SHORTCOMINGS OF THE RECENT REFORM OF STATE-OWNED ENTERPRISES' CORPORATE GOVERNANCE IN ROMANIA

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ABSTRACT*: In December 2011, the Romanian Government Emergency Ordinance (GEO) no.109 reformed the corporate governance of state-owned enterprises (SOE), in a context characterized by the financial difficulty of these entities, and under the pretext of concrete firm performance and privatization engagements assumed in front of the IMF and the EU. Taking into account the no man's land where Romanian SOEs have been operating for the past 22 years, characterized by inconsistent and summary regulations of state-owned enterprises, and also by the lack of political will for privatization in the context of many privatizations' failure, GEO no. 109/2011 represents a genuine reform, a turning point in regulating these entities.*

KEYWORDS: *corporate governance, reform, company law, functions of state ownership, minority shareholder protection, failed privatization*
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Beyond other significant shortcomings (i.e. related to disregarding stakeholders interests and to the weak accountability to the public), we hereby critically address the issues affecting the effectiveness of the reform, derived from the position and functions of the state acting as a shareholder. Some of the international corporate governance recommendations (OECD, 2005) have not been implemented within the reform and some key state-owned enterprises' foreseeable privatization will condition the efficiency of the 2011 reform on future unpredictable political decisions and new regulatory measures. The ordinance erroneously focuses on prerequisites transposed from the shareholders structure of the common corporate law and overlooks the real governance issues that characterize the intervention of the state as owner of companies, failing to provide means for a clear separation of the three functions the state plays as a shareholder in the context: ownership, regulation, and industrial policy maker. The reform at the end of year 2011 does not provide a ground for promoting, as per OECD recommendations, a foreseeable and

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coherent state shareholding policy, given the absence of a centralized authority competent to exercising the state ownership function. All those culminate with the use of inappropriate methods of privatization.

In December 2011, the Romanian Government Emergency Ordinance (GEO) no.109 reformed the corporate governance of state-owned enterprises (SOE), in a context characterized by the financial difficulty of these entities, and under the pretext of concrete firm performance and privatization engagements assumed in front of the IMF and the EU. Taking into account the *no man's land* where Romanian SOEs have been operating for the past 22 years, characterized by inconsistent and summary regulations of state-owned enterprises, and also by the lack of political will for privatization in the context of many privatizations' failure, GEO no. 109/2011 represents a genuine reform, a turning point in regulating these entities.

In principle, the governance mechanisms envisaged by the reform comply with the OECD guidelines (2005) recommendations on SOEs and are faithful to the structure of the corporate governance system as provided for in Romanian common company law, as harmonized with the European Union's corporate law. The reform's cornerstone consists in the provisions regarding the limitation of the public authorities' interference in the management of the enterprise de-politicization of the boards and of executive managers. Selection procedures for the members of the board of directors and for executive managers that would provide the involvement of independent human resources professionals at various degrees, in order to ensure the objectivity and performance of the selection process. This provision has determined the inappropriate qualification and the false idea in public consciousness that the new governance would set up "the private management in the state-owned enterprises", which became the driving force of the public presentation of this reform. The reform makes fundamental changes in the procedure of board members and executive managers' dismissal, by innovating on the effects of rejecting the administration and management plans.

Another accomplished aim was to improve transparency of the company's activity, executive compensation and related party transactions, alongside with the introduction of the obligation regarding the statutory auditing of the enterprises.

Despite that, the reform ignored significant principles and mechanisms globally related to state-owned enterprises.

Maybe the most inexplicable is the reform totally disregards the stakeholders. Addressing the role held in the governance by the employees, creditors, banks, and contributor citizens is in the philosophy of state-owned enterprises. Moreover, the reform totally discarded aspects regarding these entities social and environmental responsibility. In addition, there is a weak accountability of state enterprises to the public. For example, article 41 of GEO no. 109/2011 sets out that corporate documents are to be published on the SOE`s website, and shareholders' access to information cannot be limited. The same act further notes that limitations may apply due to shareholders' identification requests. Therefore, it results the disclosure of corporate information to the public may be limited. In the same direction, the mechanisms that ensure widespread access of citizens to the assessment of the enterprises' performances are unconvincing. The statutory reports as set out by law do not compel tutelary public authorities to make public references to performance indicators and to the degree of their accomplishment. Although the reform complies in principle with the recommendations on public reporting on the performances of SOEs, the reports have to be presented only inside governmental structures and are not addressed to the Parliament, although the Government is constitutionally subject to the control exerted by the Parliament.

The system of directors and managers duties and liabilities is limited to lapidary references to common company law, which becomes applicable. The reform contains no relevant provisions regarding the particularities of the legal regime of state-owned enterprises, despite the fact that in this case the agency relationship has a mixed legal nature, since its legal content is contractually, statutory and administratively established.

It is well known that good corporate governance is not limited to regulatory provisions. An almost equally significant component hereof is voluntary governance. The main governance mechanisms belong to organizational culture, to the way boards operate and in which the clear performance indicators are established and observed. The reform does not refer to the corporate governance codes, to code of best practices, to internal procedures regulating the activity of the board of directors or other soft-law GEO no. 109/2011 regarding the corporate governance of SOEs erroneously focuses on premises transposed from the ownership structure of privately owned companies, where governance ensures the settlement of internal conflicts created in the company operations between the management, the board of directors, the majority and minority shareholders. The reform does not take into account the real governance problems that characterize the intervention of the state as unique or majority shareholder. The multiple role of the state consists of the conflict created in the external economic environment and in the internal company environment by the fact that the state carries out all ownership function, regulatory function and industrial policy function. As long as Romanian law does not provide mechanisms for a clear separation between these three functions, internal corporate governance mechanisms shall not bring advantages to the competition or to the business environment, maintaining the misleading role the SOEs play in the economy instead.

Notwithstanding the lawmaker's objectives, giving the way the mechanisms used to reform the corporate governance of state-owned enterprises at the end of 2011 have been conceived, it is arguable the reform would be able to ensure the improvement of economic performance and to successfully stimulate the privatization of these entities. We hereby critically address the issues affecting the effectiveness of the reform, derived from the state acting as a shareholder. Some of the international corporate governance recommendations (OECD, 2005) have not been implemented within the reform and some key state-owned enterprises' foreseeable privatization will condition the efficiency of the 2011 reform on future unpredictable political decisions and new regulatory measures.

The ordinance erroneously focuses on prerequisites transposed from the shareholders structure of the common corporate law companies and overlooks treating the real governance issues which characterize the intervention of the state as owner of companies, failing to provide means for a clear separation of the three functions the state plays as a shareholder in the context: ownership, regulation, and industrial policy maker. The reform at the end of year 2011 does not provide a ground for promoting, as per OECD recommendations, a foreseeable and coherent state shareholding policy, given the absence of a centralized authority competent to exercising the state ownership function.

1. THE SEPARATION BETWEEN OWNERSHIP AND CONTROL: AN AXIOM INADEQUATE TO STATE-OWNED ENTERPRISES

It is universally accepted that the first principle of corporate governance consists in the separation of the following functions within the corporation: ownership (exerted by shareholders), management (assumed by executive directors or the management board) and controlling (carried out by the board of directors or by the supervisory board). This separation is also reflected in the organic structure of the company. Practically, today corporate governance is mainly the result of accepting two axioms in the field of corporate law. The first one consists in the separation between the ownership of shares and the control over the company. The control over the business belongs to the board of directors, which will exert the function of company administration, likely together with professional managers, by honestly pursuing the company's best interest with a view to increase shareholder value and shareholding wealth.

The second axiom consists in separating management from control, within the administration structure of the company. In the one-tier governance model, this separation is achieved, when the majority of the members of the board are non-executive, while the executive positions are exclusively delegated to management. The respective separation of tasks is clearly allocated within the same company body: the board assigns the company management function to executive board members and/or to managing directors nominated from outside the board. In the two-tier governance model, this separation occurs organically. There are two bodies to ensure together the administration of the company - the management board and the supervisory board - each of these having clear, exclusive prerogatives of either management or control.

These basics of corporate governance rely on grounds that the particular case of state-owned enterprises cannot offer, and especially in the case of Romania. The separation between business ownership and business control is the foundation for the governance of the listed companies, which have a dispersed shareholding structure. This reflects the American and British patterns, which traditionally consider raising capital through equity on regulated financial markets is the most appropriate corporate finance model. In these legal systems – mainly in the American one – company law focuses on the manager and on the board's accountability to shareholders. The management – due to its attributions statutorily conferred – exerts an almost complete control over the company's business. It concerns the debate on "shareholder versus director primacy". Except for the ordinary annual vote on the financial statements and profit distribution, and sometimes for the election of the board via cumulative voting system, only decisions with a substantial impact on shareholders' rights are subject to resolutions of the general meeting. Such matters relate to significantly amending by-laws, appointing statutory auditors and especially takeover of company (including the sale of the majority of the assets), the merger or the split-up of the company. Therefore, the premises for companies' corporate governance principles correspond to a legal system that promotes the strong manager, called to compensate the shareholders' weakness, which results from their number, dispersion and multiple interests.

It becomes obvious that these general company governance principles are not at all applicable to the specificities of the Romanian state-owned enterprises. The latter have a completely distinct shareholding structure, as the state is the sole or majority shareholder. Acting as shareholder, the state retains full control over the company`s activity which tells that the governance principle of separating ownership from control is not adequate to state-owned enterprises. Even in the case of a partial privatization, representing 10%-15% of the equity capital, the owner-state shall continue to hold effective control over the enterprise. This aspect cannot be eliminated by the fact that the members of the board of directors are selected on a competitive basis, by an officially appointed commission or even by an independent expert in human resources, since the shares held by the state in such a company allow it, as owner, to dismiss *ad nutum* the members of the board.

Moreover, the Romanian Companies Act is owner-oriented and focused on shareholders, who are granted with significant voice prerogatives in order to hold the control over the company. Considering some of them could be on a limited extent delegated to the board of directors, the shareholders general meeting have the attributions to decide upon by the following: the increase and decrease of the share capital, the change of type of business, the change of the company`s headquarter, converting shares into different classes, issuing bonds, any change of the articles of incorporation, and preliminary approval of certain operations carried out by the management. Therefore, establishing procedures for the selection of managers, involving to a greater or lower extent private human resources experts, does not necessarily represent a governance solution for the Romanian law on state-owned enterprises, as regulations in this field are not focused on the manager and do not grant them the most important role in the corporate governance. Still, one has to accept that, where there are no real corporate governance good practices in place, the selection of managers through the involvement of private recruiting companies represents, along with the transparent annual remuneration and verification process, a mechanism able to ensuring economic performance.

2. THE FAILURE OF SEPARATING OWNERSHIP, REGULATORY AND INDUSTRIAL POLICY FUNCTIONS OF THE STATE

The (local or central) government acting as controlling owner of an enterprise brings a change and a challenge on the fundamentals of corporate governance. A reform in the particular case of SOEs has to start from different premises and to follow other objectives than in the case of the private corporations' governance. According to the annotations to the OECD Guidelines on Corporate Governance of State-Owned Enterprises, it is clear that the major challenges consist of ensuring the separation between these three functions of the state, acting as owner, regulator, and industrial policy maker.

On the one hand, from a governance point of view, the expression of the state ownership function is reflected through the responsibility of selecting, assigning and supervising the members of the board of directors, which on its turn have the same attributions with relation to managing directors. This function may be efficiently achieved on condition that political interventions on the management's activity are suppressed. This preoccupation is reflected in the measures of the 2011 reform, where a procedure for the selection of board members and managers on transparent and competitive basis was provided for, and where article 4 provides the tutelary public authority and the Ministry of Public Finance cannot intervene in the state-owned enterprises' administration and management activity.

On the other hand, governance mechanisms should be put in place, by means of which the state acting as an owner could not exert its regulatory and supervisory functions of the market where the state-owned enterprise operates, in a manner which would distort competition and which would put the state-owned enterprise in a position of advantage over (private) competitors. Consequently, the objectives of economic performance and protection of consumers' interests will observe unfavourable effects. Moreover, key state-owned enterprises are usually used as industrial policy instruments, at both central and local levels. Therefore, there will be a clear legal and economic conflict when strategy attributes in the respective industry directly or indirectly belongs to the same authority that jointly plays the role of controlling shareholder of a SOEs which is also a player on the field.

These problems of corporate governance of state-owned enterprises have been inadequately tackled, or not tackled at all. There is no mechanism to separate the entity that embodies the state as owner from the authority that regulates, supervises and ensures the governmental strategy in the operating field of the respective state-owned enterprise. The proliferation of situations in which certain ministries - such as the Ministry of Economy, Industry and Trade or the Ministry of Transportation - hold the position of majority shareholder, have the status of regulatory and supervisory authority on the respective market, and establish the public policy in the same fields continues. The consequence can only be a restrained transparency in defining specific objectives and in monitoring the economic performance of state-owned enterprises.

3. THE LACK OF INSTITUTIONAL COORDINATION FOR ESTABLISHING A STATE OWNERSHIP POLICY

The OECD Guidelines on Corporate Governance of State-Owned Enterprises recommend governments to establish and implement a state ownership policy with regard to its holdings in enterprises. This policy should define the state's role and general objectives in exerting its position of shareholder, as well as the means by which it would implement such a policy. The same recommendations specifically refer to the state as exerting its shareholder function by means of a centralized separate entity or, if this is not possible, by coordinating different entities that represent the state as owner. Although independent, each of these entities carrying on the state ownership function would proceed in accordance to a publicly disclosed and predictable shareholding policy.

Does the state have specific objectives while acting as a shareholder? Are there strategies regarding the privatization of national companies? Which is the evolution of the state`s stakes in state-owned enterprises? Which is the value of the dividends the state received and is entitled to receive? Shall the state as controlling owner distribute dividends to minority shareholders this year? What about the following years? How can one avoid the "state capture" – expression reflecting the corruption that surrounds the award of public procurement contracts to the political clientele and the liabilities an enterprise holds towards other public entities just because of political agreements? Which are the remedies against the state abusively using its majority position in the detriment of the legitimate interests of minority shareholders?

For the last 22 years, the lack of any state ownership policy, to ensure transparency, predictability and especially accountability on behalf of the authorities, has represented one of the main causes of the counter-performance of state-owned enterprises. Unfortunately, GEO no. 109/2011 that was supposed to bring about the reform does not really tackle this issue.

On one hand, references to the ownership policy are formal and inconsistent, since no mechanisms for establishing shareholding-related objectives at the level of Government institutions have been provided. It is true that GEO no.109/2011 requires an annual reporting system, but reporting is only carried out within the Government and, by its nature, it can only lead to a limited disclosure towards the authorities and the public, and under no circumstances can it create a genuine ownership policy.

Under the 2011 reform, the tutelary public authority drafts an annual report on the activity of autonomous government-controlled enterprises (*régies autonomes*) and of the other subordinated companies. The report is published on the internet page of the tutelary public authority. A section of this report must comprise "information regarding the ownership policy of the authority”. Based on these reports, the following year the Ministry of Public Finance and the Ministry of Administration and Internal Affairs submit to the Government annual synthetic report concerning all the state-controlled enterprises. These reports are published on the webpage of the two ministries. The procedure, however, does not sustain the original concept of state ownership policy. At most, it could only provide *a posteriori*, aggregated reports on the activity of state-owned enterprises.

What probably is the most inadequate is that reporting is circumscribed to the Government and there is no accountability towards citizens, by means of the Parliament. This infringes the OECD guidelines recommending the authorities should be held accountable for the state's shareholding policy in front of the Parliament and not in front of the Government as executive power.

On the other hand, contrary to OECD Guidelines, in Romania, there is no authority to exert the ownership function of the state nor is there even one single authority in charge with coordinating the state's stakes in the various enterprises. Under these circumstances, it is almost impossible to create a predictable and transparent ownership policy. Only the ministry of public finances and the ministry of administration are called to collect information regarding the activities of state-owned enterprises and to report to the Government.

The legal framework currently applicable in Romania allows the existence of at least four large categories of tutelary authorities for state-owned enterprises.

The first category includes local public authorities (such as municipalities and county councils). They are sole owners of most of the autonomous government-owned enterprises (*régies*). These legal structures are mainly of local interest, due to the nature of their business scope.

Secondly, there are line ministries, which hold majority or minority shares in companies of national interest belonging to their field.

The Authority for State Assets Recovery [AVAS], a Government-subordinated specialized institution with legal personality, established in 2004 following the merger of two public authorities, is the third ownership and policy maker holder. Its main attributions are the privatization of state-owned companies, post-privatization monitoring and recovery of state’s assets and receivables. The main attribution of this authority is to administrate the state's holdings in companies subject to the privatization process and in other companies in which the state still holds ownership and voting rights in the context of post-privatization. AVAS also holds the prerogative to ensure recovery of the enterprises’ liabilities (arrears) towards the state. According to the law, the amounts gathered by Authority for State Assets Recovery are recorded as revenues of the state budget with the exclusive purpose to diminish domestic public debt.

The fourth Government intervener is the Office of State Ownership and Privatization in Industry, a public institution with legal personality, subordinated to the Ministry of Economy and Commerce. It exerts, on behalf of the ministry, the attributes hereof related to the privatization process in its field of activity and carries out the activities related to the state ownership in the companies included in its portfolio. Due to the field in which it operates (energy, oil, gas, mining, defense), the Ministry of Economy, Commerce and Business Environment exerts by means of the Office of State Ownership and Privatization in Industry the function of shareholder in the most significant companies envisaged by the corporate governance reform brought by GEO no. 109/2011.

The last two of these authorities were created for a limited period, because of their nature. This led to the Government’s attempt to reorganize them using a merger procedure carried out through GEO no.101/2006, where the Office of State Ownership and Privatization in Industry was acquired by the Authority for State Assets Recovery. The reform proved to be only temporary. Two years after the reform, as soon as the parliamentary majority changed, GEO no. 101/2006 was rejected by the Parliament by means of Law no.308/2008. Consequently, the two entities distinctly resumed their existence and activity, with attributions in the state's exertion of its role as shareholder and in the administration and privatization of the companies included in their respective portfolios.

In terms of how the state's ownership function was organized at the level of Government and taking into account the typology consecrated since 2005 by the OECD, Romania seems to belong to the "de-centralized" model, characterized by the fact that several line ministries exert the same function. This is a traditional orientation, specific to the period before the global wave of large privatizations from the 1980s and which became obsolete. The OECD report on the recent changes in the governance of state-owned enterprises in the organization's member states, ascertains that the evolution of the global approach tends towards the centralization of the state's shareholder position. This tendency is generated by the reduction of the state's portfolio, in the framework of privatizations, and by the more and more widespread practice of listing companies in which the state is the majority shareholder on the capital market. This evolution should determine the re-assessment of the mechanism used by the Romanian Government, a centralization of the state's ownership function, thus implicitly supporting the establishment of a predictable and unitary ownership policy.

4. THE REQUIREMENT OF ADDITIONAL MECHANISMS FOR MINORITY SHAREHOLDER PROTECTION

The association or partnership of state ownership with private property is able to offer a few positive effects as far as minority shareholder are concerned. The state is a shareholder who, at least theoretically, should be able to reduce uncertainties inherent to the shareholding behavior of any majority. Through a responsible shareholding policy, the state should bring a fair and just value to the investments of private minority shareholders, to reward rather non-speculative investment. These advantages are even more obvious when the enterprise majority-owned by the state is in a position of oligopoly or monopoly. Thus, the presences of the state as a shareholder in addition to its market regulation attributions are able to strengthen minority holdings.

In spite of all these, the mixed structure of the capital can be disadvantageous for private minority shareholders. First, there is a risk for the company to focus on non-commercial, such as social. This compromises the natural private purpose of increasing the shareholding value in the benefice of all shareholders and affects the company members' equality of hope to share the entity's prosperity. Secondly, certainties related to the state's behavior as shareholder are rather theoretical in Romania, where we cannot discuss about a predictable state ownership policy, as there is no institutional coordination with respect to the state's ownership function. The most significant question marks concern the dividend policy and the risk of awarding disadvantageous contracts, to the benefit of political clientele. These risks can significantly affect the success of projected partial privatizations through initial public offerings, as in the absence of specific protection mechanisms or even of certain privileges granted to private minority shareholders, investors will have no reasons to subscribe.

The 2011 reform provides four mechanisms for the protection of minority shareholders, all inspired from the Companies Act (1990, as amended) and Capital Market Act (2004, as amended). This transposition from the law governing private business forms had no preoccupation to synchronizing the minority protection legal instruments and remedies with the particularities of entities where the state has majority voting rights. The exercise of minority shareholders' rights, as set out in the Companies Act - also applicable to state-owned companies by virtue of article 46 of GEO no. 109/2011 - implies the holding of minimal thresholds of 5% or in some cases 10% of the share capital. The high degree of dispersion of the private investors subscribing to initial public offerings scheduled by the Government shall make it unlikely for them to succeed through acting in concert and voting agreements. This latter practice, although very permissively regulated in article 128 par.(2) of the Companies Act, is not widely used in Romania.

On the other hand, GEO no. 109/2011 conceives the specific minority protection mechanisms through certain types of warranties. First, the law requests simple disclosing duties, such as the obligation of maintaining a website, where the enterprise is bound to publish the documents to submit to shareholders with the occasion of general meeting of shareholders. Second, there are warranties regarding remote voting. The vote by correspondence is admitted without limitations, the vote by proxy is also allowed to holders of a paper or electronic power of attorney having incorporated an electronic signature, while the vote by electronic means must be accepted without any restrictions beside the ones proportionally established for assuring the security of the communication).

Third, there is the mechanism of cumulative voting for electing the members of the board of directors and the supervisory board. Upon the request of shareholders representing at least 10% of the share capital or voting rights, the board of directors and the management board are compelled to convene a general shareholders’ meeting having on the agenda the election of the members of the board by applying the cumulative voting method. In case an ordinary general meeting of shareholders has already been convened in order to elect the members of the board, any shareholder is entitled to make written proposals asking for the use of cumulative voting method within 15 days following the publication in the Official Journal of the notice convening the general shareholders’ meeting. Nevertheless, the legislations in the field of state-owned enterprises and the one related to capital market guarantee that, when the cumulative voting is applied, the entire board of directors (or supervisory board) shall be elected through this method, even if the mandate of some of the members of the board has not yet expired.

This regulation has several shortcomings. Article 32 of GEO no. 109/2011 implies that the board is bound to convening the ordinary general meeting for electing the board members by cumulative voting only upon the request of a significant shareholder (e.g. holding at least 10% of the share capital, according to article 2 of Capital Market Act concerning the capital market). Instead, it is not clear whether the cumulative voting method should be mandatorily used during the meeting nor is it clear whether the agenda itself (the election of the board members), as proposed by the significant shareholder, could be rejected by the majority shareholders while the meeting is called to “adopt the proposed agenda”. The black letter of GEO no. 109/2011 only ensures that the shareholders’ proposals to use cumulative voting during a meeting of shareholders convened for election purposes, should be accepted by the state-owned enterprise only in order to be marked down on the agenda. Obviously, there is no guarantee that the majority of the shareholders will approve using the cumulative voting method. Therefore, the 2011 corporate governance reform does not guarantee that election of the board members by cumulative voting at the request of minority shareholders is enforceable at the meeting.

The critique pointed above is fortunately valid for the non-listed state-owned enterprises only. In the case of the enterprises to be privatized by initial or secondary public offering, whose shares shall be listed on the regulated capital market, these shortcomings will be eliminated because of the article 32 par. (12) of GEO no. 109/2011, which makes specific reference to the provisions of the capital market legislation whose application shall therefore prevail. The Capital Market Act sets out that, upon the request of significant shareholders, the election of the board of directors members based on the cumulative voting method is enforceable, thus shall be mandatory.

The regulation on cumulative voting raises a question of efficiency. Several legal systems promoting this method are actually dealing with. The procedure of cumulative voting has no net connection with the dismissal of the member of the board of directors elected by using this particular method. The advantages of this method are paralyzed by the possibility for majority shareholders to dismiss the director appointed by cumulative vote. A possible remedy consists of setting forth a provision within the company's articles of incorporation, by means of which a member of the board appointed by cumulative voting, may not be dismissed if the number of votes against the termination of his or her mandate contract were sufficient for the election.

The above described minority protection mechanisms are far of being sufficient. In a context where the SOEs corporate governance reform is particularized by partial privatization strategies, the passive idea of protection the minority (usually private) shareholders should be attached to active incentive for investors to subscribe shares. Therefore, the minority shareholders invest in a company in which they also undertake the risk of remaining the prisoners of the state as majority shareholder and of a management that shall find difficulties in becoming profitable because of the matrix of unprofitable contracts gravitating around the state-owned enterprise.

It is essential that the fundamental means of protection available to private minority shareholders should be more than the simple *exit*, meaning the simple possibility of selling their titles, thus liquidating their investment in the state-owned enterprise. In other words, an active shareholder behavior should be stimulated so that investors make their *voice* heard by exerting control prerogatives over the company`s administration and by monitoring the attitude of majority shareholders.

Primarily, the privatization concept should contain no caps limiting the holding a private investor acting individually or in concert with other investors to a certain percentage.

Meanwhile, the privatization strategy should also consider offering for institutional investors subscription a percentage of at least 5% of the share capital or of the voting rights. It is believed, although not always confirmed, that such investors may exercise responsible activism and would be capable of exerting the democratic role of the minority, which consists of monitoring the majority.

Finally, one should also consider a privatization strategy that provides for special prerogatives or privileged rights offered to subscribing investors. One of the options would be a share capital increase by issuing a special class of shares to subscribers hereof having different prerogatives (e.g. the right to a double vote) than the ones held by the state as owner of securities from previous issues. Another option would be that the newly issued securities for the share capital increase be in the form of preferential shares with priority dividend so that minority shareholders are not subject to the discretionary state dividend policy. Of course, other options may be taken into consideration.

5. THE NEED FOR ADEQUACY OF THE PRIVATIZATION METHOD. THE *OLTCHIM* CASE

The privatization strategy must also comprise the selection of a suitable privatization method. The most recent experience points out a pitiful failure of the privatization of the most valuable asset of dictator Ceauşescu's chemical industry, the former pearl of Romanian chemistry, Oltchim S.A. chemical plant. Several branches of the national economy, including the electric power system still rely on its activity. The case highlights that the reform of corporate governance cannot prevent the dilettantism, improvisation and populism that characterized the attempt of selling the controlling interest held by the state in the aforementioned plant. During the appointment procedure of the new members of the Board of directors by enforcing GEO no. 109/2011, the ongoing board of directors and general manager resigned collectively at the beginning of September, 2012. The Government appointed interim directors and managers. Starting July 2, 2012 the special administration was established at Oltchim, a specific procedure for enterprises aimed for privatization in compliance with article 16 of Law no. 137/2002 on the measures for accelerating privatization . Similar to most state industry giants, Oltchim accumulated debts that amounted to Euro 700 million in the fall of 2012 due to the decrease in its activity and increasing the financial expenditures in the past 4 years.

54.80 % of the capital structure of the enterprise is owned by the state through the Ministry of Economy and Trade, two foreign capital private companies hold 18,31%, and 14% respectively, while little over 13% of the certificates are owned by investors scattered all over the capital market. In compliance with the Memorandum for the privatization of Oltchim approved by the Romanian Government on August 23, 2012 considering the tight term assumed by the state for privatization s in the Letters of intent addressed to the IMF in the context of the Stand-by agreement in force, the announcement for sale of the controlling interest was published between late August, 2012 in Wall Street Journal Europe inclusively. The privatization of Oltchim is part of the key challenges of the Romanian authorities for the year 2012 that imply finding sustainable solutions for the strategic state-owned companies at a loss, such as CFR Marfă, Tarom or Poşta Română.

The Government chose a combined sales method for the controlling interest package: sealed bid tender, followed by a negotiation or an open outcry auction if need. In the context of the loose conditions for the participation of the interested investors, provided by a tender book that did not provide any significant restrictions related to the participants' good reputation, in the circumstances of the emergency of the privatization imposed by international pressure, the purchase of the controlling interest package was awarded to a natural person, a highly controversial media and political figure. After a media performance, the successful bidder who had already deposited the tender security bound himself to settle approximately Euro 45 million. Pursuant to some arguments related to not reaching an agreement regarding the final share purchase agreement, the successful bidder did not fulfill its payment obligation of the first installment assumed according to his bid, and due to this reason the privatization procedure rottenly failed and should have to be restarted. The result belied everyone's interests: the state (including the political interests of the current Government), the employees affected by the perspective of the company's closedown, the other stakeholders' interests as well as the interests of private minority shareholders.

Neither the assumptions according to which the privatization consultant would have insisted on establishing certain highly permissive tender participation conditions, nor the pressure of fulfilling the commitments assumed towards the international partners can justify the highly awkward manner in which the Government managed the privatization process. The head of the Government even astonishingly declared that at least the commitments towards the IMF were met under the aspect of performing the formalities of the privatization process on due time!

It is obvious that the privatization of such a plant must have been done by the direct negotiation method that would have had to involve strategic investors. Oltchim will most probably end up in a voluntary liquidation or even insolvency, and in both cases there is not perspective for the enforcement of the new corporate governance standards of state-owned enterprises and the privatization possibilities shall also decrease.

The failure of the Oltchim privatization is not only an economic and political scandal but it also proves that the reform of corporate governance from 2011 exceeds the limits of improvisation only if it is implemented in accordance with a privatization strategy and method that would not be characterized by confusion, controversy or inadequacy.