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THE REFORM OF
CORPORATE GOVERNANCE OF STATE OWNED ENTERPRISES
IN ROMANIA

A CRITICAL ANALYSIS

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Foreword and acknowledgements

Using the international benchmark of OECD Guidelines, Romania formally introduced the concept of corporate governance for state-owned enterprises in December 2011. The Government Emergency Ordinance no. 109/2011 concerning the corporate governance of state-owned enterprises is generally regarded as a genuine reform, a turning point in regulating these entities, in a context where public policies and international commitments brought pressure to urge privatization.

Until now, in Romania there has been little research on corporate governance, and practically none related to state-owned enterprises. At the international level, the state of the art in corporate governance excels in performance while addressing private corporate law, yet the increase of interest on state-owned enterprises is still desirable. From this perspective, our intention is to break the ground on these issues relating to Romanian legal framework evolution, with a comparative research based analysis of the new provisions, powdered with our own assessments.

A major challenge of the investigation arises from the existing structure of the Romanian state-owned enterprises. They are divided into two types of entities. On one hand, the autonomous government-owned entities are legal transplants into Romanian legislation from the French administrative law, during the reorganization of the former socialist state economic units in 1990. Their legal regime is odd as they do not have the nature of a corporation. On the other hand, there are the joint-stock companies having the state as sole shareholders, or

having been already privatized by keeping the state as controlling shareholder.

Another major challenge was the legal terminology. Although Romania belongs to the civil law systems and the history of the regulation of state-owned enterprises is traditionally linked to the French model, we dare to confront this issue. We hope that the reader will understand the difficulty of these premises, and therefore permissively regard our wording and use of English legal terminology.

The first part is dedicated to the prerequisites of the reform. It aims to present the significant coordinates of legal and economic background and the role of state-owned enterprises within the Romanian economy. A few data and contextual information will help the reader to get familiar with the peculiarities of the Romanian public sector.

The second part deals with the key elements of corporate governance of state-owned enterprises. The Romanian Government conducted the reform by observing the international recommendations, especially the OECD specific guidelines, and the national corporate governance mechanisms provided by the Companies Act, since Romania promotes regulatory corporate governance. The lack of soft law instruments explains also the technique of transposing relevant provisions from the general company law to the legal regime of state owned-enterprises. In this part, we tackle the specific principles of the corporate governance of state-owned enterprises, the board composition and structure, the duties and liabilities of the board members, directors' remuneration and executive pay, minority shareholders protection, as well as issues related to transparency.

The effectiveness of the reform could be seriously affected; therefore some of the obstacles analyzed within the third part of the book should be avoided. This may be the most contributive, or at least the most anchored in the economic and political reality where the state-owned enterprises should perform, with somewhere a touch of essayistic and journalistic style. This part identifies some of the current regulation weaknesses and foresees legal or public policy solutions.

The book is taking into consideration the Romanian legislation as known as of 1 November 2012.

I am grateful to Adrian Popa and Vlad Verdeş, Ph.D. candidates at the Babeş-Bolyai University of Cluj-Napoca, for their valuable contribution to the structure, style and ideas of this book. Their constant research and reviewing support has attenuated the intensity of the last six months of hard academic labour.

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Translation of Romanian legal terminology and abbreviations

Autonomous government-owned enterprises - a particular form of state-owned enterprises transplanted in 1990 from the French administrative law, also referred to as ***régie autonome*** or ***régie.*** They operate in strategic sectors of the economy on the basis of economic and financial autonomy, were created by decision of central or local governments, are subordinated and coordinated by a tutelary public authority for the satisfaction of public, national or local interests. These entities are not corporative and therefore not covered by the corporate governance provisions related to shareholder rights.

Civil Code or **The New Civil Code** – Law no. 287 from 17 July 2009, as amended by Law no. 71 from 17 June 2011 and further republished in the Official Journal nr. 505 as of 15 July 2011, entered into force as of 1 October 2011.

Companies Act - Law no. 31 from 16 November 1990 as amended, republished in the Official Journal no. 1066 as of 17 November 2004 and further amended.

Common company law – the general framework of statutory law related to the operation of all entities bearing the form of a company, irrespective their ownership.

Capital Market Act - Law no. 297 from 28 June 2004 as amended, published in the Official Journal no. 571 as of 29 June 2004.

GEO - Government Emergency Ordinance, a legislation enacted by the Government on the basis of legislative delegation from the Parliament according to article 115 of Romanian Constitution, and which has to be further approved, amended or rejected by an Act of the Parliament.

GEO no. 109/2011 - Government Emergency Ordinance concerning the corporate governance of state-owned enterprises, adopted on 30 November 2011, published in the Official Journal no. 883 as of 12 December 2011; also referred to as ***The Ordinance***, being the object of the analysis throughout this book.

Insolvency Act – Law no. 85 from 5 April 2006 concerning the insolvency proceedings published in the Official Journal no. 359 as of 21 April 2006.

Joint-stock company – company limited by shares, a significant category of state-owned enterprises whose ownership belongs to the state either as sole shareholder, or as majority or otherwise controlling shareholder.

Mandate – the most truthful expression of *the agency* in the civil law, governing the legal relationship between directors and the company.

National company – company limited by shares set up following the corporatization of certain autonomous government-owned enterprises, where the state is usually sole shareholder.

Régie autonome see **Autnomous government-owned enterprise**

SOE - state-owned enterprise.

PART ONE

State owned enterprises in Romania. The legal and economic framework

CHAPTER I
STATE-OWNED ENTERPRISES AS PART OF THE PUBLIC SECTOR

Despite considerable global efforts towards privatization made over the past two decades, state-owned enterprises (or *public enterprises*, as they are referred to in the wording preferred by Romanian regulatory bodies)[1], continue to play a major part in many countries in Asia, South America, Africa, Central and Eastern Europe, as well as Scandinavia. That is not only due to their weight in the economy, but also due to the fact they represent strategic sectors, with considerable effects on both the economic performance and the competitiveness of the business environment.

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[1] From the terminological point of view, the "public enterprise" concept adopted by the Romanian lawmaker within the Government Emergency Ordinance [GEO] no. 109/2011 regarding the corporate governance of public enterprises creates confusions. Instead, the promotion of the concept of *„state-owned enterprises"* [or, in a word-by-word translation, *„state enterprises"*, the equivalent of the Romanian collocation *„întreprinderi de stat"*, TN] would have been in accordance with the legal reality and, also, adequate to the international legal language. These entities are public only by virtue of the fact that they belong, fully or partially, to the state, which exerts its function of shareholder by means of various authorities, bureaus or agencies. For these enterprises, the English legal terminology uses the syntactic structure *„state-owned enterprises"*. On the other hand, the structure *„public companies"* is used in order to express entities whose securities are traded on the capital market and it does not refer to „state-owned companies".

Although the public sector in general has not been dominant in the economy since the beginning of the 2000s[1], in Romania the importance of the enterprises part of the state portfolio cannot be challenged, both due to their weight in the economy and to the fact that they represent strategic sectors, with considerable effects on economic performance and the competitiveness of the business environment. At the end of 2011, the portfolio of AVAS (Authority for State Assets Recovery) alone comprised 689 enterprises wholly or majority owned by the state[2]. To this figure one must add the companies subordinated to line or sector ministries[3], as well as autonomous government-owned enterprises (*regii autonome*), created for the satisfaction of public, national or local interests[4].

[1] With regard to the weight of the public sector in the GDP, at the end of 1992 the public sector contributed with 73.6% (the private sector held only a quota of 26.4%); then, at the end of 1996, the public sector loses this majority, participating with only 45.1% (the private sector held a percentage of 54.9%). This tendency is consolidated in 2000, when the private sector acquires an increasing weight in the composition of the GDP; thus, in 2004, its participation is 70% (the public sector: 30 %) and in 2007 it reaches the peak value of the entire post-communist period, namely 72% (the public sector: 28%), and in 2008 this quota slightly diminished to 71% (the public sector: 29%).

[2] As stated in the AVAS activity report for 2011, available on http://www.avas.gov.ro/upload/raport% 20avas%202011.pdf [31.08.2012]

[3] For example, the following entities are subordinated to the Ministry of Transportation and Infrastructure: Compania Națională de Căi Ferate CFR S.A. (CFR Infrastructură), Societatea Națională de Transport Călători (CFR Călători) S.A., Compania Națională de Transporturi Aeriene Române „TAROM" S.A., Compania Națională de Autostrăzi şi Drumuri Naționale din România S.A., Societatea Comercială de Transport cu Metroul Bucureşti „Metrorex" S.A., Compania Națională Aeroporturi Bucureşti S.A., Compania Națională Administrația Porturilor Maritime Constanța S.A., Compania Națională Administrația Canalelor Navigabile S.A., Aeroportul Internațional Timişoara „Traian Vuia" S.A. and Societatea Comercială Telecomunicații CFR S.A.

[4] I. Santai, *Drept administrativ şi ştiința administrației* [Administrative Law and the Science of Administration], vol. I, Risoprint, Cluj Napoca, 2004, p. 376-377.