim SA, Transelectrica SA, Nuclearelectrica CN, Romgaz SA, Transgaz SA) and also the state is a minority shareholder in several companies.

47 Art. 51 from the Emergency Ordinance 109/2011.

48 Art. 56 from the Emergency Ordinance 109/2011.

49 Art. 59/1 from the Emergency Ordinance 109/2011.

statement of public enterprises is subjected to statutory audit.[50] Contracting audit services is possible only with respect to the public procurement legislation.[51]

Ad 7. A central goal of Emergency Ordinance 109/2011 was also the establishment of a clear remuneration policy.[52] The balance between excesses and underpayment is not an easy aim to achieve, because the state-owned enterprise must competitively attract, motivate and retain professionals with outstanding results. The concept of Emergency Ordinance 109/2011 is to introduce a remuneration system, which is performance-based, competitive but transparent at the same time. As stated by the OECD, "it would be difficult in many countries to really enhance board professionalism and business perspective as long as remuneration does not permit attracting and retaining professional board members with the required expertise and experience".[53] Also it was proposed by OECD "that a prime responsibility of the State as an active owner is to ensure that remuneration schemes serve the long term interest of the company and attract the right people"[54] and it was identified as a good practice the remuneration which reflects "the market conditions to the extent that this is necessary to attract and retain highly qualified directors".[55]

The remuneration – in the context of the one tier management system the remuneration of board members, in case of two-tier system the remuneration of the supervisory board – is set up by the general meeting of shareholders under the conditions provided by Emergency Ordinance 109/2011.

The remuneration for the non-executive board members is composed of a monthly fixed allowance and a variable allowance. The fixed allowance may not exceed twice the median for the last 12 months of the average gross salary per month in the corresponding economic sector. The variable component is determined based on financial and non-financial performance indicators negotiated and approved by the general meeting of shareholders, other than those approved for the executive board members. The amount of the variable component of the remuneration of the non-executive board members may not exceed a maximum of 12 monthly fixed allowances.

The remuneration of the executive board members (also serving as directors of the company) is similarly composed of a monthly fixed allowance and a variable allowance. The fixed allowance may not exceed six times the median for the last 12 months of average gross salary per month in the corresponding economic sector. The variable component is

50 Emergency Ordinance no. 90/2008 transposing into national law the Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC.

51 Law no. 98/2016 on public procurements.

52 For a general overview of management remuneration see Kostyuk, Alexander – Stiglbauer, Markus – Govorun, Dmitriy eds. (2016): *The Theory and Practice of Directors' Remuneration. New Challenges and Opportunities*. Bingley, Emerald Group Publishing.

53 *Corporate Governance of State-Owned Enterprises. A Survey of OECD Countries*, OECD Publishing, 2005, 20.

54 *Boards of Directors of State-Owned Enterprises. An Overview of National Practices*, OECD Publishing, 2013, 68.

55 *Boards of Directors of State-Owned Enterprises. An Overview of National Practices*, OECD Publishing, 2013, 69.

determined based on financial and non-financial performance indicators negotiated and approved by the general meeting of shareholders, other than those approved for the non-executive board members.

The variable component of the remuneration shall be reviewed annually, depending on the level of achievement of the aims of the management plan and the fulfilment of financial and non-financial performance indicators approved by the general assembly of shareholders, attached to the contracts of mandate of board members.

The remuneration of directors is established by the board and cannot exceed the established remuneration for executive members of the board. It is the only form of remuneration for directors who are board members as well. The remuneration is composed of a monthly fixed allowance similarly established as that of the executive board members and a variable component consisting of the participation percentage in the net profits of the company, granting shares, stock options or an equivalent scheme, a pension scheme or other form of remuneration based on performance indicators. The same rule applies in case of the two-tier board system, where the remuneration of the directorate members is established by the supervisory board.

Policy and criteria for the remuneration of board members and directors in case of the one tier system, of the members of the supervisory board and directorate members in the case of the two-tier system, the level of remuneration and other benefits offered to each board member or director are made public on the website of the state-owned enterprise.

6. CONCLUSIONS

The *Emergency Ordinance* 109/2011 is a great step in the good direction but its implementation is still partial. As the International Monetary Fund concluded, "the legislation contains necessary provisions for depoliticization and professionalization of SOE governance through procedures for the selection, appointment, and functioning of SOE boards and managers. It provides for increased transparency and information disclosure to help enhance SOEs' accountability to the Romanian public. Minority shareholders' protection in SOEs is also integrated in the ordinance."[56] But this is just the normative content and the practice is far from the expectations, because, for example, several newly appointed boards were dismissed. The pace of the reform is slow, and the assumption of fast results is not really founded. Between 2000 and 2015, the Romanian national airline company TAROM was managed by 13 general directors, and the tutelary authority, the Ministry of Transports was also lead by 12 ministers. This information in itself is a clear enough sign of excessive politicization. The corporate government system created by Emergency Ordinance 109/2011 seems clear and well-functioning enough to lead in time, if applied correctly, to a depoliticization (to a possible minimum level because absolute depoliticization is an utopia), professionalization and also to the stability of boards, essential to a proper management of state-owned enterprises.

56 *International Monetary Fund Country Report no. 15/80. Romania*, March 2015, 24.

Prof. Dr. Emőd VERESS (emod.veress@sapientia.ro) is full professor of private law at the Department of Legal Studies of the Sapientia University, Cluj-Napoca (Kolozsvár/Klausenburg), Romania. He obtained university degree in law at the Faculty of Law of Bucharest University, Romania and PhD at the University of Pécs, Hungary in 2006 (summa cum laude). He was elected as Secretary-General of the Societas – Central and Eastern European Company Law Research Network. He is interested in company law, capital markets regulation and comparative legal history of business organizations and published several books and articles; among them a recent monograph entitled "The Suretyship Contract" (C.H. Beck, Bucharest, 2015). His new book on "Shareholders' Agreements" is forthcoming in 2017.