# The Mandate Relationship in the Corporate Governance of Romanian State-Owned Enterprises

**Dana - Lucia TULAI**
*Babeș-Bolyai University of Cluj-Napoca, Faculty of Economics and Business Administration, Romania*
*dana.tulai@econ.ubbcluj.ro*

**Abstract**
*After two decades of uncertainties and legislative instability, following the anti-communist Revolution of December 1989, the reform of Romanian state-owned enterprises' management to a system of corporate governance was imperative. The Government Emergency Ordinance no. 109/2011, subsequently amended by the Law no. 111/2016, has modernized their management and administration system, ensuring greater transparency and increased control over the operations of public enterprises. At the base of these entities' relationship with their administrative and executive management structures there are mandate contracts, which impose specific obligations on the agents, as well as a system of accountability meant to ensure that the state is permanently informed on the operations of the enterprise, that the acts concluded on its behalf are correct and legal and that, should the public authority loose trust in the management, it could immediately hold them accountable, in order to recover the losses and put the activity of the enterprise on the right and lawful path again. In our study, we shall analyse the content and the juridical nature of this mandate relationship, with its national specificity, given by the incidental regulations from Romanian legislation.*

**Keywords**: corporate governance; state-owned enterprises; autonomous enterprises; joint-stock companies; mandate;

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## 1. Introduction

In 2001, the Organisation for Economic Cooperation and Development drafted a specific program to improve corporate governance in Romania, according to its Principles of Corporate Governance (2001). These recommendations constituted a comprehensive agenda for reform, including legislative changes, enforcement, institution building and private behavior / capacity building. The major improvements were driven by Romania‘s effort to join the European Union. The obligation to comply with the European Commission's recommendations on corporate governance materialized in the revision from 2004, 2006 and 2007 of the Companies Law no. 31/1990.

In December 2011, the Romanian Government Emergency Ordinance (GEO) no. 109 reformed the corporate governance of state-owned enterprises, which were granted with corporate governance mechanisms founded on the OECD Guidelines (2005) and on the common corporate governance mechanisms instituted by the Companies Law no. 31/1990 (as amended).

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The GEO no. 109, which was later amended by the Law no. 111/2016, represented a genuine reform, a turning point in regulating the state-owned enterprises, which had been operating in a context of inconsistent and summary legislative framework, that presented important gaps in terms of good governance, negatively influencing their economic performance and competitiveness, and consequently generating dysfunctions of the economic operator with whom they established contractual relations. The general legislation of companies did not respond to the specific needs of state-owned enterprises, not giving them the mechanisms necessary in order to function efficiently and become a vector of economic recovery. More so, the privatization process that many state-owned enterprises were going through was failing, generating disastrous economic and social losses, which fuelled the lack of political will for privatization. Therefore, in order for these entities to become efficient, it was a necessity to develop new mechanisms of corporate governance, additional to those regulated by the general legislation of companies and adapted to the particularities of state-owned enterprises. This legislative reform was rushed by the engagements that the Romanian Government assumed in front of the International Monetary Fund and the European Union.

## 2. The Mandate relationship of Romanian state-owned enterprises with their administration and management. The autonomous enterprises and the joint stock companies

The Government Emergency Ordinance (GEO) no. 109/2011 defines the corporate governance of public enterprises as „*the set of rules governing the system of administration and control within a public enterprise, the relationship between the tutelary public authority and the bodies of the public enterprise, between the Board of Administrators or the Supervisory Board, directors or Board of Directors, shareholders and other interested parties.*" (art. 2 par. 1).

It regulates the framework of corporate governance in two types of Romanian state-owned entities: (1) autonomous enterprises, established by the state or by an administrative-territorial unit and (2) national trading companies and enterprises, in which either the state or an administrative-territorial unit or an autonomous enterprise or another national trading company/enterprise is the sole, majority shareholder or in which it holds control; they are usually organised as joint stock companies.

In both cases, the regulation (art. 2 par. 11) clearly states that the relationship between the tutelary public authority and the bodies that exercise the administration and management of the public enterprise is based on a mandate contract, as defined and regulated by the Romanian Civil Code and, in addition, for the national trading companies and enterprises, by the Companies Law no. 31/1990, since these entities are organised as joint stock companies.

The mandate, which would be the relative correspondent of the agency contract, as regulated by the Common Law, is defined by art. 2009 of the Romanian Civil Code as "*the contract by which one party, called the agent, undertakes to conclude one or more legal acts on behalf of the other party, named the principal*." As for the Companies Law (art. 72), it clearly states that the obligations and the responsibility of the administrators / directors of commercial companies are regulated by the general legal provisions concerning

the mandate (namely the Civil Code), as well as by the specific regulations provided by the Law no. 31/1990.

Therefore, it is essential to underline the fact that, considering the incompatibility of the corporate mandate with the employment relationship, the possibility for the administrators / directors to find themselves in a relation specific to the labor law with the enterprise is excluded. Before the GEO no. 109/2011 came into force, all Romanian public enterprises were governed according to the one-tier system.

Under the provisions of the Law no. 15/1990 concerning the reorganization of the former socialist state economic enterprises into autonomous enterprises and state-owned companies, the members of the Board of Administrators were appointed by order of the competent minister, or the decision of the head of local public administration authority; the General Manager was appointed by the Board, but only with the approval of the competent minister/local public administration authority (art. 12 par. 2, art. 15).

In 1993, the legislator passed the Law no. 66 regarding the management contract, which applied to commercial companies in which the state owned over 50% of the shares; this legislative act set the basis for a contractual relationship between the state-owned company and its managers. In 1999, the Government had an attempt to replace the management contract by an '*administration*' contract, regulated by the Emergency Ordinance no. 49 regarding the administration of national companies/enterprises, in which the state or a local Government authority is a majority shareholder, and of the autonomous enterprises; this Government regulation was later rejected by the Law no. 136/2000. However, the next year, the Government decided through the Emergency Ordinance no. 20 that the management of the state-owned commercial companies would be performed by a Board of Administrators, whose mandate would be governed by the Companies Law no. 31/1990.

GEO no. 109/2011 represented a milestone in the modernization of these entities, setting the legal basis for a more efficient, balanced, and transparent management. It introduced the possibility of the shareholders of the joint-stock companies owning at least 5% of the registered capital to submit an initiative for the company to choose a two-tier administration system, which makes their governance similar to that of the privately owned companies, as regulated by the provisions of the Companies Law no. 31/1990. Meanwhile, without any motivation, the GEO no. 109/2011 does not allow the autonomous enterprises to opt for the two-tier governance system, art. 5 par. (1) clearly stating that these entities are administrated by a Board of Administrators.

### 2.1 The Autonomous State-Owned Enterprises

As we have already stated, presently, the GEO no. 109/2011 regulates that the administration of autonomous enterprises should be organised as a one-tier system, with a Board of Administrators governing the enterprise.

Therefore, 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 institutions that fulfil attributions of tutelary public authority are the Ministry of Public Finance and the corresponding ministries. According to the Norm of Enforcement from the 28th of September 2016, art. 3 par. (1), of the GEO no. 109/2011, the tutelary public authority is competent to conclude mandate contracts with the administrators, to monitor and evaluate their performance, to revoke them, to negotiate and approve performance indicators and to set quantifiable objectives, which will be used in calculating the variable components of their remuneration.

The mandate contract will be an annex of the administrative act appointing the administrators (art. 12 par. 1) and will be governed by the regulations of the GEO no. 109/2011 and by those of the Civil Code.

The Articles of Incorporation of the enterprise or afterwards the decision of the tutelary public authority states if the management responsibilities may be delegated by the Board of Administrators to one or more directors, who will perform the executive management of the enterprise. Should this be the case, the executive directors will conclude mandate contracts with the enterprise, represented by the Board of Administrators. The directors may be elected from outside the Board of Administrators or from among its members, but the chairman of the Board cannot be appointed General Manager. In the second situation, they will have a dual function in the enterprise, being administrator and director at the same time; these executive members of the Board will ensure the operational functioning of the enterprise, that is the implementation of strategies and of Government policies, as well as the profitable management of the financial, physical, and human resources. The non-executive members of the Board who, according to the GEO no. 109/2011, must be a majority, oversee that the management implements the strategies of the enterprise, identify long-term strategy, develop governance policies, represent the interests of the shareholders and ensure communication with them.

**2.2 The Joint Stock Companies**

According to art. 27 par. (1) of the GEO no. 109/2011, state-owned companies can be managed either in a one tier or a two-tier system, as these are regulated by the Companies Law no. 31/1990, as amended. The choice of the governance system of the company belongs to the tutelary public authority or to the public enterprise that holds control, through its representatives in the General Assembly of Shareholders. Subsequently, the change of the administration system may also be asked for by the shareholders who own 5% of the share capital; this is more likely to happen when a strategic investor holds a minority stake against the state as majority shareholder (Catană, 2012a).

In the one tier system, the administration of the company is ensured by the Board of Administrators, whose members are appointed by the General Assembly of Shareholders, at the proposal of the acting Board or of the shareholders, including the tutelary public authority and the enterprise that holds control or the majority of the shares. The majority of the Board has to be made up of non-executive and independent administrators. Unlike the autonomous enterprises, in the case of the joint stock companies, the Board of Administrators is compelled to delegate the management attributions to one or more executive directors. These managers will be appointed by the Board from outside the Board or from among its members, in which case they will have double function in the company. In the two-tier system, the General Assembly of Shareholders will appoint the members of the Supervisory Board, and the latter will elect the members of the Board of Directors, from outside the Board or from among its own members, in which case they will be executive administrators, bearing double quality in the company.

Therefore, in the case of the joint stock companies, the mandate contract is formed between the company and the members of the Administration / Supervisory Board / the directors / members of the Board of Directors. The General Assembly of Shareholders is the body through which the company, as principal, expresses its juridical will, appointing the administrators or the members of the Supervisory Board. The interests of the tutelary public authority or of the public enterprise that holds control, or the majority of shares are expressed by its representatives in the General Assembly of Shareholders. As for the directors or the members of the Board of Directors, the duty to conclude their mandate

contract lies on the Board of Administrators (in the one tier system), respectively the Supervisory Board (in the two-tier system).

## 3. The Legal Regulation of the Mandate Contract. The Issue of the Juridical Nature of the Administrators'/Directors' Mandate

According to the GEO. no 109/2011, the Civil Code is ground law for the mandate of the administrators and directors of Romanian state-owned enterprises. Therefore, for the 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 provisions of the Civil Code (art. 2009-2038). In the case of these entities, as authors (Catană, 2012b) have pointed out, the administrative character of the mandate is predominant to the civil one, due to the following features: (1) the overwhelming prerogatives of the tutelary public authority, which controls the directors' activity, by the annual assessment of activity and by the possibility to reject the administration plan, leading to termination of the directors' office; (2) the statutory clauses of the mandate agreement, defining objectives and performance criteria established by the tutelary public authority; (3) the formal aspect of the mandate contract, which appears as an annex to the administrative act issued by the public authority for appointing the directors (art. 12 par. 5 of the GEO no. 109/2011 states that in the case of the autonomous state-owned enterprises, the form and the clauses of the mandate contract are established by the tutelary public authority, with the agreement of the Ministry of Public Finances).

For the national trading companies and enterprises, their organization and functioning are regulated by the GEO no. 109/2011, amended by the Law no. 111/2016, as specialized norm, and in addition, by the Companies Law no. 31/1990, given the fact that the majority of these entities are organised as joint stock companies. Therefore, along with the Civil Code provisions regarding the mandate contract, one must also take into consideration the corresponding articles of the Companies Law, since the mandate of the administrators of these entities is assimilated to that of the directors of private companies, with no significant differences, apart from the particular selection procedures of the directors of public enterprises.

The GEO no. 109/2011 Norm of enforcement from the 28th of September 2016, art. 1, par. (7), states that the obligations of the administrators and directors of the public enterprise are established by law, by the Articles of Incorporation of the entity and by the mandate contract. Therefore, it is obvious that the mandate relationship has mixed sources, both contractual and legal. Nevertheless, the issue of the juridical nature of the relationship between the administrators /directors and the company established under the Companies Law has generated much doctrinal debate over the years, several theories being expressed.

**The contractual nature theory**

Classical commercial law has recognized the thesis of the contractual nature of the juridical relation between the administrator and the company. It was believed that the relation between the manager and the commercial company was based upon a common law mandate contract. The Romanian Commercial Code from 1887 explicitly stipulated that "*the joint-stock company is administrated by one or more temporary agents*" (art. 122 par. 1) and "*the administrators are responsible for the accomplishment of their mandate*" (art. 123). Similar provisions could be found at that time in other legislations: the Italian Commercial Code

(which was the inspirational source when drafting the Romanian Commercial Code), the French commercial legislation (namely the 24 July 1867 Law) and the Belgian one.

The theory of the contractual nature of the relation between the administrator and the commercial company is based upon the fact that, although certain attributes of the administrator are regulated by law and not by the Articles of Incorporation of the company or by the decision of the General Assembly of Shareholders, these legal tasks will engage the administrator only as a direct consequence of the conclusion of the mandate contract between him and the company. This theory seems to be reinforced by some current legal provisions, such as art. $153^{12}$ par. (3) of the Companies Law no. 31/1990, which stipulates that "*for the appointment of an administrator, respectively of a member of the Board of Directors or of the Supervisory Board to be legally valid, the designated person must expressly accept it*". Thus, the legal provisions state that the administrator's attributes cannot apply in the absence of the mandate contract concluded between him and the company.

**The employment contract theory**

Controversy has raised from the question whether the administrator of the company can also be its employee. Thus, some authors (Beligrădeanu, 1990) stated that an incompatibility between the quality of administrator of the company and that of employee would exist only in those situations in which the manager is also a shareholder; if the administrator does not have the above-mentioned quality, he would have the option of carrying out his activity either under a mandate contract, or an individual employment contract. On the contrary, other authors (Cărpenaru, 2004; Piperea, 1998) stated the incompatibility between the quality of manager of a commercial company and that of employee of the same company; indeed, even if the administrator, like an employee, carries out a permanent and paid activity for the benefit of the company, his main attribution consists in the conclusion of legal acts in the name and on behalf of the managed company, and not in committing material facts, as is the case of an employee. The legislator put an end to this controversy regarding the administration of joint stock companies by explicitly stipulating in the Companies Law that such juridical relations cannot be based upon an individual employment contract (art. $137^{1}$ par. 3: „*During the fulfilment of the mandate, the administrators cannot conclude an employment contract with the company. If the directors have been elected from the employees of the company, the individual employment contract will be suspended during the course of the mandate*"). The reason for this incompatibility resides in the very nature of the employment contract, which establishes an essentially subordinating relationship between the employer and the employee, which is irreconcilable with the activity of the administrators/directors.

**The organic nature theory**

An opinion has also been expressed stating that the administrator is subordinated in the exercise of his attributions to the fulfilment of the public order imperative, which confers him the quality of a legal representative of the company, entitled to act within the limits and on the purpose of achieving mandatory legal provisions. The source of the administrator's power of representation derives from the law, which establishes the limits and the content of his mandate, much like that of a legal guardian (Georgescu, 1948).

Some authors (David and Baias, 1992) emphasized the following aspect: the legal status of the administrator cannot be seen only from the perspective of his agent quality, as he is also fulfilling the function of a body of the commercial company; this quality derives *ex lege* and allows the company to manifest its will. There is an '*organic relation*' (Bârsan *et al.*,

1993) between the administrator and the company, as the manager cannot be defined as a mere agent, but rather as a body of the company or a legal representative.

The supporters of the organic theory conclude that the administrator, once appointed by the Articles of Incorporation, acquires his own authority *ex lege*, which allows him even to oppose the decisions of the General Assembly of Shareholders, to the extent that they are illegal; from this a liability of the administrator on tort bases also derives, for his own act causing damages to the company.

**The dual nature theory**

Most scholars (Cărpenaru, 2004; Munteanu, 2000; Mestre and Flores, 1987) agree that the source of the managers' mandate is both contractual and legal, therefore there is a dual nature to the relationship between the company and its management. The administrator / director, in relation to the company, acts as an agent, under the stipulations of the agreement that they concluded, accepting the status and powers fixed by the Articles of Incorporation. In his direct relation with third parties, the administrator has the identity of a body of the company, having powers of representation derived directly from the law. The source of the attributions and power of representation of the administrator will be primarily legal and only secondarily conventional. This is also the case of the mandate relationship within a state-owned enterprise.

We appreciate that this theory is the most accurate in defining the legal status of the administrator, both in relation to the commercial company, and to third parties engaging in commercial operations.

The administrator is, in relation to the company, an agent who acts accordingly to the contract that they have concluded when he accepted the status and the attributions set by the Articles of Incorporation or by the decision of the General Assembly of Shareholders. At the same time, the administrator has, in the direct relations with third parties, the identity of a body of the commercial company, with attributions of representation derived directly from the law, which empower him to act in the name and on behalf of the company even when exceeding the limits set by the mandate contract, as long as these acts fall within the limits established by the law and the third parties acting in good faith are not aware about the conventional restriction of the administrator's attributions.

Therefore, we believe that in relation to third parties, the one who fulfils the function of administrator of a commercial company will have the identity of a legal representative (statutory body). The source of the attributes and of the power of representation of the administrator will be primarily legal and only secondarily conventional, since art. 55 par. (2) of the Law no. 31/1990 stipulates that "*the clauses of the Articles of Incorporation or the decisions of the statutory bodies of the companies (...), which limit the powers conferred by the law to these bodies, are unenforceable upon third parties, even if they have been published*."

The Romanian High Court of Cassation and Justice had decided in the spirit of this theory, confirming the dual nature of the status of the commercial company administrator. Thus, in the decision no. 267/2003, the Commercial Court stated that according to the Law no. 31/1990, the governing body that represents the company is the administrator or, as the case may be, the Board of Administrators. The legal acts concluded by the bodies of the legal person, within the limits of the powers conferred to them, are the acts of the legal person itself. According to art. 72 of the Law no. 31/1990, the obligations and the liability of the administrators are regulated by the general provisions regarding the mandate from the Civil Code but also by the special provisions of this law. The High Court stated that "*the*

*administrators are not mere agents, but bodies of the trading company, through which it establishes legal relations with third parties. Therefore, the administrator of the commercial company has the capacity of a legal representative*." (Romanian High Court of Cassation and Justice, comm. dec. no. 267, 2003).

In conclusion, we appreciate that the complex nature of the duties of the administrator of a commercial company cannot be explained only on contractual basis, but the source of his responsibilities is double: on the one hand, its source is the mandate contract that the manager and the company agreed upon; on the other hand, his obligations and responsibility also have legal basis, which differentiates the manager of a company from a common law agent: his attributions and liability will be increased, since he not only fulfils the role of a conventional agent, but also acts as a body (legal representative) of the company, thus having attributions derived directly from the law (Tulai, 2019).

## 4. The execution of the administrators' and directors' mandate in Romanian state-owned enterprises. Board members' and managers' duties

According to the GEO no. 109/2011, art. 4, the tutelary public authority and the Ministry of Public Finance cannot intervene in the activity of administration and management of the public enterprise, but they must provide the agents with conditions for the execution of their mandate in full freedom. The competence to make administration / management decisions, as well as the responsibility that derives from them belong to the Board of Administrators and to the directors (in the one tier system), and to the Supervisory Board and the Board of Directors (in the two-tier system), respectively. The obligations of the administrator / director are established by law, by the Acts of Incorporation of the enterprise and by the mandate contract. In the case of the administrators (members of the Board of Administrators/Supervisory Board), their mandate involves the supervision, control, and accountability of the executives, as well as ensuring the good governance of the enterprise in general, and its short, medium, and long-term development. The directors/members of the Board of Directors fulfil an operational function, as they must find specific business solutions, according to a management plan.

GEO no. 109/2011 contains clear regulations regarding the duties of the administrators and managers of the state-owned enterprises, which are similar to those imposed by the common Companies Law no. 31/1990. At the same time, they largely correspond to the specific obligations of the agent, as regulated by the Romanian Civil Code, which represents the ground law in this matter. The main obligations of those who hold administrative and executive positions in Romanian state-owned enterprises are: (3.1) the duty of prudence and diligence, (3.2) the duty of loyalty and (3.3) the duty of report.

### 4.1. The duty of prudence and diligence

GEO no. 109/2011, art. 14, states that the members of the Board of Administrators of the autonomous enterprise shall exercise their mandate with the prudence and diligence of a good administrator, specifying that the administrator does not violate this obligation, if at the moment they make the business decision, they are reasonably entitled to think that they act in the best interest of the enterprise and on the basis of adequate information. According to art. 24, the same obligation falls on the directors of the enterprise, as well. The GEO no. 109 enforcement norm from the 28$^{th}$ of September 2016, annex 1b, lists the compulsory

elements of the mandate contracts that the tutelary public authorities conclude with the members of the Boards of Administration of autonomous enterprises, mentioning among the obligations of the administrators the duty to exercise the mandate with the *"loyalty, prudence and diligence of a good administrator, in the exclusive interest of the public enterprise."* For the state-owned trading companies, the corresponding provisions of the Companies Law will apply, namely art. $144^1$, which states that the members of the Board of Administration will exercise their mandate with the prudence and diligence of a good administrator.

In order to understand the notion of '*good administrator*', as it is enshrined by the Romanian private law, one must refer to the provisions of the Civil Code. The Code dedicates art. 2018 par. (1) to the agent's duty of diligence, stating that, in the case of a remunerated mandate, the agent is required to execute the mission with the diligence of a good owner. But what does the Romanian legislator mean by a 'good owner' or 'administrator'? This notion represents the reference when appreciating the accomplishment of the agent's mission. The 'good administrator / owner' is the abstract standard of a prudent and diligent individual or, in other words, the agent owes the principal the care of a *'good father of family'* (the Latin *'bonus pater familias'*). Therefore, he will give account for any misconducts as in the case of non-performance of the contract (*culpa levis in abstracto*), regardless of the fact that his mistake consists in an action (*culpa in committendo*) or an omission (*cupla in omittendo*). For example, the agent is obviously held liable for the late execution of the mandate as well, since the delay in fulfilling the entrusted duties could potentially be as harmful to the principal as the non-execution of the mission.

In a court case decision from 2011 (no. 167), the Bucharest Court of Appeal stated that in civil law, unlike the criminal law, the criteria for the quantification of the fault is usually an objective, abstract one, the standard to which the courts refer to being a diligent, prudent and knowledgeable individual, that is a "*bonus pater familias"* (Bucharest Court of Appeal dec. no. 167, 2011). In addition, the court may also take into account certain subjective elements, which derive from the concrete circumstances of the case, such as the place, time and circumstances of the deed, and especially the qualities, training and experience of the individual.

Regarding the extent of the civil liability, it is also objectively determined, depending only on the damage suffered by the creditor, which will have to be fully remedied, in so far as a direct causal link is established between the debtor's wrongdoing and the damage suffered by the creditor. Therefore, the degree of guilt of the debtor will not be taken into account for the quantification of the due compensation: regardless of the fact that the damage is caused by his cunning or just by his negligence or recklessness, the extent of the liability will be the same as a rule, that is only as much as is necessary to repair the direct and certain damage that was caused. In this case, being the responsibility of the administrator of a trading company, the assessment of his fault must be done rigorously, since we are in the presence of a paid mandate given to a professional. The test of negligence will have a high standard, specific to a qualified individual performing management activities on regular basis.

However, art. $144^1$ par. (2) of the Companies Law introduces the business judgement rule (Bercea, 2007), stating that the administrator does not breach his duty of prudence and diligence if, at the moment of making a business decision, he is reasonably entitled to believe that he is acting in the best interest of the company and on the basis of adequate information. This regulation sets a liability exemption for the administrators, if they were

acting in good faith and did not have a conflict of interest with the company and if their decision was based upon adequate information.

On the other hand, the Civil Code, art. 2021, exempts the agent who has fulfilled his entrusted mandate from any kind of responsibility towards the principal in case the third parties whom he contracted with do not properly fulfil their own obligations towards the principal. The commitment of the agent's liability towards the principal, set on contractual basis, must necessarily be based on his fault related to the manner in which he carried out the duties entrusted to him by the principal, in accordance with the general conditions for the contractual liability of the debtor (art. 1547). Therefore, the obligation to carry out the mandate is not doubled by an obligation to guarantee the execution by the third party of the obligations they have under the contract concluded through the agent. The agent could only take on such an obligation by an express clause of the mandate contract.

**4.2. The duty of loyalty. The issue of the conflicts of interests**

This obligation is expressly mentioned both in the GEO no. 109/2011, with specific reference to public enterprises, but also in the more general provisions of the Romanian Civil Code (art. 803 par. 2) and the Companies Law no. 31/1990 (art. $144^1$ par. 4). It sets a standard of behaviour, which may lead to an action for liability, should the administrator/director fail to meet those expectations. It means that the administrators/directors should act in honesty when executing their mandate, promoting exclusively the interests of the enterprise, and avoiding any conflicts of interests. The agents have the duty to inform the company about any existing conflicts of interests and in such cases, to refrain from making decisions in the exercise of their duties.

Thus, art. 52 of the GEO no. 109/2011, as amended by the Law no. 111/2016, obliges the Board of Administrators / Supervisory Board to convene a General Meeting of Shareholders for the approval of any transaction that exceeds 10% of the net assets of the public enterprise or 10% of its fiscal value according to the latest audited financial statements, should it be concluded with the administrators/directors or, as the case may be, with the members of the Supervisory Board / Board of Directors, as well as with the employees, the shareholders holding control over the company or with a company controlled by the latter; this obligation also falls on the Board in the case of transactions concluded with the spouse or relatives, up to the fourth degree inclusively. In the case of the autonomous enterprises, the Board of Administrators must immediately inform the tutelary public authority about any such transactions. Regarding the directors/members of the Board of Directors, they also have the same obligation to inform the Board of Administrators / Supervisory Board about such operations exceeding 50.000 euros.

As we shall see, the obligation to inform applies to all those who exercise administration/management functions in state-owned enterprises, and it also entails an obligation to report: the annual / half-yearly reports of the Board of Administrators / Board of Directors will mention, in a special chapter, the legal acts concluded in such conditions, specifying the following elements: the parties to the act, the date the act was concluded and its nature, the description of its object, its total value, the reciprocal claims, the guarantees, terms and conditions of payment, as well as other essential and significant aspects in connection with these legal acts. The reports shall also mention any other information necessary to determine the effects of the respective legal acts on the financial situation of the company (art. 52 par. 6 of GEO no. 109/2011).

The fraud on the interests of the public enterprise committed by the members of its administration/management, by concluding acts in which they are in a conflict of interests

with the enterprise, is sanctioned with their annulment; the action may be brought in court by any shareholder or by the person designated by the General Assembly of Shareholders within 6 months from the date on which they became aware of the conclusion of the transaction, but not later than 6 months from the date of the approval of the transaction by the General Meeting of Shareholders (art. 53 of GEO no. 109/2011). In regard to the liability of the fraudulous managers, their sanction is the obligation to pay damages, in order to cover all the losses that the public enterprise suffered from that operation. Criminal liability may also be pursued, if the breach of confidence was in bad faith, according to art. 272 of the Companies Law no. 31/1990.

The issue of the agent's duty of loyalty and that of the self-dealing transactions concluded by him in the exercise of his mandate have been intensely debated in the Romanian legal doctrine, taking into account the general regulations of the Civil Code on the mandate and representation. Thus, although it is not expressly regulated by the Civil Code, the agent's duty of loyalty towards the principal derives from the interpretation of art. 2018, which, in addition to the diligence that the agent owes the principal, provides that he also has the duty *„to inform the principal about the circumstances that arose after the conclusion of the mandate, that may determine its change or revocation."* (par. 2)

The duty of loyalty is determined by the *intuitu personae* character of the mandate contract; the agent must act on behalf of another and in the interest of the latter, therefore he is executing a mission entrusted to him precisely in consideration of the trust that the principal has in him. Therefore, the duty of loyalty prohibits the agent to act in his own personal interest to the detriment of the principal, or to favor the interests of a third party.

In particular, the question has arisen as to whether the agent may take the place of the third-party contractor in the act that he has to conclude on behalf of the principal; it is the situation of the self-dealing transactions. Also, may the agent represent opposing interests when concluding the entrusted operation, meaning to act as a representative of both contracting parties? The problem is, obviously, the fact that he will most likely be tempted to neglect the interests of one contracting party, to the benefit of the other.

The Civil Code (art. 1303) indicates the solution for resolving a conflict of interests between the representative and the represented, namely that the contract that was concluded by the representative who had interests contrary to those of the represented person be declared null and void at the request of the represented, *„should the conflict be known or had to be known by the contracting party at the time the contract was being concluded."* The task of proving knowledge of or the possibility of knowing the conflict by the third contracting party rests with the represented and it may be proven by any legal means. The conclusion of a contract under such circumstances is an abusive exercise of the power of representation conferred on the representative, being sanctioned with the relative nullity of the contract thus made, which may only be invoked by the represented.

The Civil Code also regulates, in art. 1304, the self-dealing transaction and the double representation, stating that in these cases, there is a legal presumption of the existence of a conflict of interests, which justifies the sanction of annulment, at the request of the represented, of the acts thus concluded by the representative. The presumption will be removed only if the representative can prove that either he was explicitly empowered to conclude the act in such conditions, known by the represented, or that the manner in which the contract was drafted removed the possibility of a conflict of interests. Therefore, it would seem that, except for such situations, whenever the agent concludes the act with himself or as a double representative, the legal presumption of his fault subsists, consisting in the omission to inform the principal about the double quality in which he acts; this will

attract the principal's right to request the proclamation of the annulment of the act thus concluded.

In the particular case of the mandate contract of the administrators of autonomous enterprises, art. 15 of the GEO no. 109/2011 states that the administrator who has in a certain operation, directly or indirectly, interests contrary to those of the enterprise, must inform the other administrators and the internal auditors about it and not take part in any deliberation regarding that operation. The administrator has the same obligation if his spouse or relatives up to the fourth degree have interests in a certain transaction. Art. 24 shows that the same obligation falls on the directors of the autonomous enterprise.

In the case of breaching this dual obligation of disclosure and abstention, the self-dealing transactions can be declared null and void, and the administrators/directors will be liable for the loss caused to the autonomous enterprise. The faulty manager shall cover all the costs of restoring the enterprise to its previous situation. Therefore, the fraudulent intent of the administrator is presumed, as they should have been aware of the conflict of interest. In order for the administrators/directors to comply with these obligations, the autonomous enterprise shall establish a policy regarding the conflicts of interests and the systems for its implementation. For this purpose, the Board of Administrators adopts a Code of Ethics, which is reviewed annually, if necessary, with the prior approval of the internal auditor.

The Norm of enforcement from the 28$^{th}$ of September 2016 of the GEO no. 109/2011, through its 1b annex, details the obligatory clauses of the mandate contract that the tutelary public authority concludes with the administrators of the autonomous enterprise, including among these criteria of ethics and integrity (par. 10), as well as clauses regarding the conflicts of interests (par. 16). The management contract shall refer to the applicable legal provisions on the conflict of interests, as well as to the procedure to be followed by the administrator in order to inform the public enterprise about the existence of a potential conflict of interests. It shall specify in detail the way in which the administrator refrains from making those decisions within the Board, which put him in a conflict of interests. Other obligations of the administrator are also regulated, in order to ensure the compliance, as well as the monitoring and management of the legal provisions on the prevention of conflicts of interests.

Thus, the mandate contract shall include explicit clauses regarding the following: compliance with the Code of Ethics of the public enterprise, applicable not only to the employees, but also to the Board members; the denunciation of the conflicts of interests, defined accordingly to current legislation and internal regulations of the public enterprise; the behaviour necessary to be exercised within the Board in case of situations that could put the administrator in a conflict of interests; obligations related to the treatment of confidential and sensitive information with due discretion and in accordance with the terms of the mandate contract; having and maintaining an excellent professional reputation; the conditions for suspending the mandate in case of pursuing criminal charges against the administrator for the offenses regulated by art. 6 of the Companies Law no. 31/1990, as amended (offenses against property by disregarding trust).

We must mention that the duty of loyalty that falls on the administrators and managers of public enterprises also involves an obligation of confidentiality, regarding the information they became aware of while in office. Thus, art. 14 of the GEO no. 109/2011 states that the members of the Board of Administrators, who have the duty to exercise their mandate loyally, in the interest of the autonomous enterprise, shall not disclose the confidential information and the trade secrets of the enterprise, to which they have access as administrators. This obligation will continue after the termination of their mandate, too.

The precise content and the duration of the confidentiality obligation will be detailed in the mandate contract. According to art. 24, the directors of the autonomous enterprise also have a similar obligation.

The exact content of this duty and its effects in case of a faulty breach will be decided upon within the mandate agreement. For example, in the case of the mandate contract that the autonomous enterprise concludes with its administrators, the duty of confidentiality will be a mandatory clause, according to the Norm of Enforcement from the 28th of September 2016, Annex 1b, par. (13), of the GEO no. 109/2011. The contract shall contain clauses regarding the waiting period after the end of the term of office, before obtaining a position of administration or management in a public enterprise that is in direct competition with the entity in which the mandate was exercised, as well as the obligation to comply, after the termination of the mandate, with the confidentiality of the accessed information.

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

### 4.3. The duty to give an account (to report). The self-assessment

The obligation to give an account is a general principle, applicable to any representative, regardless of whether the basis of his empowerment is the law, a convention, or a court decision. In the matter of the mandate contract, the Civil Code (art. 2019), which is ground law, imposes on the agent the duty *'to give account'*, materialized in the obligation to inform the principal about the execution of the mandate, called the *'duty to report'*. As the agent concludes legal transactions on behalf of the principal, it is natural to notify him about the performance of the tasks entrusted. The agent's obligation to report also has an accounting aspect: the agent must make available for the principal an account of his management. Therefore, the agent's obligation to give an account to the principal firstly implies the duty to inform him about the execution of the mission entrusted. The principal is entitled at any moment of the accomplishment of the mandate to know the status of the operations that he empowered the agent with, as well as the accounting situation derived from them.

But what exactly does this obligation to inform consist of? The agent has the duty to continuously inform the principal about the diligences made for the execution of the mandate; the mere accomplishment of the mission is not sufficient, it must also be communicated to the principal, this obligation to inform being ancillary to fulfilling the mandate diligently. The obligation to give an account is not a purely accounting one. It not only imposes on the agent the delivery of accounts as to what he has received and given in the execution of the mandate, but also a report on the measures taken in carrying it out. The duty to give an account compels the agent to keep an account of the transactions that he has made, and to return the amounts received from third parties, otherwise he might become liable even to criminal charges.

State-owned enterprises, often operating in strategic sectors of the national economy, incorporate economic interests of national importance and they often pursue objectives that

are not just purely commercial, such as the implementation of certain social policies. Therefore, it is crucial that legal regulations ensure the transparency of their governance.

The GEO no. 109/2011 dedicates a special chapter (chapter V) to the duties of report and the transparency of the corporate governance of public enterprises. According to the GEO no. 109/2011, the mandate contract of the administrators/directors of state-owned enterprises must be completed with an additional act, which will establish financial and non-financial performance indicators, the fulfilment of which will be taken into account when establishing the variable component of their remuneration. The Board of Administrators/Board of Directors have the obligation to prepare annual reports, in which they present the manner and the extent to which the principles and recommendations of corporate governance are accomplished, as well as the measures taken to comply with the recommendations that are not fully met. In other words, the *'comply or explain'* principle applies, which is a mechanism for self-assessment of the compliance with the principles and recommendations contained in the corporate governance guidelines applicable to public enterprises, according to the law and their Articles of Incorporation. The internal self-assessment of the Board, of its committees and of each member of the Board aims to allow the Board to identify the strong points and the potential for collective and individual development, in order to fulfil the functions of the Board, as well as the auxiliary conditions, but also the processes and competencies necessary for these functions. Thus, in the Letter of Expectations, by which the tutelary public authority establishes the expected performances from the administration and management bodies of the public enterprise, a special section is dedicated to communication with them. It specifies the information wanted by the tutelary public authority or the shareholders, the frequency of their reporting, as well as the obligation that any deviation from the established performance indicators be notified to the tutelary public authority and the shareholders, as soon as possible, from the moment the administration and management bodies of the enterprise establish that such a deviation is very likely to happen.

Moreover, the 2016 Norm of Enforcement, Annex 1b, of the GEO no. 109/2011, mentions that the right of the enterprise to request information from the administrators regarding the exercise of the mandate and the evaluation of their activity must be included among the obligatory clauses of the administrators'/directors' mandate contract. The obligation to report the administration/management activity of public enterprises falls on all those who have received such a mandate.

Thus, according to art. 5 of the 2016 Norm of Enforcement of the GEO no. 109/2011, in autonomous enterprises, non-executive administrators are required to provide effective supervision and reporting on the management of the operational and financial activities of the public enterprise, as well as on its internal control systems and to ensure that reporting on the events that are significant to the legal activity of the enterprise shall be carried out in a fair, timely and complete manner for the competent authorities and for the interested parties. At the same time, the executive administrators must translate the management plan into an effective and efficient management component and inform the Board on its fulfilment, providing them with information of the required quality, format and timing, so that the meetings of the Board are well-informed. This information is materialized in the half-yearly report on the activity of the autonomous enterprise, that the Board of Administrators presents to the tutelary public authority.

As for the directors of the autonomous enterprise, they also owe periodic reports of the managerial activity. Each trimester, they will draw up a report on the executive management activity and on the evolution of the enterprise, which will be communicated to the Board

of Administrators. The directors also draw up an annual report on remuneration and other benefits granted to the administrators and managers, which they present to the tutelary public authority.

In joint-stock companies, the General Manager or, as the case may be, the Board of Directors prepares a quarterly report that they present to the Board of Administrators / Supervisory Board, in which they present information regarding the execution of their mandate, the significant changes in business and in external matters, that are likely to affect the performance of the company and its strategic prospects. The Board of Administrators/Supervisory Board of the company shall present every six months, at the General Meeting of Shareholders, a report on the management activity, which shall include detailed information on the execution of the term of office of the directors/Board of Directors, as well as details regarding the operational activities, financial performances, and the half-yearly accounting reports of the company. The Board of Administrators/Supervisory Board also prepares the annual report on the activity of the company, which is published on its website.

Moreover, the obligation to inform the tutelary public authority or the General Assembly of Shareholders on the activity of the corporate governance structures is a continuous one, both in the case of the autonomous enterprises, and the joint-stock companies. It concerns the way of complying with the financial and non-financial indicators, annexed to the mandate contract, as well as other data and information of interest to the principal, upon his request. Thus, the Board of Administrators or the General Manager, if the executive management is exercised by directors, or, as the case may be, the Board of Directors, has the obligation to send to the Ministry of Public Finance and to the tutelary public authority or the shareholders holding more than 5% of the share capital, each trimester or whenever required, substantiations, analyses, situations, reports and any other information referring to the activity of the public enterprise, in the format and deadlines established by the beneficiaries.

Failure to comply with the obligation of complete, fair and timely reporting, shall bring disciplinary, civil, contraventional or criminal liability, in accordance with the law. The revocation of the mandate of the liable ones can also be a consequence of the loss of trust of the tutelary public authority or the General Assembly of Shareholders.

## 5. Enforcing the agents' liability

According to the GEO no. 109/2011, art. 4, the execution of the obligations related to the mandate contract will be done by the administrators/directors autonomously, the tutelary public authority and the Ministry of Public Finance not being allowed to intervene in the administration and management activity of the enterprise. The competence to make decisions and implicitly the responsibility for them lie with the administrators and the directors.

At the same time, it should be noted that in the case of the administrators, liability will be incurred both for the damages caused to the enterprise as a result of their own decisions, as well as for the prejudicial acts of the directors, if the damage did not occur should they have exercised the due supervision required by their position (art. 16 par. 2 of the GEO no. 109/2011). This is essentially also a responsibility for the administrators' own deed, namely for their fault in supervising the executive activity of the directors. A duty to monitor is also

imposed upon the administrators by the common Romanian Companies Law no. 31/1990, but with a more severe effect, namely the responsibility of the administrators is engaged not only for the acts of the directors, but also for those committed by the employees of the commercial company. In this respect, the GEO no. 109/2011 diminishes the liability of the Board members of state-owned enterprises.

A joint responsibility is also placed upon the members of the Board of Administrators for the acts of their immediate predecessors, if, having knowledge of the irregularities committed by the latter, they do not communicate them to the internal auditors, the financial auditor, nor to the tutelary public authority (art. 16 par. 3). The administrators can avoid this liability only by recording their opposition in the Board's decision register, as well as by informing in writing the internal auditors, the financial auditor and the tutelary public authority. Failure to comply with these obligations shall bring disciplinary, civil, contraventional or even criminal liability of the members of the administration / management bodies. Also, the revocation of the mandate entrusted to them by the tutelary public authority / the trading company will occur, as a natural consequence of the loss of trust in the agent.

According to art. 16, respectively art. 24 of the GEO no. 109/2011, the administrators / directors of the autonomous enterprise are responsible for fulfilling all the obligations provided by law and the Articles of Incorporation of the enterprise. At the same time, their mandate contract will include, among the mandatory clauses, provisions regarding the contractual civil liability of the parties (the 2016 Norm of Enforcement of the GEO no. 109/2011, Annex 1b, par. 6). Therefore, the source of the responsibility of the members of the administration / management bodies of Romanian public enterprises is a mixed one, being contractual, as well as statutory and legal.

Who will have the power to bring an action against them and what will be the consequences of such legal action? In the case of the autonomous enterprises, art. 16 states that the claim against the members of the Board of Administrators for negligence and breach of statutory and fiduciary duties will be introduced by the head of the tutelary public authority; at the same time, art. 24 regulates that such action can also be brought against the executive directors, introduced by the Board of Administrators.

Regarding the state-owned trading companies, the GEO no. 109/2011 does not contain special provisions referring to the competence to introduce an action in court against the administrators / directors, therefore the provisions of the Companies Law no. 31/1990 on joint-stock companies will apply. Thus, art. 155 establishes that the court action against the administrators and directors of the company, for the damage caused by them to the company by the breach of their duties, belongs to the General Assembly of Shareholders. If the Assembly decides to initiate such an action against the administrators / directors, their term of office shall automatically cease from the date that decision was made, and the General Assembly (for the administrators), or the Board of Administrators / Supervisory Board (for the directors) shall replace them. The liability action against the members of the Board of Directors may also be introduced by the Supervisory Board. Also, if the General Assembly does not introduce the liability action and does not accept the proposal of one or more shareholders to initiate such action, then the shareholders representing, individually or collectively, at least 5% of the share capital, have the right to bring the action for compensation to court, in their own name, but on behalf of the company.

Therefore, the decision of the tutelary public authority (for the autonomous enterprises) or of the General Assembly of Shareholders (for the joint stock companies) to introduce the action against the administrators / directors, will not just entail their liability for the

damages caused to the enterprise, but it will also mean the termination of their mandate contract.

## 6. Conclusion

The efficiency of an economic operator depends decisively on the performance of its management, on the correct implementation of the mechanism of good governance within the company. The Government Emergency Ordinance no. 109/2011 reformed the corporate governance of Romanian state-owned enterprises. This regulation managed to create the legislative and administrative premises leading to an increase in the efficiency of economic operators, given that public enterprises – autonomous enterprises and trading companies in which the state has full or the majority of stakes – represent an important part of the national economy and therefore their liquidity, solvency and functionality have a decisive influence on the stability of the whole economic environment.

The GEO no. 109/2011 provided legislative tools that would ensure the objectiveness and transparency of the management and administrative selection process, the professionalism and responsibility of managers' decision process, an increased protection of the rights of minority shareholders and transparency towards the public both of the activity of state-owned companies and of the state shareholding policy.

In this paper, we focused on the mandate agreement on which the relationship between the public enterprise and its administration/management agents is based, with its mandatory clauses. We analyzed the complex nature of the duties of the administrator, concluding that the source of his responsibilities cannot be explained only on contractual basis, but that he has increased attributions and liability, derived directly from the incidental regulations in Romanian legislation, which differentiate the company manager from a common law agent.

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