2 Assessment of Romania against the OECD Guidelines of Corporate Governance of SOEs

This chapter describes the corporate governance framework of Romanian SOEs specifically with regard to how actual policies and practices compare with the recommendations of the *OECD Guidelines of Corporate Governance of SOEs.* In particular, it examines: (i) the rationales for state ownership, (ii) the organisation of the state ownership function, (iii) the level playing field between SOEs and private companies, (iv) the treatment of non-state shareholders and other investors, (v) principles and standards of responsible business conduct, (vi) transparency and disclosure policies and practices, and (vii) the roles and responsibilities of the boards of directors of SOEs.

2.1. Rationales for state ownership

The state exercises the ownership of SOEs in the interest of the general public. It should carefully evaluate and disclose the objectives that justify state ownership and subject these to a recurrent review.

2.1.1. Articulating the rationales for state ownership

> *A. The ultimate purpose of state ownership of enterprises should be to maximise value for society, through an efficient allocation of resources.*

According to Romania's state ownership policy adopted in 2016, the rationale for establishing or maintaining state ownership in certain companies or sectors is based on "economic, social, structural or national security" reasons, including four key objectives: (i) retaining control over natural resources, (ii) managing natural monopolies, (iii) delivering essential public services, and iv) producing "strategic" goods and services.

Box 2.1. Rationales for state ownership according to the 2016 state ownership policy

- **Control over natural resources**. Holding stakes in key areas, such as energy and the environment, including the forestry, mining and hydrological sectors, is based on the belief that the revenues generated by these natural resources must benefit society as a whole.
- **Natural monopoly** (such as electricity and natural gas transmission infrastructure; railway infrastructure). At present, the state maintains majority stakes in public enterprises operating in these non-competitive sectors, and it is more economical to manage these networks through a single economic agent than through several.
- **Public service**. If a service is considered essential for the economic and social development of a certain category of citizens, or of a certain region, or of the population as a whole, the state may impose on economic agents – either public enterprises or private companies – the obligation to provide that service even if it would not normally be justified on commercial grounds for the enterprise concerned.
- **Strategic business reasons**, which are based on the production and capitalisation of various products and services that are realised through these SOEs.

Source: Romanian Government (2016[1]), *Romanian State Ownership Policy*, https://www.gov.ro/ro/guvernul/sedinte-guvern/memorandum-cu-tema-participarea-statului-in-economie-orientari-privind-administrarea-participatiilor-statului-in-intreprinderi-publice-rolul-si-a-teptarile-statului-ca-proprietar

For this purpose, the ownership policy also classifies SOEs into two overarching categories: commercially-oriented enterprises which are expected to maximise economic value, and those with public service and policy objectives. Overall, while the first three rationales for state ownership are soundly defined – notably given Romania's SOE landscape characterised by a large share of public enterprises operating in the energy and transport sectors, it should be noted that the rationale for owning SOEs for "strategic business reasons" is generally vague and may potentially be used to justify direct state intervention in any industry (across a wide range of economic activities and sectors) where a more solid rationale (e.g. market failure or public service requirements) cannot be provided.

It should also be noted that as a transition economy, Romania inherited a large state-owned sector from the communist period, notwithstanding recent large-scale privatisation efforts since 1990s – including

through divestiture, privatisations, floating of shares and sales. As such, the ownership policy also recognises that "diversifying the shareholding in these [state-owned] companies through minority shareholdings, including listing, can be beneficial for their effectiveness and profitability". It is also stated that "the exploitation of natural resources may in some cases be concessioned to private agents, following a cost-benefit analysis and depending on the macroeconomic situation at the time".

2.1.2. The ownership policy

> *The government should develop an ownership policy. The policy should inter alia define the overall rationales for state ownership, the state's role in the governance of SOEs, how the state will implement its ownership policy, and the respective role and responsibilities of those government offices involved in its implementation.*

As alluded to above, in 2016, the government adopted an ownership policy aiming to define, at national level, the policy underpinning the management of state holdings in public enterprises "where the state is the sole or majority shareholder, or exercises control". The ownership policy was developed by the government – together with the Ministry of Finance and line ministries with ownership rights – which then sought to align with international best practice, in particular taking the *OECD Guidelines on Corporate Governance of State-Owned Enterprises* (thereafter "SOE Guidelines") as a model. As such, the ownership policy includes the main areas recommended by the SOE Guidelines, and effectively outlines the state's overall ownership objectives and its expectations from public enterprises, as well as the roles and responsibilities of those exercising ownership functions (Box 2.2).

Box 2.2. Overview of the 2016 state ownership policy

The policy includes three main sections, each defining: (i) the rationale for state ownership in SOEs, (ii) the roles, responsibilities and levels of decision-making in SOE governance, and (iii) expectations of the state owner.

Rationales for state ownership in SOEs

The first section briefly outlines the importance of SOEs in the national economy, before setting out the four main rationales underpinning state ownership in public enterprises. The section also lays out the government's vision regarding the role of the state as a shareholder, as well as regarding the performance of SOEs over the long term.

Roles, responsibilities and levels of decision-making in the governance of public enterprises

The second section provides an overview of the main roles and responsibilities of the stakeholders involved in the governance of SOEs – including the ownership rights of line ministries (known as "public supervisory authorities"), and the monitoring powers of the Ministry of Finance. The section also outlines high-level principles regarding the separation of responsibilities of the annual general shareholder's meeting and of the board, calling for the state to respect the independence of boards by refraining itself from the operational procedures and functioning of boards, emphasising that the state should refrain itself from excessively intervening in the operational management of public enterprises. This section also calls for respecting the rights of information of all shareholders (especially of minority (non-state) shareholders).

Expectations of the state as shareholder

The third section outlines the expectations of the state owner with regard to the financial performance of SOEs, the dividend policy, non-financial expectations, risk management and internal control

mechanisms, as well as business ethics, integrity and conflicts of interests, trainings, and transparency and disclosure.

Source: Adapted from Romanian Government (2016[1]), *Romanian State Ownership Policy*, https://www.gov.ro/ro/guvernul/sedinte-guvern/memorandum-cu-tema-participarea-statului-in-economie-orientari-privind-administrarea-participatiilor-statului-in-intreprinderi-publice-rolul-si-a-teptarile-statului-ca-proprietar

The policy was introduced in the context of concerns regarding the inefficiency of SOEs likely due to political clientelism and a general lack of accountability of public enterprises, in turn negatively impacting their financial performance and causing *inter alia* accumulation of losses and arrears, which can represent a potential medium-term risk for fiscal sustainability. The ownership policy thus aims to improve the corporate governance and performance of SOEs. The policy was introduced at the same time as important amendments to the legal framework on SOEs, notably the adoption of Law no. 111/2016 (approving and amending GEO no. 109/2011) and GD no. 722/2016. In many ways, the policy reiterates legal provisions into a policy document.

> *C. The ownership policy should be subject to appropriate procedures of political accountability and disclosed to the general public. The government should review at regular intervals its ownership policy.*

As a government decision, the ownership policy was published both in the Official Gazette of Romania and on the government's website. As the policy reiterates to a large extent legal provisions applicable to SOEs, the government, Ministry of Finance, and line ministries verify the implementation of the provisions of the ownership policy as part of their duties. The Court of Accounts also exercises an oversight role with regard to the implementation of legislation including aspects related to the ownership policy. To date, the ownership policy has not been reviewed since its adoption in 2016.

2.1.3. Defining SOE objectives

> *D. The state should define the rationales for owning individual SOEs and subject these to recurrent review. Any public policy objectives that individual SOEs, or groups of SOEs, are required to achieve should be clearly mandated by the relevant authorities and disclosed.*

The rationale for ownership of public enterprises is set out in the substantiation notes which form the basis of the legislative acts of incorporation of SOEs (including applicable laws and government decisions). The revision of these incorporation documents is common practice, since amendments are necessary when new elements appear, which were not taken into account at the time of issuance of the incorporation documents. In addition, line ministries are responsible for defining the objectives of every SOEs in their respective portfolio, which should be based on sectoral strategies developed by the government. SOE objectives (set out through "letters of expectations") are required to be published by line ministries on their websites.

2.2. The state's role as an owner

The state should act as an informed and active owner, ensuring that the governance of SOEs is carried out in a transparent and accountable manner, with a high degree of professionalism and effectiveness.

2.2.1. Simplification of operational practices and legal form

> *A. Governments should simplify and standardise the legal forms under which SOEs operate. Their operational practices should follow commonly accepted corporate norms.*

In Romania, the majority of centrally-owned SOEs are established as joint-stock companies (JSCs) according to the provisions of the Companies Law (no. 31/1990), which is also the legal form that all stock-market listed SOEs must take. As of end 2020, there were 121 JSCs (of which 18 were listed) – accounting for more than half of the 216 active and centrally-owned SOEs considered in this review (56%). State-owned enterprises can also operate as limited liability companies (LLCs), pursuant to the Companies Law. As of end 2020, there were 10 such active LLCs. Romanian SOEs can also take the form of autonomous administrations ("regii autonome") – a legal form created according to Law no. 15/1990 to reorganise state enterprises as companies in the post-communist period – which are fully-owned by the state. As of end 2020, there were 36 active autonomous administrations under the oversight of central government institutions in Romania.

Overall, all fully or majority-owned SOEs (including JSCs, LLCs, and autonomous administrations) broadly operate on the basis of rules applicable to private companies. While all three SOE legal forms are subject to the main law bearing on the corporate governance of SOEs (Law no. 111/2016 amending and approving GEO no. 109/2011), the law also applies to subsidiaries of SOEs. It should however be noted that Law no. 111/2016 provides for slightly different provisions regarding the composition of boards, the selection process of board members, and the responsibilities of ownership entities (i.e. central government authorities) vis-à-vis SOEs depending on their legal form – with specific requirements applicable to (fully-owned) autonomous administrations on one hand, and to (majority-owned) companies incorporated according to the Companies Law on the other hand, albeit with only minor procedural differences (Table 2.1). Financial and non-financial disclosure requirements prescribed by Law no. 111/2016 apply to all SOEs indifferently (see sub-section F.5 and section 2.6 for details).

Table 2.1. Differentiated provisions of Law no. 111/2016 according to SOE legal forms

	Autonomous administrations established by the state	Companies established according to the Companies Law (no. 31/1990), fully or majority-owned by the state, or in which the state has a controlling stake	Subsidiaries (i.e. Companies in which one or more SOE(s) hold(s) a majority or controlling stake)
Ownership rights of central government institutions	• to draft the letter of expectations and to publish it on its own website in order to be acknowledged by the candidates shortlisted for the position of administrator or director; • to appoint and dismiss the members of the administrative board; • to negotiate and approve financial and non-financial performance indicators for the administrative board; • to conclude mandate agreements with the administrators; • to monitor and assess the performance of the administrative board, in order to ensure, on behalf of the State or of the founding administrative-territorial unit, that the principles of economic efficiency and profitability in the	JSCs: • to draft the letter of expectation and to publish it on its own website in order to be acknowledged by the candidates shortlisted for the position of administrator or director; • to propose, on behalf of the State or of the administrative-territorial unit shareholder, candidates for the positions of members of the administrative board or, as the case may be, the supervisory board, in compliance with the conditions of qualification and professional experience and selection provided by this emergency ordinance; • to appoint the representatives of the State or, as the case may be, of the administrative-territorial unit in the general assembly of shareholders or associates and to approve their mandate;	• to ensure that the public enterprise exercises the capacity of shareholder with economic and strategic efficiency; • to ensure that the controlled company complies with the principles of economic efficiency and profitability; • to ensure through the representatives in the general assembly of shareholders and through the corporate governance structures the implementation of the requirements of the expectation letter in the financial and non-financial performance indicators that constitute an annex to the mandate contract; • to monitor and evaluate through its own corporate governance structures the financial and non-financial performance indicators attached to the mandate contract;

	Autonomous administrations established by the state	Companies established according to the Companies Law (no. 31/1990), fully or majority-owned by the state, or in which the state has a controlling stake	Subsidiaries (i.e. Companies in which one or more SOE(s) hold(s) a majority or controlling stake)
	functioning of the public company are respected; • to monitor and evaluate through its own corporate governance structures the financial and non-financial performance indicators included in the annex to the mandate contract; • to draft and publish on its own website the list of the administrators in office at public companies; • other duties provided by law;	• to empower its representatives in the general assembly of shareholders to negotiate and approve financial and non-financial performance indicators for the administrative board; • to monitor and evaluate through its own corporate governance structures the financial and non-financial performance indicators appended to the mandate contract; • to monitor and assess through its representatives in the General Assembly of Shareholders the performance of the administrative board, in order to ensure, on behalf of the State or of the territorial-administrative unit, that the principles of economic efficiency and profitability in the functioning of the Company are observed; • to ensure the transparency of the state shareholding policy within the companies over which it exercises the powers of supervisory public authority; • other duties provided by law; **LLCs**: To exercise all of the above, and approve the articles of association regulating the number of board members, the selection procedure and the constitution of board committees, where applicable.	• other duties provided by law;
	to monitor and evaluate through its own corporate governance structures the application by SOEs of corporate governance provisions of GEO 109/2011 (as amended and approved by law 111/2016), and to report to the Ministry of Public Finance on it and on the fulfilment of its own duties in the application of this emergency ordinance;		
	to establish integrity criteria for board members, and ensure their inclusion thereof in their mandate contracts;		
Board composition	The board must be composed of 3-7 members, including one representative from the Ministry of Finance, one representative from the relevant line ministry, and between 1-5 independent members who may not be public servants, or state representatives from the line ministry or other public institution, all of which should have relevant experience, and a majority of which should be non-executive and independent directors appointed according to the requirements provided by Article 138 of the Companies Law (no. 31/1990).	**JSCs**: One-tier boards must be composed of 3-7 members, and may only include one state representative. In the case of large enterprises with over 50 employees and a turnover of over EUR 7.3 million, the board of directors can also be formed of 5-9 members, with a maximum of two seats for state representatives, who must be evaluated by the selection committee and comply with the same standards of professional qualifications imposed on all candidates (according to Article 28 of GEO no. 109/2011). The majority of board members should be non-executive and independent, as per the requirements of article138 of the Companies Law (no. 31/1990). **LLCs**: The number of board members is decided by the line ministry through the articles of incorporation of the companies in question.	
Board selection process	After the vacancy announcement is published, the selection process is conducted by a committee set – which must be composed of independent experts for large enterprises, and the line ministry appoints board members (based	**JSCs**: After the vacancy announcement is published, the selection process is conducted by the board nomination committee, or by human resources recruitment specialists for large companies, and board members are appointed by the AGM (with the cumulative voting method at the request of minority shareholders). **LLCs**:	

	Autonomous administrations established by the state	Companies established according to the Companies Law (no. 31/1990), fully or majority-owned by the state, or in which the state has a controlling stake	Subsidiaries (i.e. Companies in which one or more SOE(s) hold(s) a majority or controlling stake)
	on the proposal of independent experts for large enterprises).	The selection procedure, as well as the establishment of certain board committees, are decided by the line ministry through the articles of incorporation of the companies in question.	

While autonomous administrations were exempted from the application of insolvency rules until 2014, provisions were amended in 2014 by the Insolvency Law no. 85/2014 (Article 3 (2)) to apply to all SOEs equally, and as such does not protect any SOE from insolvency procedures according to their specific legal status. However, according to the provisions of Law no. 137/2002 (as amended by Law no. 173/2020) on measures to accelerate privatisation, SOEs slated for privatisation which ultimately remained in the state's portfolio are protected from insolvency proceedings.

According to Law no. 85/2014, the minimum amount of the claim in order to file the request to open insolvency proceeding is of RON 50 000 (amounting to approximately EUR 10 000) for both creditors and debtors. As of end 2020, 194 majority-owned SOEs were in different stages of insolvency proceedings, including 179 JSCs, 7 LLCs, five autonomous administrations and three national research and development institutes.

According to the Romanian authorities, all employees of state-owned enterprises are subject to the provisions of the Labour Code (Law no. 53/2003) and to the same conditions as those applicable to the employees of private enterprises, and as such do not benefit from special treatment according to the legal form of SOEs.

2.2.2. Political intervention and operational autonomy

> *B. The government should allow SOEs full operational autonomy to achieve their defined objectives and refrain from intervening in SOE management. The government as a shareholder should avoid redefining SOE objectives in a non-transparent manner.*

In Romania, state capture of SOEs has been a cause for concern. According to Romania's state ownership policy, political intervention in the operations of SOEs has been a widespread phenomenon, materialising through "political appointments to the management of public enterprises or even by illegal practices (such as preferential contracts) which are currently being investigated by competent bodies" (Section 3.9.3). The ownership policy further states that "while good practice calls for the General Assembly to meet at least once (and a maximum of twice) a year to approve the annual financial statements, there are cases where such meetings have been held monthly [and cases where the board has met as often as twice a month, compared to the normal practice of seven to eight times a year on average]" (Section 2.5). Finally, the ownership policy also posits that line ministries "very often call the executive managers of SOEs for bilateral meetings on operational management issues" (Section 2.7). While this can effectively hamper SOEs' operational autonomy, this can also give rise to information asymmetries in enterprises where the state is not the sole shareholder. Although provisions were adopted to address these concerns, according to information gathered by the review team, this practice seems to persist, as the Ministry of Transport reportedly continues to meet with executive managers of SOEs on a bilateral basis; however, when this is the case, information is reportedly disclosed to all shareholders.

Against this background, safeguards were introduced in the legal framework on SOEs, with Article 4 of GEO no. 109/2011 (as amended and approved by Law no. 111/2016) stating that "line ministries and the Ministry of Finance may not intervene in the administration and management of public enterprises". The law further provides that "the board of directors and executive management shall be competent to take decisions on the management of the public enterprise and shall be responsible, in accordance with the

law, for their effects". This is reiterated by the ownership policy, which states that line ministries should not intervene in the day-to-day operations of SOEs, which should be left to executive management, and that SOE boards are responsible for supervising executives on behalf of line ministries. While executive managers are selected by the board of directors, and are liable exclusively before the board (pursuant to the Companies Law no. 31/1990), GEO no. 109/2011 also introduced important provisions to ensure the appointment of professional and independent board and executive members in SOEs in order to address widespread concerns over politicised boards and executive management (see sub-section F.2 of section 2.2.6 for details).

In order to improve SOEs' autonomy and further insulate them from political interference, Law no. 111/2016 introduced "letters of expectations" as the main tool for the state to communicate broad mandates and objectives to SOEs, which are to be designed with a sufficiently low level of granularity in order to avoid 'micromanaging' SOEs' operations. These letters are drawn by line ministries – in consultation with shareholders owning at least 5% of the share capital – for individual SOEs in their portfolio, and set out expectations of the state for SOEs for the medium term (i.e. four years). In particular, they should include:

- A summary of relevant government programme(s), strategies and policies in the area/sector in which the SOE operates, including fiscal-budgetary policies
- The general vision of the ownership entity and other shareholders with respect to the mission and financial and non-financial objectives of the SOE, including information about any public policy objective, their cost and funding (in accordance with Article 11 of Annex 1 of GD 722/2016)
- Expectations regarding the dividend and investment policies applicable to the SOE
- A classification of the SOE into the following three categories: commercial, regulated monopoly or public service entity
- Recommended performance indicators (or binding performance targets in accordance with relevant legislation in force, if applicable)
- Other expectations.

According to applicable provisions, these broad mandates and objectives should be established and communicated to board and executive candidates as part of their selection process, and are also required to be made publicly available on the websites of line ministries. Upon their appointment, SOE board and executive members are in turn required to jointly draft an "administration plan" for approval by the board of directors, which should set out concrete actions and objectives to reflect the state's expectations – albeit at a higher level of granularity than those set out in the letter of expectations, and stand as a roadmap for the SOE during the board's term of office. In particular, these administration plans should set out missions to be undertaken over the medium term (i.e. four years), along with their associated resources and performance indicators. However, it should be noted that this process does not apply to temporary members directly appointed by the state, which currently account for the large majority of board and executive positions. As such, at present, financial objectives are set on a quarterly basis,[1] which de facto limits the operational autonomy of boards.

Overall, while these provisions seek to ensure that SOEs operate at arm's length from government, concerns remain with regard to the political insulation of SOE boards and key executives. Indeed, while the law provides for the appointment of professional and independent board and executive members, a loophole in the legal framework simultaneously allows for the appointment of interim board and executive members for a period not exceeding six months, which may bypass independence requirements. As mentioned in Chapter 1, while this provision was initially envisaged as a transitory measure, it has become widespread practice: as of end 2021, across the 50 largest SOE (in equity value and number of employees), 72% of board positions were temporary appointments, and 61% of executive managers were temporary appointments (Figure 1.15).

As mentioned above, these temporary appointments have been criticised by minority shareholders, as they are considered as exclusively based on political criteria and lacking relevant professional qualifications. Overall, this practice raises concerns about whether the operational autonomy of SOEs is effectively safeguarded.

2.2.3. Independence of boards

> *C. The state should let SOE boards exercise their responsibilities and should respect their independence.*

As mentioned above, Romanian SOEs have historically been subject to excessive political interference and state capture, notably through political appointees on boards and in executive positions. Starting in 2011, significant efforts were undertaken to professionalise boards and improve their performance management framework, in the aim of enhancing their autonomy and independence. While boards are required to be comprised of a majority of non-executive and independent members appointed according to clearly set criteria of professional qualifications and independence, they should also abide by applicable conflict of interest provisions and adopt a code of ethics within 90 days of their appointment. However, as mentioned above, the widespread practice of interim board appointments bypassing these criteria – as provided by Law no. 111/2016, albeit as a transitory arrangement – raises concerns around whether SOE boards can be considered to operate fully independently from company shareholders, management, and in some cases, regulators.

According to applicable provisions, in theory SOE boards are granted full responsibility and autonomy to define strategies for the company, in line with the objectives established by government. As previously mentioned, Law no. 111/2016 provides that general medium-term objectives be established by line ministries for individual SOEs at the start of the board selection process, in consultation with shareholders owning – either individually or collectively – at least 5% of the share capital of the enterprise. Based on these state expectations, board (and executive) candidates are required to prepare a "declaration of intent" presenting their vision for the development of the company, and within 90 days of their appointment (according to due process), selected board and executive members are required to jointly draft an "administration plan" outlining missions and objectives to be achieved during their four-year term, along with their allocated resources and performance indicators. However, as mentioned above, this process does not apply to interim appointees, which currently account for the large majority of board and executive positions, for whom financial objectives (derived from the approved) are set and reviewed on a quarterly basis.

According to the Romanian authorities, state representatives appointed on the board of SOEs according to the provisions of GEO no 109/2011 (i.e. maximum of two state representatives on the board of autonomous administrations, and one on the board of JSCs and LLCs), are subject to the same rules as those applicable to other board members. While the Companies Law no. 31/1990 also requires board members to "act in the interest of the company [and to] exercise their mandate with loyalty towards the company" (Article 144), according to the Romanian authorities, the mandate contracts of board members (including state representatives) usually also include confidentiality clauses, prohibiting them to disclose confidential information to third parties. However, as mentioned, the large majority of politically appointed (and politically connected) interim members on SOE boards legitimately raises concerns around the ability of boards to exercise independent judgment.

2.2.4. Centralisation of the ownership function

> *D. The exercise of ownership rights should be clearly identified within the state administration. The exercise of ownership rights should be centralised in a single ownership entity, or, if this is not possible, carried out by a co-ordinating body. This "ownership entity" should have the capacity and competencies to effectively carry out its duties.*

As mentioned above, while the exercise of ownership rights is rather decentralised across central government institutions, significant efforts to strengthen the state ownership function were undertaken in 2016 through the adoption of Law no. 111/2016 (amending and approving GEO no. 109/2011), which (i) required the establishment of 'corporate governance structures' within line ministries to exercise ownership rights, and (ii) attributed a monitoring function to the Ministry of Finance. However, evidence suggests that the Ministry of Finance currently has insufficient enforcement powers, and that the current institutional set-up of some ministerial corporate governance structures may not enable them to exercise their ownership function completely separately from other regulatory powers of the ministry. As such, consideration could be given to further centralising the ownership function.

Ownership rights exercised by line ministries' corporate governance structures

As mentioned in Chapter 1 above, in order to delineate the ownership function from other conflicting roles of the state with regard to regulating markets and setting industrial policies, Law no. 111/2016 requires government authorities overseeing SOEs (i.e. line ministries) to establish a dedicated "corporate governance structure" tasked with carrying out ownership rights over the public enterprises in their respective portfolios. While the staff of these corporate governance structures have the status of civil servants, they are required to be competent and operate at arm's length from the ministerial officials involved in the drafting of policies impacting the sectors in which SOEs operate.

According to the provisions of Law no. 111/2016, corporate governance structures are mainly responsible for: appointing state representatives to SOE boards; overseeing the selection process of independent executive and non-executive directors, and proposing candidates for appointment (in accordance with applicable requirements regarding qualifications and experience); establishing and monitoring performance objectives; monitoring the implementation of the remuneration guidelines, as well as conflicts of interests, and approving related party transactions. In practice, this entails that corporate governance structures are responsible for designing various corporate governance instruments for SOEs in their portfolios and for monitoring their implementation, including letters of expectations; evaluation grids for the declarations of intent of SOE board and executive candidates; performance indicators for SOE board members and executive managers; mandate contracts; and annual processes for evaluating the performance of the board.

However, as mentioned in Chapter 1, wide disparities seem to exist with regard to the resources of these corporate governance structures across line ministries, which can range from including three to 16 civil servants. These disparities in available resources do not seem to be explained by variations in the size of SOE portfolios across line ministries. Further, these structures do not seem to have been established in all central government institutions, as legally required. In some instances, it is also unclear what mechanisms are in place to ensure that they are effectively insulated from other ministerial departments with regulatory powers. This is specifically a concern for the corporate governance structure located in the Ministry of Transport, which retains important regulatory powers.

Monitoring and enforcement powers attributed to the Ministry of Finance

Law no. 111/2016 (Article 3) also attributes a "co-ordination" role to the Ministry of Finance (MoF), which is responsible for monitoring the implementation of corporate governance requirements (as provided by Law no. 111/2016, amending and approving GEO no. 109/2011) by both line ministries and SOEs. For this purpose, the MoF administers a reporting system to collect data from both public enterprises and their shareholding ministries, which it uses to prepare and publish an annual aggregate report including information on the economic and financial performance of SOEs, as well as assessments of the degree of compliance by SOEs and line ministries with corporate governance requirements (see Section 2.6.3 for details). While the MoF also has sanctioning powers in case of non-compliance with the provisions of the law, evidence suggests that the amounts of these monetary fines are insufficient to deter bad behaviour[2]

(Box 2.3). Last but not least, the MoF is also responsible for developing – together with relevant ministries – methodological rules and guidelines, such a methodology on performance evaluation, board and executive remuneration, and models of "letters of expectations" issued by line ministries to SOE boards (outlining the expectations of the state towards public enterprises for a period of four year). For details on the responsibilities of the MoF, see Table 1.9.

Overall, this framework represents an improvement compared to the previous institutional set-up where ownership was fully dispersed and is notably beneficial with regard to the streamlining of reporting requirements to enable co-ordinated monitoring of SOEs' economic and financial from both line ministries and the Ministry of Finance. However, it is unclear whether the Ministry of Finance currently has sufficient enforcement powers to foster compliance with corporate governance standards, notably those related to board and executive appointments (with regard to due process), as well as transparency and disclosure requirements.

Box 2.3. Amounts of sanctions targeting line ministries and SOEs, as provided by Law no. 111/2016

Sanctions targeting line ministries

According to Article 59 (1), a warning or fine of between RON 3 000 and RON 5 000 can be issued to line ministries if they fail to comply with the following requirements:

- Publish on their website the letter of expectations of shortlisted candidates for the position of board members of executive manager, both for autonomous administrations and other companies (as per articles 3 (1) (a) and (2) (c)).
- Publish the vacancy notice on board and executive management positions in at least two widely distributed economic or financial newspapers and on their website, along with the conditions to be met by the candidates and the criteria for their assessment (as per Article 5 (8) and Article 29 (7)).
- Corporate governance structures within line ministries are required to report the performance indicators used to monitor SOEs to the Ministry of Finance, on a quarterly basis (as per Article 57 (2)).
- Publish a report on SOEs in their portfolio on their website by the end of June of each year (as per Article 58 (1)).

Sanctions targeting SOEs

According to Article 59 (2), a warning or fine of between RON 2000 and RON 4 000 can be issued to the chairman of the supervisory board of SOEs if they fail to comply with the following requirements:

- Publish the vacancy notice on board and executive management positions in at least two widely distributed economic or financial newspapers and on the SOE website, along with the conditions to be met by the candidates and the criteria for their assessment (as per Article 5 (8) and Article 29 (7)).
- Publish on the SOE website the policy and criteria for the remuneration of board members (or non-executive directors) and executive managers (or executive directors), as well as the level of remuneration and other benefits offered to individual board members and executive managers.

In addition, according to Article 51 (1), a warning or fine of between RON 1 000 and RON 3 000 can be issued to the chairman of the supervisory board of SOEs if they fail to publish on the SOE's websites the following documents for access by shareholders and the general public:

- resolutions of the general meetings of shareholders within 48 hours of the date of the meeting
- annual financial statements, within 48 hours of approval
- half-yearly accounting reports, within 45 days of the end of the six-month period
- annual audit report
- the list of directors and executive managers, the CVs of the members of the supervisory board (or non-executive directors) and the members of the management board (or executive directors)
- reports of the board of directors/supervisory board
- annual report on the remuneration and other benefits granted to non-executive and executive directors during the financial year
- Code of Ethics, within 48 hours of its adoption, and on 31 May of each year, in the event of its revision.

If infringements lead to the establishment of remedial measures and a deadline for that purpose is laid down, failure to comply with the measures ordered, within the prescribed period, constitutes an administrative offence and is punishable by a fine, the minimum and maximum of which are, respectively, twice the limits of the fine laid down by law for the offence in respect of which remedial measures have been ordered.

Source: Romanian Government (2016[2]), *Law no. 111/2016*, https://legislatie.just.ro/Public/DetaliiDocumentAfis/178925

2.2.5. Accountability of the ownership entity

> *E. The ownership entity should be held accountable to the relevant representative bodies and have clearly defined relationships with relevant public bodies, including the state supreme audit institutions.*

While line ministries are not accountable to Parliament, the Ministry of Finance is required to submit to the government each year and publish on its website an annual report on SOEs, reporting on the activities carried out by autonomous administrations and companies in which the state holds a majority or full ownership stake. Line ministries are also required to publish each year on their websites a report on the SOEs in their portfolio, including information regarding the shareholding policy, restructuring processes, changes in the capital structure, and the financial and non-financial performance of SOEs. These reports are prepared based on information submitted by SOEs to line ministries on a quarterly basis regarding their financial and non-financial performance, which is then transmitted to the Ministry of Finance for centralisation and monitoring purposes.

The activities of SOEs and line ministries are subject to audits by the Court of Accounts (CoA), which itself reports to Parliament. According to the provisions of Law no. 94/1992, the CoA carries out performance and compliance audits of state-owned enterprises with more than 50% of state shareholding, which are planned according to an annual activity programme. If irregularities are found, a notice is sent to SOEs' management, as well as to the ownership entity, who are required to take measures to address the issues identified according to a set deadline. Audit reports are made publicly available on the CoA's website and are also presented to Parliament annually.

2.2.6. The state's exercise of ownership rights

> *F. The state should act as an informed and active owner and should exercise its ownership rights according to the legal structure of each enterprise. Its prime responsibilities include:*
>
> *F.1. Being represented at the general shareholders meetings and effectively exercising voting rights;*

State representation in general shareholders' meetings falls under the prerogative of corporate governance structures of line ministries, which are responsible for appointing state representatives to the general shareholders' meeting, who will vote according to the mandate received. According to the provisions of GEO no. 109/2011, state representatives of line ministries in the general shareholders' meeting are mandated to: (i) negotiate and approve the financial and non-financial performance indicators for the board of directors, (ii) monitor and assess the performance of the board of directors in order to ensure that economic efficiency and profitability are observed in the company's operations, and (iii) ensuring the transparency of the state shareholding policy in companies in the line ministries' portfolio. According to the provisions of Ordinance no. 26/2013 (Article 14), state representatives may not receive additional compensation for these duties.

The duties and responsibilities of the general meeting of shareholders are regulated by the Companies Law no. 31/1990, as well as by the provisions of companies' articles of associations. In particular, the articles of association prescribe conditions under which SOEs may require the approval of the general shareholders' meeting to adopt certain decisions. However, according to the state ownership policy, this had led to significant dysfunctions in the Romanian corporate governance system, with the general shareholders' meetings of SOEs convening much more often than international best practice would recommend (i.e. monthly in some cases). As such, the ownership policy recommends reviewing the articles of association of companies, as well as other statutes that "create the obligation or possibility to convene AGMs in situations other than those provided for by the Companies Law no. 31/1990".

> *F.2. [The state's prime responsibilities include:] Establishing well-structured, merit-based and transparent board nomination processes in fully- or majority-owned SOEs, actively participating in the nomination of all SOEs' boards and contributing to board diversity;*

In Romania, substantial reform efforts were undertaken since 2011 to improve the structure, selection criteria and transparency of the board nomination process, in the aim of professionalising boards and insulating them from political interference. At present, the selection and nomination process for board members (and executive managers) of fully and majority-owned SOEs is clearly defined and regulated by Law no. 111/2016 (amending and approving GEO no. 109/2011) and the methodological rules set in GD no. 722/2016. While different procedures apply according to the corporate form and size of SOEs (i.e. autonomous administrations, companies incorporated according to the Companies Law no. 31/1990, and "large" companies), they nonetheless share several common features.

For all SOEs, the selection process starts with an open call for applications, whereby line ministries and SOEs are required to publish the vacancy announcement on their websites as well as in at least two widely read newspapers, which should specify the candidate profile and the applicable assessment criteria. Candidate profiles are established by line ministries, in collaboration with SOE boards, and comprise two components: (i) a description of the role derived from the specific requirements of the SOE, and (ii) a description of the specific mix of skills and selection criteria for each candidate. While candidate profiles should take into account the general criteria set by Law no. 111/2016,[3] the specific selection criteria are established by the SOE's board nomination and/or independent experts (as applicable) by considering the company's activities and the requirements set in the letter of expectations established by the line ministry. In order to guide the selection process, additional criteria are set out in GD no. 722/2016 for consideration by line ministries (Article 33 of Annex 1) (Box 1.8).

For **fully incorporated companies**, candidates are selected by the board nomination committee, which may be assisted by independent human resources experts, whose costs are borne by the line ministry. It should be noted that if line ministries are to propose board candidates, these proposals should be subject to a prior selection made by a committee of human resources recruitment specialists. For 'large' companies (with at least 50 employees and a turnover of EUR 7.3 million), the selection process must be carried out by human resources recruitment companies or independent recruitment specialists. On the basis of the letter of expectation established by the line ministry, all shortlisted candidates are required to develop a declaration of intent. For **autonomous administrations**, the selection of board members is made by committees of human resources specialists set up by the line ministry, and for those with more than 500 employees, the line ministry is required to mandate human resources recruitment companies or independent recruitment specialists to carry out the selection procedure on its behalf.

While board members of **autonomous administrations** are appointed by the line ministry (based on the proposal of the independent expert when applicable), board members of **fully incorporated companies** are appointed by the general meeting of shareholders among the shortlisted candidates. Of note, shareholders owning (individually or collectively) at least 5% of the SOE's share capital may request the application of the cumulative voting method by written proposal within 15 days as of the date of publication in the Official Gazette of Romania of the convening notice of the general meeting of shareholders which has on its agenda the election of the board members. If the request is made by a shareholder holding more than 10% of the SOE's share capital, the application of the cumulative vote method is mandatory. The cumulative voting method allows shareholders to cast all of their votes for one or more shortlisted candidates(s). While these provisions do not apply to companies in which the state is a minority shareholder, the state is entitled to nominate board member of minority-owned SOEs (pursuant to the Companies Law no. 31/1990).

While these provisions can be considered comprehensive and make for a robust framework underpinning the board selection process, important caveats exist with regard to the state of its implementation. As previously mentioned, a loophole in Law no. 111/2016 currently allows for interim appointments of board members and executive managers (similar to the provisions introduced by Article 137 of the Companies Law no. 31/1990), who can be directly proposed by the state and should serve for a period not exceeding six months. While this provision was initially envisaged as a transitory measure, this practice remains widely used by line ministries to appoint SOE directors without due process. Although compliance has slightly increased since the process was introduced, as of end 2021, almost three-quarters of board positions in centrally-owned SOEs were temporary appointments (72%). It is also worth noting that in 2020, while the board selection process was initiated in 92 centrally-owned SOEs, it was completed in only 31 SOEs (Ministry of Finance, 2021[3]).

While this is reportedly due to a lack of candidates, this may also be taken to indicate that the selection process as required by law may be too cumbersome and resource-intensive for line ministries to implement in the current ownership framework. According to interviews with stakeholders, line ministries sometimes justify bypassing the process by explaining that they do not have the required budget to recruit independent experts, as required by law. Another reason may be that the length of the prescribed process.

> *F.3. [The state's prime responsibilities include:] Setting and monitoring the implementation of broad mandates and objectives for SOEs, including financial targets, capital structure objectives and risk tolerance levels;*

As mentioned above, significant efforts to improve the performance management framework for SOEs were undertaken in 2016, notably through the adoption of Law no. 111/2016 (amending and approving GEO no. 109/2011), as well as the introduction of Government Decision (GD) no. 722/2016 which sets out methodological norms for the establishment of performance indicators. In particular, Law no. 111/2016 provides for the introduction of "letters of expectations" to be drawn by ownership entities (i.e. line ministries) as part of the board selection process, setting out broad mandates and objectives for individual SOEs for the medium term (i.e. four years).

Of note, according to Annex 1 of GD no. 722/2016, a section of the letter of expectations should be dedicated to the dividend policy and the payment of net profits applicable to SOEs, over a period at least equal to the mandate contract of SOE management, as dividends received by the state from SOEs constitute a significant source of revenue for the state budget. Annex 1 of GD no. 722/2016 also prescribes that a section of the letter of expectations be devoted to the principles to be followed by SOE management with regard to its investment policy and its general capital expenditure, which should specify the following:

- general rules on the approval of future capital expenditure
- expectations related to the reduction of outstanding payments and receivables
- expectations regarding the quality of service and/or the management of the infrastructure
- expectations related to improving operational performance, such as labour productivity, cost reduction and so on, without an indication of the lines of action to improve operational performance, but only of expected results
- any concerns about the ex-post evaluation of performance indicators by the management and board of the public undertaking.

Based on these state expectations and upon their appointment, SOE board and executive members are then required to prepare an "administration plan" (for approval by the board of directors) outlining the mission of the enterprise, its objectives, strategic actions to be undertaken and the resources to be devoted to this end, as well financial and non-financial performance indicators to measure the performance of specific activities for a period not exceeding four years.

Based on these agreed medium-term objectives, specific key performance indicators are negotiated between board and executive members of individual SOEs and the respective corporate governance structures of line ministries and included in their "mandate contracts" upon their nomination, in accordance with the provisions of Law no. 111/2016. While mandate contracts should include the general objectives and KPIs established by the General Assembly, as well as those from the letter of expectations, they are also required to include quantifiable objectives regarding the reduction of outstanding liabilities, details on the management of receivables and their recovery, the implementation of the investment plan and the assurance of cash flow for the activities performed. As such, the performance indicators most often used are those recommended by Annex 2 of Government Decision no. 722/2016 (Article 35), including:

- **Financial indicators**, comprising outstanding payments, operating expenses, current liquidity, EBITDA, work productivity, etc.
- **Operational indicators**, comprising the achievement of public policies, quality of services/products, coverage of services/products, productivity of assets, customer satisfaction, etc.
- **Corporate governance indicators**, comprising the development of an internal management control system, establishing risk management policies and risk monitoring.

According to Article 35 of Annex 2 of GD no. 722/2016, when setting performance indicators, corporate governance structures may be assisted by independent experts. According to applicable legal provisions, the performance of board and executive members is assessed on an annual basis by the general meeting of shareholders (for JSCs and LLCs) and by the ownership entity (for autonomous administrations) – who may both be assisted by independent experts – considering the degree of achievement of financial and non-financial KPIs established in their contracts. These KPIs also underpin their variable remuneration component, which should be established based on calculation models set out by GD no. 722/2016 (see sub-section F.7 below for details).

Overall, while this procedural framework can be considered robust in theory, important caveats exist with regard to the state of its implementation, which seems to remain largely suboptimal in practice. As previously mentioned, this performance management framework is intertwined with the nomination process of board and executive members, which is itself often bypassed due to a loophole in Law no.

111/2016. This entails that KPIs are only set for board and executive members appointed according to due process as provided Law no. 111/2016, and not for those "interim" board and executive members appointed for a period not exceeding six months. As of end 2020, KPIs for board members had only been set in 31 centrally-owned SOEs (out of 151 SOE subject to the requirement), and in 26 SOEs for executive managers (Ministry of Finance, 2021[3]). At present, in practice, financial objectives of SOEs with interim appointees are established on a quarterly basis, and mainly include revenue and expenses forecasts derived from the approved budget.

> *F.4. [The state's prime responsibilities include:] Setting up reporting systems that allow the ownership entity to regularly monitor, audit and assess SOE performance, and oversee and monitor their compliance with applicable corporate governance standards;*

All majority-owned SOEs – regardless of their corporate form – are subject to the reporting requirements of GEO no. 109/2011 (as amended and approved by Law no. 111/2016). All SOEs are also required to abide by the provisions of the Accounting Law no. 82/1991, and to submit their annual financial statements, and the consolidated statements with the auditor's report, to the Ministry of Finance and their ownership entities within 150 days of the end of the financial year (i.e. by May of the following year).

For autonomous administrations, according to Article 9 of Law no. 111/2016, SOE boards are required to prepare "monthly reports to the supervisory public authority [regarding] the fulfilment of the financial and non-financial performance indicators, annex to the mandate contract, as well as other data and information of interest to the public supervisory authority, at its request", as well as to "prepare the semestrial report on the activity of the public enterprise and submit it to the public supervisory authority". For fully incorporated SOEs, according to Article 55, the board of directors must submit on a semestrial basis a report on the activity of the SOE at the general shareholders' meeting, which should include information on the performance of the mandate contracts of board members, details on the operational activities and financial performance of the company, as well as the semestrial accounting reports of the company. Further, according to Article 57, the board must also submit information (including statements and reports) relating to the activity of the SOE to the line ministry, Ministry of Finance, and shareholders with more than 5% of ownership on a quarterly basis and whenever requested "in the format and within the deadlines established by orders or circulars of the beneficiaries".

However, as outlined above, KPIs are currently rarely established for SOE board and executive members. At present, for SOE board and executive members appointed on an interim basis, only financial objectives (restricted to revenue and expense forecasts derived from the approved budget) are set on a quarterly basis. As such, for interim appointees who do not have financial and non-financial indicators established in their mandate contracts, the reporting requirements provided by law (as described above) do not apply.

Reporting requirements also apply to ownership entities (i.e. line ministries) regarding information collected from the SOEs under their oversight that should be transmitted to the Ministry of Finance for centralisation and monitoring purposes, subject to monetary fines in case of non-compliance. According to Order of the Minister of Finance no. 1952/2018, line ministries should submit to the Ministry of Finance information regarding: (i) the state of implementation of the corporate governance provisions of GEO no. 109/2011 (as amended by Law no. 111/2016) on a bi-annual basis; (ii) audits of the annual financial statements and the key financial and non-financial performance indicators from the mandate contracts of executive and non-executive directors of the SOEs in their portfolio, on an annual basis; and (iii) the list of SOE board members, on a bi-annual basis. Order no. 1951/2018 also provides that this information be transmitted electronically through the standardised online "S1100 form" administered by the Ministry of Finance and available on its website.[4] However, evidence suggests that line ministries do not always comply with these reporting requirements: as of end 2021, nine central government institutions had not reported information about 16 SOEs.

As mentioned above, this information is in turn used by ownership entities to assess the performance of SOE board and executive members against the financial and non-financial indicators set out in their

administration plans and mandate contracts. According to the Romanian authorities, this is done on an annual basis after the annual financial statements are approved, based on the directors' report and the report of the external auditor. However, KPIs remain widely not set, with the large majority of SOEs boards comprised of members appointed on an interim basis. As such, in practice, the performance of interim executive and non-executive directors of SOEs is assessed against the degree of achievement of the quarterly financial indicators, derived from the approved income and expenditure budget.

According to applicable provisions, SOEs' compliance with applicable corporate governance standards is also monitored by both ownership entities and the Ministry of Finance. Based on the information collected, line ministries and the Ministry of Finance are also required to prepare and publish on their respective websites an annual aggregate report on SOEs, reporting on their economic and financial performance, as well as on their overall degree of compliance with corporate governance requirements.

> *F.5. [The state's prime responsibilities include:] Developing a disclosure policy for SOEs that identifies what information should be publicly disclosed, the appropriate channels for disclosure, and mechanisms for ensuring quality of information;*

Financial and non-financial disclosure requirements are provided by Law no. 111/2016 (amending and approving GEO no. 109/2011), and apply to all majority-owned SOEs regardless of their corporate form (including autonomous administrations, and SOEs incorporated according to the Companies Law). In order to ensure equal access to information by all shareholders and the general public, the law requires SOEs to have their own websites (according to Article 40), and to publish – through the care of the board chair – the following information (according to articles 51 and 56):

- resolutions of the general shareholders meeting (within 48 hours of the meeting)
- annual financial statements (within 48 hours of approval)
- half-yearly accounting reports (within 45 days of the end of the six-month period)
- annual audit reports
- directors' reports (on 31 May of each year)
- the list of directors (or supervisory board members, in the case of two-tier board) and their CVs
- annual report on the remuneration and other benefits granted to non-executive and executive directors during the financial year
- Code of Ethics (within 48 hours of its adoption, and on 31 May of each year, in the event of its revision).

The law also provides for the application of sanctions in case of non-compliance, and prescribes the Ministry of Finance (through the General Directorate of Economic and Financial Inspection) to issue a warning or fine of between RON 1 000 and RON 3 000 to the board chair of non-compliant SOEs. However, evidence suggests that the sanctioning system might be ineffective, as non-compliance remains high among centrally-owned SOEs: as of end 2020, only around three-fifths of SOEs had complied with these requirements on average. Beyond mere compliance, it is also unclear how the quality of disclosures is ensured in practice. While the law prescribes ownership entities to monitor the implementation of corporate governance requirements (including transparency and disclosure requirements) by SOEs in their portfolio, it is unclear how individual corporate governance structures proceed to ensure that the public enterprises they oversee respect high disclosure standards, and if such procedures exist, whether they are standardised across line ministries.

> *F.6. [The state's prime responsibilities include:] When appropriate and permitted by the legal system and the state's level of ownership, maintaining continuous dialogue with external auditors and specific state control organs;*

According to Law no. 162/2017, SOEs are required to have an external audit, under the co-ordination of the audit committee. According to applicable provisions, the external auditor is selected by the audit committee, and appointed by the general meeting of shareholders for companies, and by the board for autonomous administrations, for a period of three years.

The report of the statutory auditor is submitted to the annual general shareholders' meeting, and informs the General Assembly's approval of the annual financial statements. Should the auditor's report include opinions with reservations, measures to address and prevent these concerns should be included in the annual report of the line ministry.[5]

> *F.7. [The state's prime responsibilities include:] Establishing a clear remuneration policy for SOE boards that fosters the long- and medium-term interest of the enterprise and can attract and motivate qualified professionals.*

According to the provisions of Law no. 111/2016 (amending and approving GEO no. 109/2011) and the methodological rules set in GD no. 722/2016, remuneration packages of non-executive directors (or supervisory board members, in the case of two-tier boards) should include both a fixed and variable component for all SOEs (regardless of their corporate form), which are both capped. While the amount of the fixed remuneration component may not exceed twice the average of the last 12 months of the average gross monthly salary in the sectors in which SOEs operate, the variable component is capped at 12 times the amount of the fixed component. These limits apply to both autonomous administrations and fully incorporated companies (pursuant to the Companies Law no. 31/1990). The amount of the fixed component may differ across board members according to the number of meetings they attend, their participation in board committees, and any other specific duties established in their mandate contracts.

According to applicable legal provisions, the variable remuneration component of non-executive directors should be based on the financial and non-financial KPIs negotiated and approved by the general shareholders' meeting (for corporatised SOEs). In particular, according to the provisions of GD no. 722/2016, the weight of financial and non-financial KPIs differs when determining the amount of the variable component, with corporate governance KPIs accounting for between 50-75% of the performance-based remuneration component, and financial and operational KPIs accounting for between 5-20%. Conversely, the variable remuneration of executive directors is mainly based on financial KPIs (25-50%), with corporate governance KPIs accounting for only between 10-25% of the amount. While this methodology applies to all SOEs regardless of their corporate form, for fully incorporated companies, the remuneration of board members should be formalised at the annual shareholders' meeting.

According to the Romanian authorities, the variable remuneration component is revised on an annual basis according to the level of achievement of the objectives included in the administration plan and the degree of fulfilment of the financial and non-financial performance indicators approved by the line ministry and included in the mandate contract. However, an important caveat of this framework is that performance-based remuneration is not granted to interim non-executive and executive directors, as KPIs are not set for temporary appointees. This can significantly reduce their remuneration levels, compared to the amount granted to duly appointed non-executive and executive directors (with performance indicators set in their mandate contracts).[6] As temporary appointments currently account for the majority of board positions among central and majority-owned SOEs, this may be a cause for concern as it may disincentivise board members to act in the best interest of the company.

2.3. State-owned enterprises in the marketplace

Consistent with the rationale for state ownership, the legal and regulatory framework for SOEs should ensure a level playing field when SOEs undertake economic activities.

2.3.1. Separation of functions

> *A. There should be a clear separation between the state's ownership functions and other state functions that may influence the conditions for state-owned enterprises, particularly with regard to market regulations.*

According to Romania's ownership policy, the state's regulatory and ownership functions should be clearly separated so as not to favour SOEs over private counterparts "under any circumstances". This effectively incorporates a recommendation included in a 2015 World Bank report entitled "decision-making, roles and responsibilities in state energy enterprises" issued as part of a technical assistance project (Frederick, 2015[4]). In practice, as mentioned above, this entails that line ministries acting as supervisory authorities are legally required (by Law no. 111/2016) to set up separate structures within their ministries (known as "corporate governance structures") responsible for exercising ownership rights and for monitoring the implementation of corporate governance provisions in SOEs in their respective ministerial portfolios. Importantly, these structures should be comprised of specialised staff different from those involved in policy making – including the drafting of sectoral policies, laws and opinions.

These provisions represent a significant improvement in the corporate governance framework of SOEs, as no clear requirements for delineating ownership from industrial/sectoral policy making functions existed before 2016, which then represented a risk for potentially conflicting interests and priorities to arise in the exercise of state ownership. However, evidence gathered by the review team suggests that some gaps remain in practice. While it is unclear whether corporate governance structures are sufficiently staffed to effectively exercise their ownership rights and oversight functions, in some line ministries which retain important regulatory power (e.g. Ministry of Transport) it is unclear how the ownership function is kept separate from other regulatory functions. Of note, energy SOEs undertaking supply and distribution activities operate under the oversight of separate central government institutions, which stands in line with applicable EU regulations.

SOEs (similar to private companies) are subject to oversight by the Competition Council, as well as by a number of sectoral regulatory bodies, the most relevant of which (in the case of SOEs) include:

- National Energy Regulatory Authority (ANRE)
- National Agency for Mineral Resources (ANRM)
- Romanian Railway Authority (AFER)
- Railway Surveillance Council
- Romanian Civil Aviation Authority.

In the case of the transport sector, as mentioned above, it should however be noted that only limited regulatory scope is attributed to the Romanian Railway Authority, and as such that significant regulatory powers remain within the Ministry of Transport where the ownership function is also located. Other potential concerns exist in the energy sector, where the energy regulator ANRE was investigated in 2019 by the European Commission over concerns of political interference that may have led to significant market distortions (Box 2.4).

Box 2.4. Allegations of political interference in ANRE in 2019

Allegations included:

- Reported meetings between politicians, government officials and ANRE's senior members outside working hours with a view to influence the regulation of electricity and gas prices,
- Allegations that a controversial emergency ordinance requesting the capping of gas and electricity prices, which led to significant market distortions this year, may have been written by at least one member of the regulator at the instructions of a senior government official.
- ANRE agreeing to cap electricity prices for producers following requirements stemming from the government's emergency ordinance 114/2018, despite overriding EU free market principles obligating free price formation embedded in the third energy package, which member states are required to uphold.
- Allegations that the regulator may have set suppliers' rate of return with a political goal in mind, rather than to create a fair market environment.

It should also be noted that the call for investigation against ANRE came shortly after parliamentary attempts to amend legislation that would exonerate senior ANRE members of any allegations of negligence that may have led to significant market distortions. The amendments also sought to increase the power of the regulator as a result of a 2% tax imposed by government on the gross margins of energy companies.

Source: ICIS (2019[5]), *Romanian regulator faces political influence claims*, https://www.icis.com/explore/resources/news/2019/11June10440676/exclusive-romanian-regulator-faces-political-influence-claims/

2.3.2. Stakeholder rights

> *B. Stakeholders and other interested parties, including creditors and competitors, should have access to efficient redress through unbiased legal or arbitration processes when they consider that their rights have been violated.*

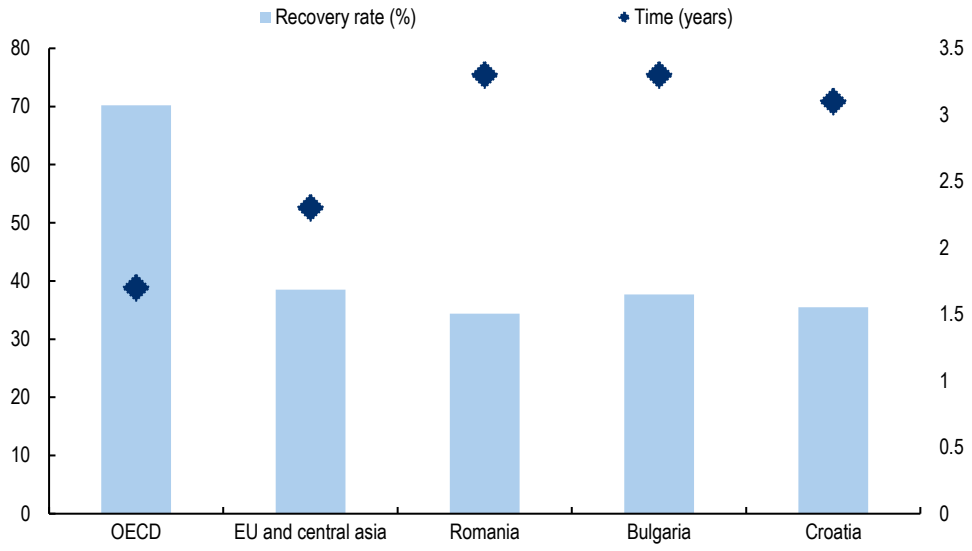
According to the Romanian authorities, stakeholders of SOEs are subject to the same legal and arbitrational mechanisms for redress as those applicable to stakeholders in private companies. The rights of contractual partners of SOEs are regulated by the contractual agreements concluded, in accordance with applicable laws and regulations (such as for instance GD no. 1/2018 for the approval of the general and specific conditions for certain categories of procurement contracts related to the investment objectives financed from public funds), and disputes are solved in arbitration courts.

Overall, the rights of creditors, consumers and business partners are regulated by applicable laws and regulations, including the Civil Code (Law no. 287/2009), Fiscal Code (Law no. 227/2015), Fiscal Procedure Code (Law no. 207/2015), and Insolvency Law (no. 85/2014). Contentious procedures carried out before competent courts, as well as arbitral procedures, are regulated by the Civil Procedure Code (Law no. 134/2010).

With regard to creditor protection in particular, Romania has made progress with regard to its insolvency framework (with the adoption of Law no. 85/2014). However, the time required to resolve insolvency proceedings (3.3. years on average in 2020) and share of claims recovered from insolvent firms (34.4% in 2020, compared to the OECD average of 70%) stand well below OECD and EU averages (but remain on par with its regional peers). It should also be noted that according to the World Bank's ease of doing

business index, as of 2020, Romania ranked higher than both OECD and EU averages regarding the quality of judicial processes for enforcing contracts (World Bank, 2020[6]).

Figure 2.1. Recovery rate and time of insolvency proceedings in Romania (as of 2020)



Source: World Bank (2020[6]), Rankings on Doing Business topics – Romania, https://archive.doingbusiness.org/en/data/exploreeconomies/romania#DB_ec

2.3.3. Identifying the costs of public policy objectives

> *C. Where SOEs combine economic activities and public policy objectives, high standards of transparency and disclosure regarding their cost and revenue structures must be maintained, allowing for an attribution to main activity areas.*

As far as could be established by the review team, SOEs that undertake both economic and public policy activities in Romania mainly operate in the transport sector. These SOEs, similar to private capital railway companies, are subject to Law no. 202/2016, EC financing regulations and GEO no. 12/1998, which require SOEs to maintain separate cost and revenue structures according to their type of activities (policy or commercial) and source of financing. Further, according to the provisions of Law no. 500/2002 on public finances, budget allocations (from the state budget) to finance SOEs' public policy objectives and their related costs should be included in SOEs' financial statements and publicly disclosed. This structural separation is subject to verification by the Railway Supervisory Board within the Competition Council.

2.3.4. Funding of public policy objectives

> *D. Costs related to public policy objectives should be funded by the state and disclosed.*

The public policy objectives of SOEs are defined in their normative acts and articles of association, where their sources of financing are also provided. According to Law no. 500/2002 on public finances, any expenditure made from the state budget allocated to public policy objectives is made on the basis of a law approved for this purpose, authorising related costs to be funded by the budget of line ministries. The budget of the SOE is approved by the general shareholders' meeting, thus providing for equal access to

information by all shareholders. As mentioned above, these subsidies should be included in the SOEs' revenue and expenditure budget and publicly disclosed.

For instance, in the case of CFR and CNAIR, the state budget law annually approves amounts from *inter alia* the state budget and European funds within approved investment programs for the management of transport infrastructures. According to the Romanian authorities, these allocations also finance related costs, such as those related to expropriations, utility taxes, and environmental taxes. In addition, railway service providers (such as Metrorex or CFR Calatori) also receive subsidies from the state budget within public service contracts.

2.3.5. General application of laws and regulations

> *E. As a guiding principle, SOEs undertaking economic activities should not be exempt from the application of general laws, tax codes and regulations. Laws and regulations should not unduly favour SOEs over their market competitors. SOE's legal form should allow creditors to press their claims and to initiate insolvency procedures.*

SOEs do not seem to benefit from any overarching exemptions from the application of laws and regulations applicable to private companies, nor from any special legal privileges (such as immunity to lawsuits for executive and board members). However, as previously mentioned, SOEs subject to provisions of Law no. 137/2002 (as amended by Law no. 173/2020) – which include those slated for privatisation which ultimately remained in the state's portfolio – are protected from insolvency proceedings. According to the law, "the budgetary creditors will suspend, until the transfer of the ownership right over the shares, the application of any forced execution measure started on the commercial company and will not take any steps to institute new such measures. The same provisions are applicable to the public institution involved, if it has the capacity of a creditor."

Romanian SOEs and private companies are both subject to the provisions prescribed by the Competition Law (no. 21/1996) and enforced by the Competition Council. State aid regulations must also be adhered to by all market players regardless of the nature of the aid (i.e. capital injections, fiscal benefits, guarantees and loans). EU Regulation no. 696/2014 on market abuse also applies to listed SOEs, including provisions on insider trading. The Competition Council has both a preventive function – involving the surveillance of markets and respective players, and a corrective function – aiming to correct market distortions and ensure fair competition. As the body responsible for the enforcement of the EU *acquis communautaires*, it also stands as the national contact point between the European Commission on one hand, and the public institutions which are state aid suppliers and beneficiaries on the other hand.

While competitive neutrality provisions apply to SOEs and private companies indifferently, distinct procedures exist with respect to passing or amending legislations bearing on SOEs, with regard to analysing their respective implications on competition and state aid. In particular, all draft government decisions or laws presented before government must fill in a rubric on its "implications on competition and state aid". When that rubric is triggered for government decisions or laws on SOEs (including for instance those approving the tariffs or budget of an SOE), unlike for private companies, the Competition Authority submits an opinion to government on their implication for competition. This procedure has had positive results in the past with regard to safeguarding a fair competitive environment, and has for instance enabled the inclusion of a provision in a government emergency ordinance prescribing SOEs operating in the energy sector to sell the majority of their product through transparent markets (i.e. OPCOM or BRM).

Certain sectors are reportedly subject to particular attention by the Competition Authority, including the utilities, rail and naval sectors, where SOEs have in the past been identified and sanctioned for engaging in anti-competitive behaviours and abuses of dominance – notably leading to the issuance in 2010 and 2006 respectively of substantial fines of EUR 24 million for the National Post Office, and EUR 7 million for the state freight operator CFR Marfa (Competition Council, 2010[7]; Competition Council, 2006[8]). More recently, Hidroelectrica was also investigated for alleged abuse of dominance (Competition Council,

2018[9]). The Competition Authority also reports specific concerns with regard to public bid rigging, which has been the subject of specific investigations – including in but not restricted the coal transport sector (Competition Council, 2019[10]). As such, the Competition Authority has published a guide for implementing the OECD bid rigging best practices, especially in conjunction with public procurement procedures (Competition Council, 2016[11]).

Regarding EU state aid regulations, while the decision on the merits of awarding state aid belongs to the relevant line ministries, the assurance of the conformity of the state aid with applicable regulations falls within the purview of the Competition Authority. As such, the Competition Authority ensures the implementation of the OECD Recommendation on Competitive Neutrality (adopted by the OECD Council in May (2021[12])). Of note, some SOEs have recently been found by the European Commission to have benefitted from unlawful state aid, including the energy producer Hunedoara Energy Complex (CE Hunedoara) which had to repay around EUR 6 million of incompatible state aid, and more recently CFR Marfă which needs to return EUR 570 million of incompatible state aid (EC, 2018[13]; EC, 2020[14]).

2.3.6. Market consistent financing conditions

> *F. SOEs' economic activities should face market consistent conditions regarding access to debt and equity finance.*
>
> *In particular:*
>
> *F.1. SOEs' relations with all financial institutions, as well as non-financial SOEs, should be based on purely commercial grounds.*

According to the Romanian authorities, the creditor/debtor relationship is conducted at arm's length from government, on purely commercial terms and free from undue influence by government officials. Further, financial institutions controlled by the state may be creditors for other SOEs, in accordance with the general rules applicable to all enterprises. It should however be noted that there appears to be no cross-requirements for benchmarking SOE transactions based on transactions carried out by private operators in comparable situations.

In terms of the main creditors of SOEs, as of end 2020, the total debts of SOEs amounted to RON 83 136 billion (USD 20 962 billion), out of which around 81% was owed to "private companies", 5% to banks, 5% to the state's consolidated budget, 2% to SOEs, and 7% to "other creditors", which mainly represent SOE debts to employees. Of note, SOE debts to "private companies" mainly represent the amount remaining to be amortised from the concession contract that CNAIR concluded with the Ministry of Transport and Infrastructure (total of RON 63.7 billion).

> *F.2. [SOE's economic activities should face market consistent conditions regarding access to debt and equity finance. In particular] SOEs' economic activities should not benefit from any indirect financial support that confers an advantage over private competitors, such as preferential financing, tax arrears or preferential trade credits from other SOEs. SOEs' economic activities should not receive inputs (such as energy, water or land) at prices or conditions more favourable than those available to private competitors.*

Although under the law, SOEs do not benefit from direct competitive advantage compared to private companies in like circumstances, it can be argued that the recent cases of unlawful state aid granted to Hunedoara Energy Complex and CFR Marfa (described above) raise concerns about the preferential treatment of SOEs in the energy and transport sectors. Overall however, according to the Romanian authorities, SOEs are subject to a similar tax treatment as private competitors in like circumstances, and are therefore liable to enforcement measures by the tax administration in accordance with applicable laws and regulations. While commercial credits between SOEs are not allowed, in practice SOEs can accumulate tax arrears like private companies subject penalties, according to applicable laws and regulations.

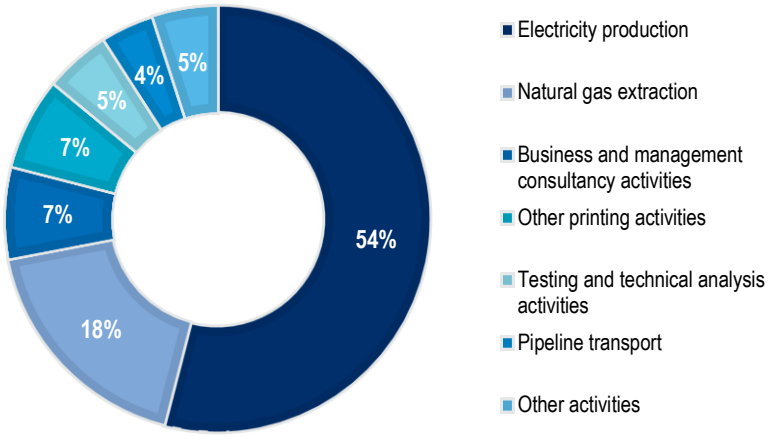
> *F.3. [SOE's economic activities should face market consistent conditions regarding access to debt and equity finance. In particular] SOEs' economic activities should be required to earn rates of return that are, taking into account their operational conditions, consistent with those obtained by competing private enterprises.*

According to the Romanian authorities, there are apparently no formal requirements for SOEs engaged in competitive activities to achieve a minimum rate-of-return on those activities. In addition, SOEs differ significantly from private companies with regard to their dividend pay-out ratios.

Government Ordinance no. 64/2001 on the distribution of profit (in national enterprises, national companies and fully or majority state-owned companies, as well as autonomous administrations), approved with modifications by Law no. 769/2001, provides that the accounting profit left after deduction of the corporate income tax should be distributed in a minimum share of 50% transfers from the dividends of national enterprises, national companies and fully or majority state-owned companies, to the state budget. Of note, Article 1 of GO no. 64/2001 was amended by Government Emergency Ordinance no. 29/2017, which now provides that SOEs' financial reserves may be redistributed in the form of dividends to the state or local budget. This law also stipulates that the result carried forward in the balance on 31 December of each year (reported result) may be distributed in the form of dividends to the state or local budget.

This decision was based on the government's findings that "the reserves established as a self-financing source from the undistributed profit for compulsory destinations [were] not used by companies where the state holds a majority stake, [as] the surplus is reflected in their liquid assets". Further, according to GEO no. 114/2018, it was established that a percentage of 35% of the SOEs financial reserves found in cash should be distributed as dividends. As such, since 2016, some SOEs have distributed 85%-90% of their net profit as dividends to the state budget, and mainly operate in the energy sectors (Figure 2.2).

Figure 2.2. Structure of dividends / payments distributed to the state budget from the profit realised in 2020 by SOEs



Source: (Ministry of Finance, 2021[3]).

2.3.7. Public procurement procedures

> *G. When SOEs engage in public procurement, whether as bidder or procurer, the procedures involved should be competitive, non-discriminatory and safeguarded by appropriate standards of transparency.*

Similar to private companies, all SOEs are required to abide by the provisions of Law no. 98/2016 on public procurement and Law 99/2016 on sectoral procurement, along with the methodological norms set in GD

no. 394/2016 and GD no. 395/2016. These laws and regulations transposed the provisions of the EU Directive on procurement (EC 2014/25/EU) into national legislation, and treat public and private enterprises – when acting as bidders – equally. SOEs operating in competitive markets do not seem to be exempted from the application of these provisions. In order to ensure transparency of the procurement process, Law no. 98/2016 mandates the publication of the contract notice in the e-Procurement system, applicable to all procurement procedures (except negotiations without publication) (Article 145 and 215). SOEs are also required to publish notices of procurement awards in the e-Procurement system within 30 days of the award, and must also publish a notice in case of negotiations.

However, evidence suggests the existence of restrictive tendering and single bidding in the energy sector. According to a study of the public procurement from 2015 to 2020 in all energy sub-sectors in Romania, contracting authorities seem to award contracts through less-transparent procedures. In the electricity sector in particular, evidence suggests that 42% of contracts were negotiated without prior publication procedure, while in the oil and gas sub-sector, the majority of contracts (34%) were awarded via open procedures, followed by negotiated procedures with bidders (31%). Overall, the majority of contracts were awarded using the lowest price criterion (95% for electricity and 96% for oil and gas), thus avoiding the evaluation of qualitative, social and/or environmental aspects of tenders (CSD, 2022[15]).

Overall, financial audits of SOEs have also regularly revealed irregularities in the area of public procurement, thus suggesting that it remains an area of high risk across all sectors (Box 2.5).

Box 2.5. Selected cases of irregularities in public procurement involving SOEs, according to audits by the Court of Accounts

Transelectrica

- Inefficient use of funds for the implementation of an investment project, through the purchase of similar equipment at different prices, contracted in the same year (in the estimated amount of RON 3 348 000), as well as through the purchase of equipment/licenses (in the estimated amount of 7 930 000), which have not been installed, having expired warranty.
- Inefficient use of funds, in the amount of RON 7 652 000 (without VAT), by accepting for payment some works carried out by SC Smart SA, overvalued, that consisted in incorporating some materials (switches) purchased at prices higher than those existing on the market.
- Failure to comply with the legal provisions regarding the purchase of IT equipment, meaning the purchase of products/services at prices higher than the prices practiced on the market, having the consequence of making additional payments in the amount of RON 8 770 000.

SMART

- The purchase of goods and services at overvalued prices compared to the market price (switches, tool kits, measurement and control equipment, machine tools, snow blowers, tires), resulting in additional payments in the amount of 10 596 000.

Apelor Minerale

- The entity had unjustified expenses in the amount of RON 55 000 for the procurement of consulting services in the management of delivery contracts, although the company, through the Administrative Commercial Department, had specialised personnel with duties in the field, set through the Organization and Operation Regulation and through job descriptions.

CNCIR

- Inefficient use of funds, estimated at RON 379 000, through the purchase of services/goods (technical expertise, feasibility studies, trolleys/backpacks), at overvalued prices, respectively at prices higher than those existing on the market at the time of the purchase.

Source: Information provided by the Romanian authorities.

2.4. Equitable treatment of shareholders and other investors

Where SOEs are listed or otherwise include non-state investors among their owners, the state and the enterprises should recognise the rights of all shareholders and ensure shareholders' equitable treatment and equal access to corporate information.

2.4.1. Ensuring equitable treatment of shareholders

> *The state should strive toward full implementation of the OECD Principles of Corporate Governance when it is not the sole owner of SOEs, and of all relevant sections when it is the sole owner of SOEs. Concerning shareholder protection this includes:*
>
> *A.1. The state and SOEs should ensure that all shareholders are treated equitably.*

Equal treatment of all shareholders is encouraged by line ministries and stands as a core recommendation of Romania's state ownership policy issued in 2016. As mentioned in other sections, this is because of concerns around excessive political intervention in SOEs in the past, which notably entailed a high number of bilateral meetings between the state and SOE executives, which can give rise to information asymmetries in SOEs where the state is not the sole shareholder.

In particular, the protection of minority shareholders is regulated by Law no. 24/2017 on issuers of financial instruments and market operations, FSA Regulation no. 5/2018 on issuers of financial instruments and market operations, and GEO no. 109/2011. These laws and regulations provide non-state shareholders with the same rights as those of the majority shareholders, the most relevant of which include:

- **The right to be informed** with regard to any information related to the way the company is organised and operates (e.g. type of contracts concluded, identification of business partners, legal status of the company's assets, estimates of the company's profit, content of annual financial documents, regime investments, etc.).
- **The right to participate in general shareholders' meetings and to cast a vote:** all shareholders have the right to participate and cast their vote in the general meetings of shareholders. Upon reaching certain value thresholds in relation to the size of the company's share capital (e.g. shares representing 5% of the total share capital), the minority shareholder has a number of additional prerogatives (e.g. the right to request the convening of the general meeting of shareholders, the right to request the introduction of new items on the agenda of the shareholders' meeting, etc.).
- **The right to request the appointment of directors by the cumulative voting method:** in the case of listed companies (public limited companies), as well as SOE subject to GEO no. 109/2011, minority shareholders exceeding a certain share threshold may request the appointment of the directors of the company by the cumulative voting method.

- **The right to challenge the decisions of the general meeting of shareholders:** in a company the majority will be imposed on the will of the minority, in which case the decisions of the general meeting of shareholders are binding even for shareholders having voted against or absent from the meeting. However, to the extent that the decision taken by the majority shareholder contravenes the company documents and / or the law, minority shareholders have the possibility to challenge the validity of the decision before the courts.
- **The right to receive dividends from the company's profit:** in the event that the company registers a profit, it can be distributed in the form of dividends to shareholders.

Obligations, responsibilities and protection mechanisms of minority shareholders are provided by articles 40-41 of GEO no. 109/2011 (as amended and approved by Law no. 111/2016), and Article 117 of the Companies Law no. 31/1990. Redress mechanisms are stipulated in Article 43 of GEO no. 109/2011, and Article 132 of the Companies Law, as well as by other regulations in force. Of note, if they consider that their rights have been violated, minority shareholders may challenge in court any decision they deem discriminatory or illegal.

Box 2.6. Proposed share capital increase at Bucharest Airport challenged before the court by Fondul Proprietatea

Fondul Proprietatea investment fund, minority shareholder (20%) of Bucharest Airport, filed a claim of annulment in 2021 against the extraordinary general shareholder meeting (EGSM) resolution no. 15 (of 26 October 2021), which approved the increase of the share capital from RON 143 772 150 to RON 4 912 283 610 as a result of the contribution in kind of the Romanian State with the land inside the Băneasa airport, giving Fondul Proprietatea the option to participate by subscribing for 95 370 229 shares with a value of RON 953 702 290 to avoid being diluted. This increase would also have created legal risks for the listing of Bucharest Airport (which is the primary candidate for listing from the Ministry of Transport's portfolio), which would also have endangered one of the milestones included in Romania's Recovery and Resilience Plan.

The representatives of the Romanian Government justified the high value of the land by the high interest of the real estate investors in the area where the airport is located. Fondul reportedly proposed to the Ministry of Transport to cancel the general meeting resolution and re-do the valuation with the help of a reputable independent valuator, but the ministry reportedly took no action. Upon the filing of the complaint by Fondul, ANEVAR (the National Association of Authorised Appraisers from Romania) sanctioned the valuator who performed the valuation report, with a suspension from the profession for six months.

Fondul's request for the suspension of the EGSM decision regarding the share capital increase was admitted by the Bucharest Court of Appeal in January 2022.

Source: https://www.fondulproprietatea.ro/files/live/sites/fondul/files/en/investor-reports/2021/Share%20cap%20increase%20Buch%20Airp.pdf?mc_cid=22a3c2ae13&mc_eid=607bd7d763

> *A.2. [Concerning shareholder protection this includes:] SOEs should observe a high degree of transparency, including as a general rule equal and simultaneous disclosure of information, towards all shareholders.*

Regarding the mechanisms in place to ensure that all shareholders have equal and timely access to material information needed to make informed investment decisions, the convening notices of the general meetings of shareholders are published in the Official Gazette of Romania, Part IV (art. 117 para. (3) in

Law no. 31/1990 republished, as subsequently amended and supplemented) and on the company's web page. Further, every shareholder may address to the board of directors/management written questions regarding the company's activity, before the date of the meeting (art. 1 172 para. (3) in Law no. 31/1990) and the answer shall be given either during the meeting or be published on the company's website. However, it should be noted that almost 40% of central and majority-owned SOEs had not published resolutions of the general shareholders' meeting in 2021. Companies whose shares are admitted for trading are also required to publish with the Bucharest Stock Exchange periodical (quarterly, half-yearly and annual) reports, reporting on key financial and non-financial information.

> *A.3. [Concerning shareholder protection this includes:] SOEs should develop an active policy of communication and consultation with all shareholders.*

As far as could be established by the OECD review team, SOEs are not required to develop an active policy of communication and consultation with all shareholders, nor are they encouraged to go beyond the standards prescribed by law. Conversely, as flagged in other sections, concerns may exist with regard to bilateral (i.e. informal) communication channels between the state and SOEs (especially those with a majority of politically appointed directors), which may negatively hamper minority shareholder rights.

> *A.4. [Concerning shareholder protection this includes:] The participation of minority shareholders in shareholder meetings should be facilitated so they can take part in fundamental corporate decisions such as board election.*

As mentioned above, applicable laws and regulations allow all shareholders to cast a vote in the general meetings of shareholders. In the case of companies whose shares are admitted for trading, the issuers are required to elaborate procedures that give to the shareholders the possibility to vote in person or in absentia (according to Article 92 of Law no. 24/2017). The shareholders can be represented in the general meeting of shareholders by other persons than shareholders, based on a special or general power of attorney.

Board members are elected and revoked by the general meeting of shareholders, through secret vote, under conditions of fulfilment of requirements of attendance of the shareholders and with the majority of the votes cast (according to Article 112 of the Companies Law no. 31/1990). According to the Companies Law no. 31/1990, decisions are taken with the majority of vote held by the shareholders present or represented. The decision of amendment of the main object of activity of the company, of reduction or increase of the share capital, of changing the legal form, of merger, division or dissolution of the company shall be taken by a majority of at least two-thirds of the voting rights held by the shareholders present or represented. The articles of incorporation may provide requirements for a bigger quorum and majority.

It should be noted that the main law on SOEs (Law no. 111/2016, amending and approving GEO no. 109/2011) provides for a stronger legal framework than the Companies Law and Capital Markets Law in terms of the right of minority shareholders to use the cumulative voting method to nominate board members. According to the provisions of Law no. 111/2016, shareholders owning (individually or collectively) at least 5% of the SOE's share capital may request the application of the cumulative voting, and if the request is made by a shareholder holding more than 10% of the SOE's share capital, the application of the cumulative vote method is mandatory.

> *A.5. [Concerning shareholder protection this includes:] Transactions between the state and SOEs, and between SOEs, should take place on market consistent terms.*

In Romania, there appears to be no special rules or procedures to ensure that transactions in the SOE sector are executed on market consistent terms. According to the Romanian authorities, as mentioned above, all transactions between the state and state-owned enterprises are analysed in terms of the measure in question observing the economic, budgetary and financial policies of the state. Any draft measure susceptible of representing state aid shall be analysed by reference to applicable procedures and

regulations in the field of state aid. However, the irregularities detected in procurement (as outlined in previous sections) may cast doubts over the market consistency of other SOE transactions as well.

2.4.2. Adherence to corporate governance code

> *B. National corporate governance codes should be adhered to by all listed and, where appropriate, unlisted SOEs.*

Listed SOEs are required to abide by the Bucharest Stock Exchange (BVB) Corporate Governance Code, on a comply-or-explain basis. However, it seems that not all SOEs do: the board of Transgaz currently includes a Secretary of State from the Ministry of Energy, which is not in line with listing rules. Further, all members of the Romanian-American Chamber of Commerce (AmCham) – including both SOEs and private companies – are also required to adhere to AmCham Romania Code of Corporate Governance (2010[16]).

2.4.3. Disclosure of public policy objectives

> *C. Where SOEs are required to pursue public policy objectives, adequate information about these should be available to non-state shareholders at all times.*

As mentioned in previous sections, according to the provisions of Law no. 111/201 (amending and approving GEO no. 109/2011), medium-term objectives for SOEs – including information about any public policy objective, their cost and funding – are set in the letters of expectation drawn by line ministries for individual SOEs in their portfolio, in consultation with shareholders owning at least 5% of the share capital of the company. In addition, costs related to public policy objectives are funded by the state through budget allocations which are approved on an annual basis, and disclosed in SOEs' budget. As SOEs' budgets are formally approved by the general shareholders' meeting, this ensures equal access to material information by all shareholders. Overall, according to Law no. 111/2016, all relevant information that allows the adoption of a decision is shared with all shareholders through materials which form the basis of the items on the agenda of the general shareholders' meeting (such as decisions of the board, analysis and substantiation notes, etc.).

2.4.4. Joint ventures and public private partnerships

> *D. When SOEs engage in co-operative projects such as joint ventures and public-private partnerships, the contracting party should ensure that contractual rights are upheld and that disputes are addressed in a timely and objective manner.*

Co-operative projects such as concessions, public-private partnerships (PPPs), management delegation contracts and joint ventures are regulated by Law 100/2016 on works concessions and service concessions, GEO 39/2018 on public-private partnerships, Law 51/2006 on community services of public utilities, the Commercial Code and the Civil Code. Of note, management delegation contracts are awarded in compliance with the provisions of Law 100/2016 on works concessions and service concessions. The legal frameworks regulating concessions and PPPs mainly differ in one respect. In the case of PPPs, the law provides that more than half of the revenues to be obtained by the project company from the use of the good(s) or public service activity that is the subject of the project are sourced by payments made by the public partner or by other public entities for the benefit of the public partner (as per Article 2 of GEO 39/2018 on public-private partnership).

SOEs may be involved in concession projects and public-private partnerships, insofar as they have the quality of contracting authorities (according to Article 7 of GEO 39/2018 and Article 9 of Law 100/2016). In practice, concessions and management delegation contracts are used more often than PPPs and joint ventures in Romania, which is due to the fact that at present, there are no guidelines and methodologies

to facilitate the preparation and implementation of projects for PPPs. In general, the settlement of disputes must be negotiated and transposed into the documents which shall be signed by the parties (agreements, articles of incorporation, and in the case of joint ventures, contracts).

Overall, it should be noted that a few high-profile cases have highlighted that some SOEs have entered into contracts on unfavourable terms in recent years, which have reportedly caused insolvency. This includes Hidroelectrica, which entered into 11 "bad contracts" reportedly detrimental to the company due to unfavourable clauses before being declared insolvent,[7] as well as Oltchim, which seems to have entered into several ineffective contracts before going into insolvency, some of them reportedly with connected parties.[8]

Box 2.7. Contractual disputes in transport infrastructure

As major construction and rehabilitation projects are often subject to delays (especially in transport infrastructure, which ranks among the least developed in the EU according to the European Investment Bank), Romanian authorities have had to deal with a rising number of contractual disputes or claims over the past decade in which contractors are requesting financial compensation for years of delays. For instance, between 2007 and 2019, the road, railway, and metro companies received claims from contractors amounting to EUR 2.2 billion. Evidence suggests that some contractors have taken advantage of this situation and even succeeded in obtaining financial compensations exceeding their effective financial losses.

Against this background, Romania concluded a project with EIB under the PASSA agreement requesting advice in contract and claims management, whereby it was found that although the claims for prolongation were generally well-founded, this was not the case for the financial claims, which in many cases were substantially higher than the costs incurred by the contractors. Under the terms of the project, it is estimated that the Romanian authorities were able to lower the contractors' financial claims by 39%, on average. Over the course of a year, only EUR 50 million out of the EUR 85 million claimed by contractors for railway and metro disputes, were granted.

Source: https://www.eib.org/en/products/advisory-services/passa/romanian-transport-infrastructure-roller-coaster-ride.htm

2.5. Stakeholder relations and responsible business conduct

The state ownership policy should fully recognise SOEs' responsibilities towards stakeholders and request that SOEs report on their relations with stakeholders. It should make clear any expectations the state has in respect of responsible business conduct by SOEs.

2.5.1. Recognising and respecting stakeholders' rights

> *A. Governments, the state ownership entities and SOEs themselves should recognise and respect stakeholders' rights established by law or through mutual agreements.*

While there appears to be no legal provisions, regulations or mutual agreements that establish specific rights for the stakeholders of Romanian SOEs (e.g. employees, consumers and creditors), the rights of trade unions to information and consultation is recognised by law. In particular, information and consultation procedures are regulated by Law no. 53/2003 on the Labour Code, Law no. 467/2006 on establishing the general framework for informing and consulting employees, and Law no. 62/2011 of the

social dialogue. The relationship between employees and the management of SOEs is regulated by the Collective Labour Agreement, which establishes the rights and obligations of both parties. There are no special rule for employee board representation in SOEs. Regarding the protection of whistleblowers, Law no. 571/2004 "on the protection of personnel from *public authorities and public institutions* who report violations" applies equally to SOEs (including both central and local autonomous administrations, and SOEs incorporated according to the Companies Law).

For companies whose shares are admitted to trading, Law no. 24/2017 regarding the issuers of financial instruments and market operations, and Regulation no. 5/2018 of the Financial Supervisory Authority, provide for a series of continuous information and reporting requirements, in order to provide all shareholders and interested parties with up-to-date information on aspects related to the company's management activity, remuneration policy, significant transactions, and financial audit.

Regarding special consultations with stakeholders groups, Law no. 292/2018 on assessing the impact of certain public and private projects on the environment provides that the procedure for assessing the environmental impact of a project be an integral part of the procedure for issuing development approval, and establishes in this regard clear mechanisms by which the general public can be consulted on a project (according to Article 2 (5)e.).

2.5.2. Reporting on stakeholder relations

> *B. Listed or large SOEs should report on stakeholder relations, including where relevant and feasible with regard to labour, creditors and affected communities.*

In Romania, EU Directive 95/2014 NFRD (Non-Financial Reporting Directive) was transposed into national legislation through Order of the Ministry of Finance 1938/2016, and later through Order of the Ministry of Finance 3456/2018, which extended the initially envisaged scope of the Directive to all companies regardless of size with more than 500 employees. As such, all large entities (including SOEs) with more than 500 employees are required to include in the director's report a non-financial statement containing information regarding environmental, social, and employee-related aspects, as well as aspects related to human rights, and the fight against corruption and bribery. In particular, it should contain the following information:

- a brief description of the entity's business model
- a description of the policies adopted by the entity with respect to these aspects, including the necessary diligence procedures applied
- the results of those policies
- the main risks related to these aspects which arise from the entity's operations, including, when relevant and proportional, its business relationships, its products or services which could have a negative impact on those fields and the manner in which the entity manages those risks
- key non-financial performance indicators relevant for the entity's specific activity.

In spring 2022, the Bucharest Stock Exchange (BVB) also published its first environmental, social and governance (ESG) reporting guidelines for listed companies,[9] developed with the technical assistance of the European Bank for Reconstruction and Development (EBRD). The ESG Reporting Guidelines for issuers were prepared in co-operation with sustainability consultancy Steward Redqueen, and intend to provide clear and comparable information to investors and assist compliance with forthcoming EU reporting requirements under the Sustainable Finance Disclosure Regulation (SFDR) and the Corporate Sustainable Reporting Directive (CSRD)" (EBRD, 2022[17])

In addition, for SOEs subject to Law no. 111/2016 (amending and approving GEO no. 109/2011), according to Article 52, boards are required to inform shareholders of all transactions concluded with SOE board members, employees, controlling shareholder, as well as their spouse, relatives or in-law up to the fourth

degree, or to convene the shareholders' meeting to approve such transaction if its value accounts for more than 10% of the SOEs' net assets or turnover. The board should also inform shareholders of transactions of at least the equivalent of EUR 100 000 concluded with another SOE or line ministry. These transactions should also be reported in the board's annual reports.

2.5.3. Internal controls, ethics and compliance programmes

> *C. The boards of SOEs should develop, implement, monitor and communicate internal controls, ethics and compliance programmes or measures, including those which contribute to preventing fraud and corruption. They should be based on country norms, in conformity with international commitments and apply to the SOE and its subsidiaries.*

In Romanian SOEs, the company's risk policy is submitted by the board for approval by the general shareholders' meeting. Further, according to applicable provisions, internal management control systems, risk management policies and risk monitoring are required to be implemented in SOEs as part of the "corporate governance indicators" set for individual board members and executive managers upon their appointment, as part of the objective-setting process. According to GD no. 722/2016, the degree of compliance with these corporate governance KPIs should determine between 50-75% of the variable remuneration of board members, and between 10-25% of the variable remuneration of executive managers. However, as this is linked to the due appointment process which is itself often bypassed, KPIs – including corporate governance indicators – remain widely unused for individual SOE board and executive members. While in some companies – notably within the financial sector – a risk committee is formed within the board, it is unclear whether adequate risk management frameworks have been established in all SOEs.[10]

In spite of this, all SOEs are subject to Law no. 672/2002 on internal public audit, which requires internal auditors to independently assess risk management, control and governance processes, and to report directly to the board. According to Law no. 162/2017, SOEs are also required to have an external audit under the co-ordination of the audit committee, which is responsible for selecting the external auditor, for ensuring his/her independence and objectivity, and for monitoring the external audit of financial statements. While this stands in line with good practice, some issues may exist with regard to the independence of the audit committee in some SOEs. Indeed, while SOEs are also required to establish an audit committee comprised of a non-executive and independent members, for SOE boards with a majority interim appointees bypassing independence criteria, it may be inferred that the composition of the audit committee may not fully comply with independence requirements. However, according to the Romanian authorities, independence requirements of audit committee members are usually complied with.

With regards to integrity measures and mechanisms, the board of each SOE is required to establish a policy related to conflicts of interest and its implementation plan. In that aim, the board adopts, within 90 days of its appointment, a code of ethics, which should be revised annually, and be approved by the internal auditor. The code of ethics should be published by the chair of the board on the SOE's webpage within 48 hours of its adoption and, in case of revision, on 31 May of the current year. However, as of 2020, only 61% of centrally-owned SOEs subject to this requirement had published the code of ethics. Further, while the largest SOEs seem have adopted such codes of ethics, it is unclear how they are monitored. (OECD, forthcoming[18]).

Board members and executive managers of SOEs are required to disclose declarations of assets and interests, which can be completed and submitted through the e-DAI platform administered by the National Integrity Agency (ANI) and is monitored by ANI. This tool has reportedly enabled ANI to better monitor conflicts of interest, with SOE board and executive members being revoked when irregularities are found (Table 2.5).

In the case of listed SOEs, according to provision A.2 of BVB Corporate Governance Code, "provisions for the management of conflicts of interest must be included in the board regulation. In any case, board

members must notify the board of any conflicts of interest that have arisen or may arise and refrain from participating in discussions (including by the default, unless the failure to appear would prevent the formation of the quorum) and from voting for the adoption of a resolution concerning the matter giving rise to such conflict of interest". Further, according to provision A.5, "other relatively permanent professional commitments and obligations of a member of the board, including executive and non-executive positions in the board of some companies and non-profit, must be disclosed to the shareholders and potential investors prior to appointment and during the term of office thereof." Likewise, according to provision A.6, "any member of the board must submit to the board information on any relationship with a shareholder directly or indirectly owning shares representing over 5% of all voting rights. This obligation refers to any relationship that may affect the position of the member on matters decided by the board".

While elements for ensuring integrity and fighting corruption can include codes of conduct, compliance function, integrated risk management, and internal and external controls, and are usually integrated into SOEs' corporate governance structure, they may also be integrated into specific "integrity programmes". In Romania, SOEs which adhere to the National Anti-Corruption Strategy (NAS) commit to developing "integrity plans" which contain measures identified by the company's management as remedies for the risks and institutional vulnerabilities to corruption. While these plans are actively recommended by the NAS, evidence suggests that their uptake remains the exception rather than the rule (and may be restricted to the largest SOEs only), as they are developed on a voluntary basis. It is also unclear what these integrity plans should include. Overall, consideration should be given to ensure that risk management and control activities be truly integrated into company strategy and processes, and not siloed in stand-alone programmes.

Box 2.8. National anti-corruption strategy (NAS) 2021-25

The Romanian Government introduced its first national anti-corruption strategy (NAS) for the period 2001-04, in the context of widespread corruption concerns. Anti-corruption strategies are approved by government decision, but stand under the overarching responsibility of the Ministry of Justice. Each strategy includes sets of objectives, performance indicators and associated risks.

In recent years, strategies have included provisions directly aimed at strengthening integrity in the business environment – including in the state-owned enterprise sector, which was identified as one of the "priority sectors" particularly prone to corruption risks. The development of integrity plans by SOEs was first recommended by the NAS 2012-15 and reiterated by the following NAS 2016-20 due to implementation shortcomings. Provisions related to procurement and disclosure were also included the NAS 2012-15 and NAS 2016-20, respectively.

Building on these measures, the NAS 2021-25, which was formally approved by government decision no. 1 269 in December 2021, mainly aims to further strengthen (i) the use of integrity plans as managerial tools to promote organisational integrity in SOEs, as well as (ii) disclosure requirements by SOEs. It also includes (iii) compliance functions to be introduced by law in SOEs, along with a national compliance monitoring system at SOE-level, as well as (iv) provisions to strengthen integrity in public procurement, through open contracting data standards and the uptake of anti-corruption contract clauses.

Table 2.2. Specific objective no. 4.5 of the NAS 2021-25: "Increasing integrity, reducing vulnerabilities and the risk of corruption in the business environment"

Specific objectives	KPI / performance indicator	Risks
1. Continue Romania's efforts to become a full member of the OECD and relevant working groups, especially the	• Completion of implementation projects	• OECD reserves regarding the extension of the composition of the working group.

Anti-bribery working group, which also implies accession to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted in 1997 and effective since 1999.	jointly with the OECD Secretariat. • Business integrity projects / promotion activities.	• Failure to implement OECD recommendations.
2. Regulate the introduction of the **compliance function** within public enterprises and create an occupational standard suitable for compliance officers.	• Adoption of a normative act for regulation of the compliance function. • Development of occupational standards for compliance officers. • Number of public enterprises that have designated a compliance officer.	• Delays in adopting the normative act. • Failure to implement the provisions of the new normative act. • Lack of knowledge/specialised skills of employees regarding the compliance environment.
3. Develop a national **compliance monitoring system** from the perspective of integrity, at the level of public enterprises.	• Functional compliance monitoring system. • Number of reporting SOEs.	• Delays in ensuring the functionality of the compliance monitoring system. • Lack of adequate human and financial resources.
4. Consolidate the use **of integrity plans** as managerial tools for promoting organisational integrity frameworks within public enterprises	• Number of integrity plans adopted by public enterprises.	• Adoption of plans non-adapted to the organisational integrity context. • Lack of financial and human resources to develop adequate integrity plans.
5. **Exchange of good practices** in the implementation of integrity programs between the private and public sectors.	• Number of identified good practices. • Number of common professional training activities. • Degree of adoption of good practices.	• Low level of participation and involvement of representatives of the public sector and the business environment.
6. **Publish economic and financial indicators in open format** (including budgets and grants received from public authorities) for enterprises in which the state is a shareholder.	• Database available in open format containing the list of enterprises in which the state is shareholder (through central and local institutions) with the following indicators: financial data, KPIs, letter of expectations, the mandate contract, grants received.	• Lack of information on enterprises in which state is the shareholder.
7. **Elaborate a study** on integrity and security incidents, and remedy measures taken in the business environment in Romania.	• Study developed and published.	• Lack of adequate human and financial resources. • Failure to use the study developed by the group aim
8. Implementation of **open contracting data standards** (OCDS).	• Number of published datasets. • Institutions and public authorities that have implemented OCDS.	• Failure to implement OCSD public institutions. • Lack of adequate human and financial resources.
9. Encourage private operators to enter in **anti-corruption contract clauses**, which stipulates that any contract is considered null if one party is convicted for corruption.	• Number of awareness campaigns. • Number of presentation of good practice activities. • Number of disseminated educational materials.	• Low level of application of anti-corruption clauses.

Source: OECD (forthcoming[18]), *Stocktaking of the Public Integrity System of Romania: strengthening integrity measures in the health, education and SOEs sectors*, based on OECD (2021[19]), *National Anti-Corruption Strategy 2021-25*, https://sgg.gov.ro/1/strategia-nationala-anticoruptie/

2.5.4. Responsible business conduct

> *D. SOEs should observe high standards of responsible business conduct. Expectations established by the government in this regard should be publicly disclosed and mechanisms for their implementation be clearly established.*

As mentioned, according to Order of the Ministry of Finance no. 3456/2018, large entities (including SOEs) with more than 500 employees are required to include in the director's report a non-financial statement containing *inter alia* information regarding environmental, social, human rights aspects. In particular, with respect to environmental aspects, the non-financial statement must contain details regarding the current and predictable impact of the entity's operations on the environment and, as applicable, on health and safety, as well as on the use of renewable and non-renewable energy, greenhouse gas emissions, water use and air pollution.

With regard to the social and employee-related aspects, the information supplied through the non-financial declaration may refer to the actions taken to ensure gender equality, the implementation of the fundamental conventions of the International Labor Organization, labour conditions, social dialogue, the observance of the workers' right to be informed and consulted, the observance of union rights, health and safety at work, dialogue with the local communities and/or actions taken to ensure the protection and development of these communities.

With respect to human rights, fighting corruption and bribery, the non-financial statement may include information regarding the prevention of abuse in the field of human rights and/or regarding the instruments established for fighting corruption and bribery. The non-financial statement must also include an assessment of the entity's impact – including the use of the goods and services it produces – on climate change, as well as over its commitments in favor of sustainable development, the fight against food waste and in favor of the fight against discrimination and diversity promotion.

2.5.5. Financing political activities

> *E. SOEs should not be used as vehicles for financing political activities. SOEs themselves should not make political campaign contributions.*

According to Law no. 334/2006, SOEs are prohibited from financing political activities and electoral campaigns. In particular, according to Article 14, "the use of financial, human and technical resources belonging to public institutions, autonomous administrations, companies regulated by the Companies Law no. 31/1990, and credit institutions in which the state is a majority shareholder, to support the activity of political parties or their electoral campaign, other than under the conditions established by electoral laws, [is prohibited]." Further, "political parties may not accept donations or services provided free of charge from public institutions, autonomous administrations, companies regulated by the Companies Law no. 31/1990, and credit institutions in which the state is a majority shareholder".

In spite of these provisions, it should be noted that several criminal investigations of corruption cases involving SOEs were initiated by the National Anticorruption Directorate in recent years (Table 2.3). While some of these cases relate to ongoing court proceedings and are reported here without prejudice to the question of guilt and eventual outcomes of the cases, it is nevertheless worth noting that several former Ministers and Secretaries of State are involved – mainly for influence peddling offences. When executive

managers of state-owned enterprises have been indicted, it is mainly for taking bribes, abuse of office and money laundering (OECD, forthcoming[18]).

As alluded to in previous sections, state capture of SOEs has been reported as one of Romania's main governance problems throughout its transition to a market economy, with cases of extensive political interventions and use of public assets for personal gains (State capture, 2018[20]). While this is likely to affect SOEs' economic performance as a going concern, in the case of SOEs that are slated for privatisation it may negatively affect the sale conditions. Overall, the mere perception of interference in SOEs can provide disincentive for investment (OECD, forthcoming[18]).

Table 2.3. Selected criminal investigations involving SOEs over the past five years

Concluded investigation	Criminal investigation details
No. 916/VIII/3 (17 December 2020)	The former Secretary of State in the Ministry of Transport and adviser to the minister (at the time of the facts) were investigated for traffic of influence and money laundering for crimes allegedly committed between June-September 2012. In particular, in the period immediately following the change of government, based on information that the new government would no longer be interested in investing in the expansion of the Bucharest subway network, defendants allegedly claimed a bribe from the company in charge of executing the works in exchange of use of influence at the decision-making level of the Ministry of Transport in June 2012. The defendants also allegedly received money transfers between July-September. The criminal investigation was completed in end 2020, and the indictment and plea agreements were then sent to court. Source: DNA (2020[21]), Press release no. 916/VIII/3 of 17 December 2020, https://www.pna.ro/comunicat.xhtml?id=10122
No. 648/VIII/3 (2 October 2020)	The then CEO and head of sales of a SOE wholly owned by the Ministry of Health were sent to trial in June 2020 for taking bribes, abuse of office, complicity to traffic of influence and instigation to forgery in the context of the COVID-19 outbreak. These crimes occurred in the aftermath of the Government's issuance of Order no. 11/2020 on emergency medical stocks, as the SOE was assigned the purchase of such equipments. These purchases have occurred in violation of Law 98/2016 on public procurement, in exchange of bribes and traffic of influence. Source: DNA (2020[22]), Press release no. 648/VIII/3 of 2 October 2020, https://www.pna.ro/comunicat.xhtml?id=10983
No. 904/VIII/3 (15 November 2019)	The then Minister of Finance and Secretary of State of the Ministry of Transport, along with a former member of parliament, a former employee of the Ministry of Finance and a person formerly close to the Romanian National Railway Company's management were charged with traffic influence and taking bribes for offenses committed from 2005 to 2017, in the context of a tender for the rehabilitation of a railway. Source: DNA (2019[23]), Press release no. 904/VIII/3 of 15 November 2019, https://www.pna.ro/comunicat.xhtml?id=10707
No. 404/VIII/3 (3 March 2019)	Several people – including the then Minister of Communication and Information Society, state secretary within the ministry, and CEO of the National Company Poșta Română (CNPR SA) – were indicted for taking bribes, traffic of influence, complicity in abuse of office, and money laundering. These crimes were committed in 2010, in the context of the purchase of postage machines in violate of due procurement procedures (i.e. at an overestimated price). Of note, eight other cases were previously sent to trial for offences that caused damage to the Romanian Post National Company. In three of these cases, the courts ruled decisions of final conviction. Source: DNA (2019[24]), Press release no. 404/VIII/3, https://www.pna.ro/comunicat.xhtml?id=10969
No. 174/VIII/3 (20 February 2017)	The then CEO of a SOE in the air transport sector and the then administrator of a commercial company were indicted for respectively taking and giving bribes in 2011-12, in the context of public tender procedures ignoring principles of competition and transparency. Source: DNA (2017[25]), Press release no. 174/VIII/3, https://www.pna.ro/comunicat.xhtml?id=10979

2.6. Disclosure and transparency

State-owned enterprises should observe high standards of transparency and be subject to the same high quality accounting, disclosure, compliance and auditing standards as listed companies.

2.6.1. Disclosure standards and practices

> *A. SOEs should report material financial and non-financial information on the enterprise in line with high quality internationally recognised standards of corporate disclosure, and including areas of significant concern for the state as an owner and the general public. This includes in particular SOE activities that are carried out in the public interest. With due regard to company capacity and size, examples of such information include:*

All SOEs in which the state is a majority or controlling shareholder – regardless of their size or legal form[11] – are required to abide by the same financial and non-financial disclosure requirements, as provided by Law no. 111/2016 (amending and approving GEO no. 109/2011). According to Article 51 of the law, all majority-owned SOEs[12] are required to set up a website, on which the following information should be made available for access by shareholders and the general public: resolutions of the general shareholders' meeting (within 48 hours of the meeting); annual financial statements (within 48 hours of approval); half-yearly accounting reports (within 45 days of the end of the semester); annual audit reports; directors' reports (on 31 May of each year); the list of non-executive directors (or supervisory board members, in the case of two-tier board) and their CVs; annual reports on the remuneration and other benefits granted to non-executive and executive directors during the financial year; and codes of ethics (within 48 hours of their adoption, and on 31 May of each year, in the event of their revision).

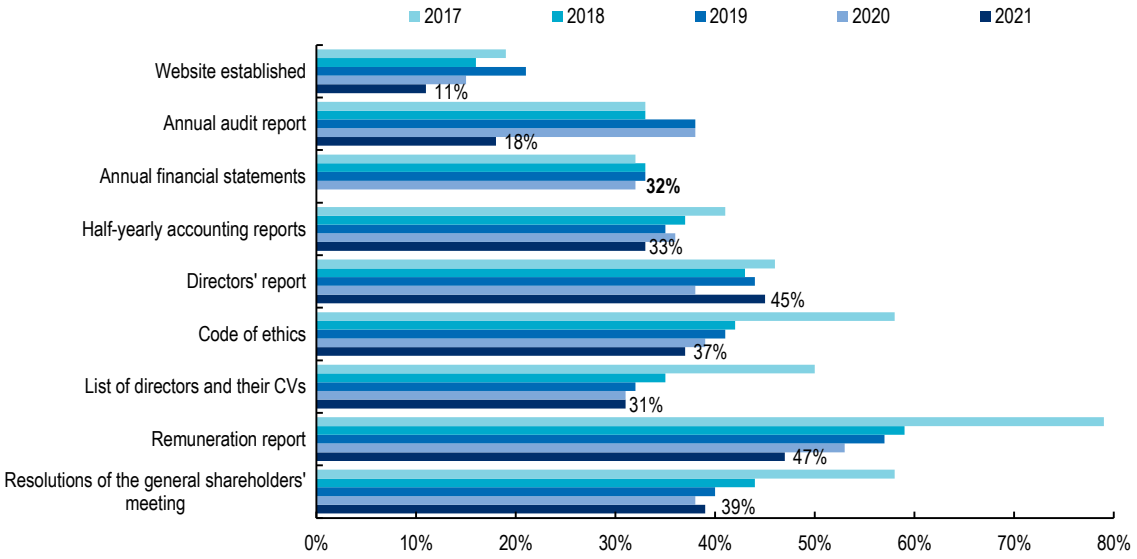
According to Law no. 111/2016, the annual financial statements, half-yearly accounting reports, directors' reports and annual audit reports should remain available on the websites of SOEs for a period of at least three years from the date of publication. Further, according to the provisions of Article 2 of Law no. 544/2001 on free access to information of public interest, public enterprises are considered as "public institutions", and as such are also required to respond to ad-hoc requests for information of public interest. SOEs with shares traded on the stock exchange are also required to abide by applicable capital market requirements, such as those provided by Law no. 24/2017 on issuers of financial instruments and market operations as amended and supplemented by Law No. 158/2020, Financial Supervisory Authority (FSA) Regulations, and the provisions of the Bucharest Stock Exchange (BVB) Corporate Governance Code (applicable on a comply-or-explain basis). Minority-owned SOEs which are fully incorporated according to the Companies Law are required to abide by applicable laws and regulations, including the requirement to disclose their financial statements in the commercial register.

As already mentioned in previous sections, although sanctions are foreseen by Law no. 111/2016 in case of non-compliance by SOEs in which the state is a majority or controlling shareholder,[13] the overall degree of compliance with disclosure requirements remains relatively low across central and majority-owned public enterprises, with little progress made since 2017 – especially with regard to the disclosure of financial information – and apparent stagnation since 2018 (Figure 2.3). As of end 2020, more than 30% of SOEs had not published their annual financial statements and half-yearly accounting reports, and almost 40% had not published their annual audit report. As of end 2021, almost half of SOEs (45%) had not published the directors' report. Although some progress was made since 2017 regarding disclosure of board composition and their remuneration, as of end 2021, around one-third of SOEs had not published the list of directors and their CVs, and almost half (47%) had not disclosed information on the remuneration of executive and non-executive directors. It is also worth noting that almost 40% of SOEs had not published resolutions of the general shareholders' meeting in 2021, which can negatively impact the right to

information of non-state shareholders in particular, hence hampering the principle of equal treatment of all shareholders.

Figure 2.3. Degree of non-compliance with disclosure requirements by majority-owned SOEs (2017-21)

According to the provisions of Law no. 111/2016 (amending and approving GEO no. 109/2011)



Note: Data refers to non-compliance rates with disclosure requirements by central and majority-owned SOEs subject to Law no. 111/2016 (amending and approving GEO no. 109/2011), including 144 SOEs in 2021, 151 in 2020, 146 in 2019, 147 in 2018 and 145 in 2017. Indicated labels refer to 2021 data, except for "annual financial statements" where data for 2021 is unavailable and 2020 data is indicated instead.
Source: OECD Secretariat, based on data retrieved from the Ministry of Finance's website, https://mfinante.gov.ro/domenii/guvernanta/rapoarte-generale-periodice

According to the Romanian authorities, this is mainly due to non-compliance by smaller enterprises. However, an analysis of disclosure practices by 16 large SOEs (by number of employees and equity value or market valuation) reveals some degree of non-compliance with disclosure requirements even by large SOEs (Table 2.4). For instance, five of these 16 SOEs have not disclosed their directors' reports and annual audit reports in recent years, including four of the largest SOEs in the Ministry of Transport's portfolio, some of which have also not recently disclosed their annual financial statements, bi-annual accounting reports and resolutions of general shareholders' meetings. Regarding the latter, disparities in transparency levels exist, with some SOEs publishing the underlying material of agenda items for discussion by the general meeting, and some only publishing resolutions of the general meeting (although this information is not always available without a password). Overall, variations exist across these large SOEs regarding the accessibility of disclosed information, which is not always available in a machine-readable format (nor in English). Gaps in the quality and accessibility of information are especially pronounced across SOEs depending on their listing status. As such, consideration could be given by the state to aspire to similar transparency levels for both listed and unlisted enterprises.

When non-compliance is identified, there are no interim steps that line ministries resort to before sanctions are issued (i.e. whereby line ministries would first reach out to SOEs bilaterally to check why they have not yet complied, and ensure that they intend to comply before issuing sanctions). In practice, non-compliant SOEs are flagged by their respective line ministries to the Ministry of Finance, who then issues sanctions

to the chair of the board. Sanctions can also be issued to line ministries that fail to transmit information to the Ministry of Finance for monitoring purposes, as required by Order no. 1952/2018 (Box 2.3). As of end 2021, nine central government institutions had not reported information about 16 SOEs[14] to the Ministry of Finance (including seven fully incorporated companies and nine subsidiaries) (Ministry of Finance, 2021[3]). To some extent, this might help explain some of the degree of non-compliance by SOEs with disclosure requirements as reported by the Ministry of Finance (detailed in Figure 2.3). Overall, consideration could be given to increasing the amounts of monetary fines, which at present may not bear a strong enough deterrent effect against non-compliance with disclosure requirements by both SOEs and line ministries.

According to the Romanian authorities, SOEs usually do comply with applicable reporting requirements, even when this information is not publicly disclosed. As mentioned above, according to the provisions of Law no. 111/2016 (amending and approving GEO no. 109/2011) and Order no. 26/2013 (on the degree of quarterly achievement of the indicators from the approved revenue and expenditure budgets), SOEs are required to report financial and non-financial information to their line ministries, to the Ministry of Finance and to the general shareholders' meeting on a regular basis. SOEs are also required to abide by the same financial reporting requirements as those applicable to private companies, including the provisions of the Accounting Law no. 82/1991, Order no. 1802/2014 (which transposed the requirements of the EU Accounting Directive into national legislation), Order no. 2873/2016 and Order no. 58/2021, as well as those of Law no. 24/2017 (for listed SOEs). According to Order no. 666/2015 adopted upon the recommendation of the IMF and World Bank, 16 majority-owned SOEs (identified in the Annex to the Order) are required to prepare financial statements in accordance with IFRS since 2016, in addition to those listed on the Bucharest Stock Exchange since 2012.[15]

Table 2.4. Disclosure practices by 16 large majority-owned SOEs by equity value and number of employees (as of end 2020)

	Romgaz	Nuclear-electrica	Trans-gaz	Trans-electrica	Conpet	Hidro-electrica	Oltenia	Romsilva	Posta Romana	CFR	CNAIR	CFR Marfa	CFR Calatori	CEC Bank	Bucharest Airport	RAAPPS
% state ownership	70	82.5	58.5	58.7	58.7	80	78	100	93.5	100	100	100	100	100	80	100
Website available in English	✓	✓	✓	✓	✓	✓	Partial	X	Partial	X	Partial	Partial	Partial	X	Partial	X
Annual audit report	✓	✓	✓	✓	✓	✓	✓ ❖	✓ ❖	✓ ❖	✓ ❖	X	X	X	✓ ❖	X	X
Annual financial statements	✓	✓	✓	✓	✓	✓	✓ ❖	✓ ❖	✓ ❖	✓ ❖	X	X	✓	✓ ❖	X	✓ ❖
Bi-annual accounting reports	✓	✓	✓	✓	✓	✓	✓	✓ ❖	✓ ❖	✓ ❖	X	X	X	✓ ❖	X	✓ ❖
Director's report	✓	✓	✓	✓	✓	✓	Partial	✓ ❖	✓ ❖	✓ ❖	X	X	X	✓ ❖	X	X
Code of ethics	✓	✓	✓	✓	✓	✓	✓ ❖	✓ ❖	✓ ❖	X	✓ ❖	✓ ❖	✓ ❖	X	✓ ❖	X
List of directors and their CVs	✓	✓	✓	✓	✓	✓	✓ *	✓ *	✓ *	✓ *	✓	✓ *	✓	Partial	✓	Partial*
Remuneration report	✓	✓	✓	✓	✓	✓	X	✓ ❖	X	✓ ❖	✓ ❖	X	✓ ❖	✓ ❖	X	X
Resolutions of general meetings	✓	✓	✓	✓	✓	✓	✓ ❖	✓ ❖	✓	✓	✓ ❖	X	✓ ❖	X	✓ ❖	X

Note: As a credit institution, CEC Bank is exempted from the application of GEO no. 109/2011, but is included in this table for comparative purposes. "❖" means "available in Romanian only". For **SOE websites** where availability in English is indicated as "partial", this either means that not all information is available in English, or that while tabs are available in English, the underlying documents usually are not. Regarding the **annual audit report**, CNAIR's 2021 report is not available, while it has only been published up to 2018 by CFR Marfa, up to 2019 by CFR Calatori, and up to 2014 by Bucharest Airport. Likewise, the **annual financial statements** of CNAIR are not available for 2021, while they are only available up to 2018 for CFR Marfa and Bucharest Airport. **Bi-annual accounting reports** are not available for 2021 for CNAIR, and have only been published up to 2019 by CFR Marfa. While the **director's report** of Oltenia does not seem to include information on risk management (as provided by Law no. 111/2016), it has only been published up to 2020 by CNAIR, up to 2018 by CFR Marfa, up to 2014 by Bucharest Airport, and up to 2017 by the Property Administration (RAAPPS). All SOEs disclose the **list of directors and their CVs**, except for CEC Bank and RAAPPS where CVs are not available. It should also be noted that only two listed SOEs (Romgaz and Nuclearelectrica) disclose the independence status of directors; however for other SOEs, their appointment status is often indicated (i.e. whether they are interim or tenured appointees, or state representatives). In the case of Oltenia, Romsilva, Posta Romana, CFR Marfa and RAPPS, directors' statements of interest and assets are publicly disclosed (which is not the case for other SOEs, as far as could be established by the review team). Regarding the **remuneration report**, Oltenia and CFR Marfa only publish the remuneration policy (and not actual remuneration levels of SOE board and executive members), and Posta Romana and Bucharest Airport have only published it until 2019 and 2018 (respectively); for Posta Romana, it is also missing for 2016.
Source: OECD Secretariat, based on desk research.

> *A.1. A clear statement to the public of enterprise objectives and their fulfilment (for fully-owned SOEs this would include any mandate elaborated by the state ownership entity);*

As provided by Law no. 111/2016 (amending and approving GEO no. 109/2011), corporate governance structures of line ministries are required to set objectives for individual SOEs in their respective portfolios, based on government programmes and sectoral strategies. This is done through "letters of expectations" establishing objectives for a period of at least four years, which should set out: (i) the summary of the government strategy in sectors and fields of activities where SOEs operate, including sectoral and fiscal objectives, and (ii) the general vision of the line ministry and of the shareholders with respect to the mission and objectives of the SOE resulting from the government policy in sectors and fields of activities where SOEs operate.[16]

While letters of expectations are only required to be published on the websites of line ministries (and not on those of SOEs[17]), according to Article 56 of Law no. 111/2016, SOEs are required to publish an annual report on their websites by 31 May of each year, which should report on the activities of the SOE undertaken during the previous fiscal year, including measures adopted to meet the objectives mentioned in the letter of expectations. However, it is unclear whether SOEs do in practice comply with this requirement.[18] SOEs are also required to prepare and publish a directors' report accompanying their annual financial statements, which should also include information about achievement of objectives. However, as mentioned above, only 55% of central and majority-owned SOEs had published their directors' report as of end 2021 (Figure 2.3).

While SOEs are also required to publish a remuneration report, which should include information on the degree of fulfilment of key performance indicators (KPIs) underpinning the amount of performance-based remuneration granted to board and executive members (hence also providing information on the degree of fulfilment of objectives, as KPIs should be derived from the objectives set in the letters of expectations for SOEs), it should be noted that KPIs are rarely set in practice for board members and executive management, due to the widespread practice of interim appointments. In addition, between 2018-21, only around 40%-50% of SOEs had published this remuneration report.

> *A.2. Enterprise financial and operating results, including where relevant the costs and funding arrangements pertaining to public policy objectives;*

As mentioned above, according to the provisions of Law no. 111/2016, SOEs are required to disclose their annual financial statements, bi-annual accounting reports, and audit report on their websites, which should remain publicly available for a period of at least three years. However, since 2018, around 30% of central and majority-owned SOEs on average have not published these reports (Figure 2.3). SOEs with shares traded on the stock exchange are subject to more stringent provisions. According to Article 63 of Law no. 24/2017, listed SOEs are required to send quarterly, half-yearly and annual reports to the Financial Supervisory Authority (FSA) and to make them available to the public. According to the provisions of the law, listed SOEs are required to publish these reports within five days from the date of approval, and to inform investors about their availability through a press release published in at least one widespread daily newspaper (Article 63 (2)). While the law provides for the FSA to issue regulations regarding the content of these reports, it also states that the reporting should include "any significant information for investors to make a substantiated assessment of the company's activity, profit or loss", and that "the financial situation [should be] presented in comparison with the existing financial situation in the same period of the previous financial year". Further, according to Article 65, listed SOEs should publish an annual financial report no later than four months after the end of each financial year and ensure its public availability for at least 10 years, which should comprise: (i) audited annual financial statements, (ii) the directors' report, and (iii) the audit report.[19]

For railway companies undertaking both commercial and public policy objectives, the separation of accounts between commercial and non-commercial activities is prescribed by Law no. 202/2016 on the integration of the Romanian railway system into the single European railway area, applicable EC financing regulations, as well as by Ordinance no. 12/1998 regarding the transport on Romanian railways and the reorganisation of the National Society of Romanian Railways. In practice, this entails that the activities of the railway freight and passenger transport operators, with both state and private capital, are separated from those of the railway infrastructure administrator. Further, according to the Romanian authorities, in the case of CFR, revenues and expenses are disclosed separately depending on the type of activities delivered and their sources of financing, and in the case of rail passenger transport operators, accounting of the revenues related to the delivery of the public service and those related to commercial activities are kept separate and are also disclosed separately. However, as mentioned above, it should be noted that CFR Marfa (the state-owned freight railway operator) has not published its annual financial statements, bi-annual accounting reports and annual audit report since 2018. According to the Romanian authorities, the structural and economic-financial separation of accounts is subject to verification by the Railway Supervisory Board within the Competition Council.

Overall however, it is unclear to what extent other SOEs (operating in other sectors than the railway transport sector) are required to disclose the costs and funding arrangements pertaining to public policy objectives. However, it should be noted that the annual budgets of SOEs are approved by government decisions which are made public.[20] The Ministry of Finance also publicly reports on an annual basis on the total amount of subsidies granted to central SOEs – including a breakdown of subsidies granted for SOEs' operating activities or investments, as well as according to their sector of operation (by reporting information on the amounts of subsidies granted to individual line ministries from the state budget).

> *A.3. The governance, ownership and voting structure of the enterprise, including the content of any corporate governance code or policy and implementation processes;*

According to the provisions of Article 51 of Law no. 111/2016 (amending and approving GEO no. 109/2011), central and majority-owned SOEs are required to publish all the decisions of the general shareholders' meeting on their websites – which should in principle ensure transparency around the decisions related to the governance, ownership and voting structure of the enterprise. However, as mentioned above, only around 60% of SOEs on average have published the resolutions of general meetings in recent years.

Of note, SOEs with shares traded on the stock exchange are also required to abide by reporting requirements of major holdings, as provided by Law no. 24/2017.

> *A.4. The remuneration of board members and key executives;*

As previously mentioned, SOE boards are required to prepare and disclose on their websites an annual remuneration report including information on the level of remuneration of board and executive members including information on the remuneration and other advantages granted to board members and executive managers during the financial year. At a minimum, the report should include information regarding:

- The structure of the remuneration, with explanation of the share of the variable component and of the fixed component
- performance criteria which substantiate the variable component of the remuneration, the ratio between the performance obtained and the remuneration
- the considerations which justify any scheme of annual bonuses or non-monetary advantages
- the possible additional or anticipatory pension schemes
- information about the term of the agreement, the negotiated prior notice period, and the amount of damages for revocation without just cause.

However, as mentioned above, almost half of central and majority-owned SOEs (47%) subject to this requirement had not publish this report as of end 2021. In addition, disparities in disclosure practices among the 16 large SOEs surveyed in Table 2.4 seem to exist. According to a review of individual practices, while some SOEs disclose remuneration levels, some enterprises only disclose the remuneration policy. For SOEs that do disclose remuneration levels, variations also exist with regard to the format, as some SOEs disclose aggregate levels, while others disclose individual remuneration amounts. These variations also exist across listed SOEs.

While Article 107 of Law no. 24/2017 requires listed SOEs to prepare and disclose a remuneration report, applicable provisions are also provided by the Bucharest Stock Exchange corporate governance code. According to provisions C.1, "the company must publish on its website the remuneration policy and include a statement in the Annual Report on the implementation of the remuneration policy during the annual period under review. The remuneration policy must be formulated so as to allow shareholders to understand the principles and arguments underlying the remuneration of the board members and of the CEO and the members of the Executive Board in the two-tier system. It must describe the process management mode and the decision-making related to the remuneration, detail the components of the remuneration of the executive management (such as salaries, annual bonuses, long-term incentives related to the value of the shares, benefits in kind, pensions and others) and describe the purpose, principles and assumptions underlying each component (including the general performance criteria related to any form of variable remuneration). Furthermore, the remuneration policy must specify the term of the contract of the CEO and the prior notice period stipulated in the contract, as well as possible compensation for revocation without a just cause."

> *A.5. Board member qualifications, selection process, including board diversity policies, roles on other company boards and whether they are considered as independent by the SOE board;*

According to Law no. 111/2016, SOEs are required to publish on their websites the list of directors along with their CVs. However, as of end 2021, only 70% of SOEs had complied with this requirement. Further, according to a review of the websites of 16 of the largest SOEs (by number of employees and equity value), all SOEs disclose the list of directors and their CVs, except for CEC Bank and RAAPPS where CVs are not available. It should also be noted that only two listed SOEs (Romgaz and Nuclearelectrica) disclose the independence status of directors, as this does not seem to be required for (unlisted) SOEs. However for other SOEs, their appointment status is often indicated (i.e. whether they are interim or tenured appointees, or state representatives). In the case of Oltenia, Romsilva, Posta Romana, CFR Marfa and RAAPPS, directors' statements of interest and assets are publicly disclosed (which is not the case for other SOEs, as far as could be established by the review team).

It should also be noted that the announcement of the board selection process should be published on the websites of SOEs (as well as in two widespread newspapers); according to a review of 16 large SOE websites, this requirement seems to be complied with in practice, at least by the largest and economically important SOEs.

> *A.6. Any material foreseeable risk factors and measures taken to manage such risks;*

As mentioned above, SOE boards are required to prepare a directors' report for each fiscal year, which should contain a true presentation of the development and performance of the entity's activities and of its position, as well as a description of the main risks and uncertainties it is facing. In particular, the director's report should include information about the entity's exposure to price risk, credit risk, liquidity risk and cash flow risk. However, as highlighted above, almost half of SOEs subject to this requirement had not published their directors' report as of end 2021. According to the Romanian authorities, SOEs' annual report should also present information about the risk management applied by the enterprise; however, it is unclear whether these reports are published by SOEs in practice, as it is not required by Law no. 111/2016. Further, according to applicable provisions, information about the treatment of off-balance-sheet assets and

liabilities should be included in the explanatory notes to the annual financial statements; however, again, around 30% of central SOEs had not disclosed their annual financial statements in 2021.

> *A.7. Any financial assistance, including guarantees, received from the state and commitments made on behalf of the SOE, including contractual commitments and liabilities arising from public-private partnerships;*

According to the Romanian authorities, information regarding the subsidies received by the SOEs as well as the guarantees received from the state can be found in the directors' reports accompanying the annual financial statements, in the annual financial statements, as well as in the activity reports of the state enterprise, all of which are required to be published on SOE websites. However, as mentioned, almost half of SOEs had not published the directors' report as of end 2021.

> *A.8. Any material transactions with the state and other related entities;*

Related parties, and disclosure requirements of RPTs, are defined by Order of the Ministry of Finance no. 1802/2014. In addition, according to the provisions of GEO no. 109/2011, boards are required to inform shareholders of all transactions concluded with SOE board members, employees, controlling shareholder, as well as their spouse, relatives or in-law up to the fourth degree, or to convene the shareholders' meeting to approve such transaction if its value accounts for more than 10% of the SOEs' net assets or turnover. The board should also inform shareholders of transactions of at least the equivalent of EUR 100 000 concluded with another SOE or line ministry. These transactions should also be reported in the board's annual reports.

> *A.9. Any relevant issues relating to employees and other stakeholders.*

According to the provisions of Order of the Ministry of Finance no. 1802/2014, SOEs are required to prepared non-financial statement to accompany the annual financial statements. Further, the reporting requirements for all SOEs regarding the relationship with stakeholders are provided by articles 52 and 53 of GEO no. 109/2011 (as amended and approved by Law no. 111/2016).

2.6.2. External audit of financial statements

> *B. SOEs' annual financial statements should be subject to an annual independent external audit based on high-quality standards. Specific state control procedures do not substitute for an independent external audit.*

According to Article 34 of the Accounting Law no. 82/1991, the annual financial statements of fully or majority-owned SOEs, as well as those of autonomous administrations, are subject to statutory audit, which should be performed by authorised financial auditors or audit companies, and carried out in accordance with International Audit Standards, EU Regulation no. 537/2014, and Law no. 162/2017. According to articles 47-48 of GEO no. 109/2011, the audit committee should select the external auditor, who should be appointed by the general meeting of shareholders for companies, and by the board for autonomous administrations, for a period of at least three years.

However, in light of potential concerns regarding the independence of audit committees (as outlined above), this may also give rise to the existence of concerns regarding the independence and objectivity of external auditors operating under the oversight of board audit committees. In addition, while line ministries are required to publish the opinions of external auditors in their annual reports, as well as measures taken to address any concerns raised by external auditors, it is unclear whether all line ministries do in fact disclose this.

2.6.3. Aggregate annual reporting on SOEs

> *C. The ownership entity should develop consistent reporting on SOEs and publish annually an aggregate report on SOEs. Good practice calls for the use of web-based communications to facilitate access by the general public.*

Annual reports prepared by line ministries on the activity of SOEs in their portfolios

According to Article 58 of Law no. 111/2016 (amending and approving GEO no. 109/2011), central government institutions – also known as "public supervisory authorities" – (i.e. line ministries) are required to prepare annual reports on the activity of SOEs in their respective portfolios (excluding those in insolvency, dissolution or bankruptcy proceedings), which should be published on the websites of line ministries in June of each year. According to legal provisions, these annual reports should include information regarding:

- the shareholding policy of the public supervisory authority
- strategic changes in the functioning of public enterprises (e.g. mergers, divisions, transformations, changes in the capital structure, etc.)
- the evolution of the financial and non-financial performance of the public enterprises under the oversight of the public supervisory authority (e.g. reduction of outstanding payments, profit, etc.)
- the economic and social policies implemented by the public enterprises under the oversight of the public supervisory authority and their costs or benefits
- data on qualified opinions of external auditors and concerns for their removal and prevention
- other elements established by decision or order of the public supervisory authority.

The law also provides that at a minimum, information regarding the shareholding policy of line ministries should specify relate to encompass concern: (i) the objectives of the shareholding policy expressed by the letter of expectations and set out in the mandate contract; (ii) the evolution of the state's participation in public enterprises (such as privatisation, acquisition of new shares); (iii) the amounts of dividends distributed to the state shareholder; (iv) the selection of board members and executive managers, and the implementation of their mandates.

In practice however, it is unclear whether all line ministries do prepare and publish this report, as it seems that some reports are missing for some ministries, and for some years. The format and content of these reports also seem to vary from year to year and across line ministries, which may be due to inconsistent methodologies used across line ministries for reporting on SOE performance. Overall, this can hamper comparability of information.

Annual aggregate report prepared by the Ministry of Finance on the entire SOE portfolio

Law no. 111/2016 also provides that in August of each year, the Ministry of Finance is to prepare and submit to the government an annual report on SOEs based on the information collected from line ministries, which should report on the activities of central and local SOEs during the previous fiscal year (starting on 1 January and ending on 31 December). The report is to be made publicly available on the Ministry of Finance's website.

At present, the annual report is structured into two parts: a first part reporting on the activity of centrally-owned SOEs, and a second part reporting on the activity of local enterprises. Each part includes four chapters. The first two chapters describe year-on-year changes in the number of SOEs, and evolutions regarding state participations in public enterprises. The following two chapters respectively describe the main economic and financial indicators of SOEs, and report on the compliance with the provisions of Law no. 111/2016 by both SOEs and their ownership entities (Box 2.9).

Box 2.9. Overview of the structure of the annual aggregate report on centrally-owned SOEs

At present, the Ministry of Finance's annual report on SOEs, following a brief introductory text providing general information, is comprised of two parts focusing on central and locally owned SOEs respectively. The two parts follow a similar structure, illustrated as follows:

PART I – Report on the activity of Central Public Enterprises in 2020.

- Chapter 1 – Evolution of the number of central public enterprises owned by central public authorities during 2020
- Chapter 2 – Evolution of State Participations in Central Public Enterprises Owned by Central Public Guardianship Authorities
- Chapter 3 – Main economic and financial indicators recorded in 2020 by central public enterprises
  - 3.1 – The main economic-financial indicators of the active central public enterprises
  - 3.2 – Situation of the main economic and financial indicators of the active central public enterprises grouped by activity sectors according to net turnover
  - 3.3 – Evolution of outstanding payments by central public enterprises
  - 3.4 – Development of staff and staff costs at central public enterprises
  - 3.5 – Subsidies from the State Budget granted to central public enterprises
  - 3.6 – Dividends and payments distributed and transferred by central public enterprises
  - 3.7 – The first ten active central public enterprises that recorded a gross loss in 2020
- Chapter 4 – Application of the provisions of GEO no. 109/2011 and the principles of corporate governance in central public enterprises owned by central public supervisory authorities
  - 4.1 – The stage of transmission of the information by the central tutelary public authorities according to the provisions of OMFP no. 1952/2018
  - 4.2 – Status of the selection process of the board of directors or supervisors and of the directors or directorates of the central public enterprises
  - 4.3 – Status of key performance indicators in the mandated contracts of directors and directors / directorate at central public enterprises
  - 4.4 – The structure of the management bodies of the central public enterprises, during the year 2020
  - 4.5 – Evolution of the application of the provisions and principles of transparency to central public enterprises
- Recommendations

Source: Ministry of Finance (2021[3]), *Annual report on SOEs 2020*, https://mfinante.gov.ro/documents/35673/220982/raportanual2020.pdf

While these reports provide transparency around the financial performance, total employment, and application of the corporate governance provisions of GEO no. 109/2011 (regarding compliance with the board selection process and transparency and disclosure requirements) of the entire state-owned portfolio, consideration could be given to expand their coverage.

2.7. The responsibilities of the boards of state-owned enterprises

The boards of SOEs should have the necessary authority, competencies and objectivity to carry out their functions of strategic guidance and monitoring of management. They should act with integrity and be held accountable for their actions.

2.7.1. Board mandate and responsibility for enterprise performance

> *A. The boards of SOEs should be assigned a clear mandate and ultimate responsibility for the enterprise's performance. The role of SOE boards should be clearly defined in legislation, preferably according to company law. The board should be fully accountable to the owners, act in the best interest of the enterprise and treat all shareholders equitably.*

Romanian SOEs established pursuant to the Companies Law no. 31/1990 can be administered under both a unitary or two-tier structure, which may only be changed by the general shareholders' meeting. In practice, SOEs tend to have one-tier boards, which are subject to requirements set by GEO no. 109/2011 (as amended and approved by Law no. 111/2016) and the Companies Law no. 31/1990. For SOEs with one-tier boards, Article 28 of GEO no. 109/2011 provides that the boards of autonomous administrations and JSCs be comprised of three to seven members, and of five to nine members for 'large' JSCs (with more than 50 employees and a turnover of over EUR 7.3 million). For SOEs with two-tier boards, Article 31 provides that supervisory boards include five to nine members, and management boards be composed of three to seven members. In the case of LLCs, board composition requirements and the selection procedure of board members are decided by the line ministry through the articles of incorporation of the companies in question.

For **fully incorporated majority-owned SOEs**, the main responsibilities of the supervisory board (or non-executive directors) are those provided by the Companies Law no. 31/1990. According to applicable provisions, non-executive directors (of companies with **one-tier boards**) have the following main competencies (which cannot be delegated to executive directors): (i) establishing the main lines of activity and development of the company; (ii) establishing the accounting policies and the financial control system, as well as the approval of the financial planning; (iii) appointing and revoking executive directors and setting their remuneration; (iv) supervising the activity of executive directors; (v) preparing the annual (directors') report, organising the general meeting of shareholders and implementing the decisions thereof; (vi) filing the request for opening the insolvency procedure for the company. In the case of **two-tier boards**, the supervisory board has the main following duties: (i) exercising permanent control over how the company is managed by the management; (ii) appointing and revoking the member of the management board; (iii) verifying compliance with the law, with the articles of incorporation and with the decisions of the general meeting of the operations of company management; (iv) reporting at least once a year to the general meeting of shareholders with respect to the supervisory activity it has performed.

As previously mentioned, according to the provisions of Law no. 111/2016 (amending and approving GEO no. 109/2011), SOE boards (of autonomous administrations and fully incorporated companies) are also required to: analyse and approve the administration plan drafted in collaboration with executive directors, in accordance with the letter of expectations and candidates' declaration of intent; negotiate financial and non-financial performance indicators with the line ministry; prepare the semestrial report on the activity of the SOE for submission to the line ministry (for **corporatised SOEs**); prepare monthly reports for submission to the line ministry regarding the fulfilment of the financial and non-financial performance indicators annexed to the mandate contract of individual board members, as well as other data and information of interest at the request of line ministries (for **autonomous administrations**); verify the

functioning of the internal or managerial control system; and monitor and manage potential conflicts of interest at the level of the supervisory and management bodies;

In terms of accountability, as already mentioned above, SOE boards are required to issue a directors' report on an annual basis, which should contain a true presentation of the development and performance of the entity's activities and of its position, as well as a description of the main risks and uncertainties it is facing. The directors' report should be approved by the board as a whole and signed by the board chair, and should accompany the SOE's financial statements, which should in turn be submitted to the statutory auditors (along with supporting documents) at least 30 days before the date of the annual general shareholders' meeting. Of note however, while directors' reports are also required to be published by SOEs on their websites, as of end 2020, less than two-thirds (62%) of companies subject to this requirement had done so (Ministry of Finance, 2021[3]).

Additional accountability mechanisms are also set by the Companies Law no. 31/1990, which requires board members to exercise their mandate with loyalty and in the interest of the company (Article 144), and sets out the conditions under which board members can be held liable. In particular, the law provides that board members are responsible for the fulfilment of all obligations provided by law and the company's articles of association, and that they are to be held liable for the actions of their immediate predecessors if they are aware of irregularities committed by them and have failed to inform the internal auditors, the statutory auditor or the line ministry in this respect. It follows that the liability for deeds or omissions committed by other board members does not extend to those board members who had their disagreement registered in the record of decisions of the board of directors, and had duly informed the company's internal auditors, the statutory auditor and line ministry in writing.

Article 155 of the Companies Law further sets out provisions to take action in case of liability of non-executive directors (as well as executive directors, financial auditors and founders of the company). In the case of majority-owned companies, such actions should be initiated by the line ministry, and the decision to bring them before court should be taken by the general shareholders' meeting, in which case their mandate should be immediately revoked and a process for appointing replacements should be initiated.

While there is no legal notion of "shadow director" in Romania, as already mentioned above, the law provides for the possibility to resort to the appointment of interim directors in the case of one or more vacant board positions, which – in the case of companies with majority state shareholding subject to Law no. 111/2016 (amending and approving GEO no. 109/2011) – are de facto directly appointed by the state. In particular, in the case of one or more vacancy on the board of **autonomous administrations**, interim directors should be directly appointed by the line ministry until the due selection process is complete. For **fully incorporated companies**, the line ministry should convene the general shareholders' meeting to appoint one or more interim directors, and is entitled to submit proposal of candidates for consideration by the general meeting of shareholders. Interim directors are appointed for a mandate of four months, which can be extended for solid reasons to a maximum of six months. However, should the due selection process be suspended or cancelled by the court of law, the mandate of temporary board members should continue until board members are appointed according to due process.

As mentioned in Chapter 1, while this provision initially aimed to create a transitory arrangement at the time of the promulgation of the law, and was initially envisaged as a safeguard in the event of sudden resignations of board members (in accordance with the provisions of Article 153 of the Companies Law no. 31/1990), many line ministries continue to resort to this provision: as of end 2021, 72% of board positions in centrally-owned SOEs were temporary appointments bypassing due process.[21] While this raises concerns around the level of independence and operational autonomy of SOE boards, according to the Romanian authorities, the same duties and liabilities apply to temporary and tenured board members (as provided by Article 144 of the Companies Law).

2.7.2. Setting strategy and supervising management

> *B. SOE boards should effectively carry out their functions of setting strategy and supervising management, based on broad mandates and objectives set by the government. They should have the power to appoint and remove the CEO. They should set executive remuneration levels that are in the long-term interest of the enterprise.*

As mentioned in previous sections, Article 4 of GEO no. 109/2011 (as amended and approved by Law no. 111/2016) prohibits line ministries and the Ministry of Finance to intervene in the management and supervisory activities of public enterprises, and provides that SOE boards should be responsible and liable for "taking [supervisory] and management decisions for public enterprises". This provision was introduced in the context of concerns around excessive political intervention in SOEs' operations, including *inter alia* through political appointments in the management and supervisory bodies of public enterprises.[22]

Corporate governance instruments were also introduced in 2016 – including letters of expectations and administration plans – in the aim of improving the autonomy of boards in setting operational strategies for SOEs based on broad state objectives, and ensuring their ability to carry out their functions effectively and at arm's length from government. Overall, these instruments also aim to streamline communication methods and reporting requirements between line ministries and SOEs, in order to avoid that SOE objectives and strategies be set in an informal and discretionary manner by the state. However, as these instruments are formalised through the board selection process, which is itself often bypassed, it is unclear whether they are applied to SOEs with a majority of temporary appointments, which may give rise to some concerns regarding the independence and operational autonomy of boards.

The Companies Law no. 31/1990 also includes provisions to ensure that SOE board members base their decisions on the good of the company, which are applicable to both temporary and tenured members indifferently. In particular, Article 144 provides that "the members of the board of directors must exercise their mandate with the prudence and diligence of a good administrator, [and] must adopt business decisions on the basis of adequate information, […] in the interest of the company". Further, "the members of the board of directors may not disclose confidential information and trade secrets of the company they have access to in their capacity as directors". The content and duration of these obligations regarding confidentiality rules should be specified in their mandate contracts. According to the Romanian authorities, board members who are found to have been unduly influenced by outside persons or institutions may be revoked under the law, in accordance with the provisions of their mandate contract, which must include clauses in this respect.

The appointment and revocation of executive managers stands as one of the main competences of the board of directors (as per Article 142 of the Companies Law no. 31/1990). For SOEs subject to GEO no. 109/2011 (as amended and approved by Law no. 111/2016), this process is regulated by clear legal provisions. According to Law no. 111/2016, executive managers are appointed by the board of directors, upon the recommendation of the nomination committee, following a due selection procedure for the position in question, which is initiated after the appointment of board members is completed (in accordance with the provisions of Law no. 111/2016). In doing so, the board may decide to be assisted by – or that the selection be carried out by – an independent recruitment expert, whose services are contracted under the law. The selection criteria are established by the board nomination committee or the independent expert (as applicable) taking into account the particularities of the company's field of activity, and should include at a minimum relevant experience in management consulting or in management of a public or private enterprise. The vacancy announcement for the position should be published on the SOE's website and in at least two widespread newspapers at least 30 days before the deadline for applications.

However, it should be noted that as this process is conditional on the completion of the selection of board members according to due process (which is currently often bypassed), in many cases it has not been initiated. In practice, as of end 2021, 61% of executive managers of the 50 largest SOEs (in equity value and number of employees) were interim appointments directly appointed by the state. In the same vein,

while the board is responsible for setting remuneration levels of executive managers (based on prior annual evaluations) according to a methodology provided by law,[23] the remuneration of interim appointees does not include a performance-related component, as KPIs are not set in their mandate contracts. This may disincentivise them to act in the company's best financial interest.

2.7.3. Board composition and exercise of objective and independent judgment

> *C. SOE board composition should allow the exercise of objective and independent judgment. All board members, including any public officials, should be nominated based on qualifications and have equivalent legal responsibilities.*

As mentioned in previous sections, the selection process for SOE board members is clearly defined by Law no. 111/2016 and GD no. 722/2016, which provide that all board members be nominated based on qualifications criteria. In particular, Article 28 of GD no. 722/2016 provides that a 'board profile matrix' be established by the board nomination committee, together with the line ministry, which must include the following information: specific selection criteria; evaluation grids for all criteria; weights for each criterion (depending on their importance); the grouping of criteria for comparative analysis; a collective minimum threshold for each criterion (if applicable); subtotals, totals, weighted totals of all criteria for individual board members. Overall, these provisions aim to ensure for a transparent, standardised and competitive selection process.

However, as already mentioned, at present the process prescribed by the law is often bypassed, due to a loophole in Law no. 111/2016 enabling line ministries to appoint board members without regard to the prescribed selection criteria, independence requirements and mandated procedures, for an interim period of six months.[24] As of mid-2022, the selection process had not been initiated in at least ten of the most economically important SOEs, including Bucharest Airport, Constanta Port, Salrom, Romaero, Posta Romana, Danube maritime and fluvial ports, Plafar and Oltenia.

This also applies to listed SOEs:

- Although **Nuclearelectrica** duly completed the appointment process of all its seven board members which are currently appointed for four years (2018-22), the CFO was appointed on a temporary basis in February 2022 (despite the fact that financial directors are required to be duly appointed according to the provisions of GEO no. 109/2011).
- The board of **Romgaz** is composed of seven interim members appointed since July 2022, but shareholders approved the initiation of the selection process in 2022.
- Although the board of **Electrica** is composed of seven members duly appointed for four year (2021-25), the selection of the CEO is ongoing.
- The board of **Transelectrica** is composed of seven members appointed for six months (August-December 2022).
- Although the mandates of three duly appointed members of the board of **Transgaz** were extended (2021-25), two members are appointed on a temporary basis.
- The board of **Conpet** is composed of seven temporary members appointed for six months (August-December 2022).
- All seven board members of **Oil Terminal** are appointed on a six-month basis (August-December 2022), but shareholders approved the initiation of the selection process in June 2022.

Overall, for companies with a majority of such interim members on their boards, this raises concerns around the ability of the board to exercise objective and independent judgment for the long-term interest of the company.

2.7.4. Independent board members

> *D. Independent board members, where applicable, should be free of any interests or relationships with the enterprise, its management, other major shareholders and the ownership entity that could jeopardise their exercise of objective judgment.*

While the Companies Law no. 31/1990 provides that the articles of incorporation or a decision of the general meeting of shareholders may provide that one or several directors should be independent, in the case of SOEs, GEO no. 109/2011 (as amended and approved by Law no. 111/2016) provides that "the majority of board members must be non-executive and independent", in accordance with the independence criteria set by the Companies Law. According to Article 198 of the Companies Law, the nomination of the independent board members should take into account the following criteria:

a) that he/she is not a manager of the enterprise or of a company controlled by it and he/she has not held such a position in the last five years
b) that he/she is not an employee of the enterprise or of a company controlled by it and he/she has not had such a work relationship in the last five years
c) he/she should not receive or have received from the enterprise or from a company controlled by it an additional remuneration or other advantages, other than those corresponding to his/her capacity of non-executive administrator
d) he/she should not be a significant shareholder of the enterprise
e) he/she should not have or have had in the last year business relationships with the enterprise or a company controlled by it, either personally, or as shareholder, executive manager, director or employee of a company which has such relationships with the company if, due to their significant nature, they could affect his/her objectivity
f) he/she should not be or have been in the last three years a financial auditor or an employed shareholder of the current financial auditor of the enterprise or of a company controlled by the enterprise
g) he/she should not be a CEO/executive director in another company where a CEO/executive director of the enterprise is non-executive administrator
h) he/she should not have been a non-executive director of the company for more than three mandates
i) he/she should not have family relationships with a person who is in one of the situations provided under letter a) and d).

The Bucharest Stock Exchange (BVB) Corporate Governance Code also recommends that the majority of board members of listed companies be non-executive and independent. In particular, for companies with two-tier boards, not less than two non-executive members must be independent, and in the case of one-tier boards, at least one non-executive member must be independent. The Code requires each board member to submit a declaration that he/she is independent at the time of appointment, as well as when any change in his/her status arises, by demonstrating the ground on which he/she is considered independent according to clearly set independence criteria, which are similar to those provided by the Companies Law no. 31/1990. It should however be noted that the Code provides a more detailed definition of "significant shareholder of the enterprise" (under criteria d)), which is defined as a shareholder "controlling more than 10% of voting rights or with a company controlled by it".

In the case of unlisted SOEs, Law no. 111/2016 requires that the majority (i.e. more than half) of board members be non-executive and independent, inferring that independent members must account for at least half plus one of the total number of board members. Further, according to the law, boards composed of three to seven members may not include more than one civil servant (and a maximum of two civil servants for boards comprised of five to nine members).

However, at present, it seems that independence criteria are not taken into account in the appointment of interim board members which are proposed or directly appointed by the state. According to data provided the Romanian authorities, as of end 2021, the boards of the top ten SOEs included less than two independent directors on average. However, according to evidence gathered by the review team, it seems that some of these board members categorised as "independent" are in fact politically connected (see section 1.4.4 for details). It is also unclear whether/how the Ministry of Finance currently keeps a record of appointed board members according to their status (i.e. independent or non-independent).

2.7.5. Mechanisms to prevent conflicts of interest

> *E. Mechanisms should be implemented to avoid conflicts of interest preventing board members from objectively carrying out their board duties and to limit political interference in board processes.*

According to Law no. Regulation (EC) 161/2003, conflicts of interest are defined as situations whereby "the direct or indirect personal interest of a board member contravenes to the company's interest so that it affects or might affect its independence and impartiality in taking business decisions, or in fulfilling his/her duties with objectivity during his/her mandate". Such conflicts of interest are managed in accordance with applicable laws and regulations, including the Regulation of Organisation and Operation of the company, and the Regulation of Organisation and Operation of the Board of Directors. Conflicts of interest of a criminal nature are defined by Article 301 of the Criminal Code, although it should be noted the existence of a conflict of interest of an administrative nature does not presuppose the automatic existence of an act of corruption.

According to the Romanian authorities, the mandate contracts of individual board members should include clear provisions according to which board members must avoid conflicts of interest relative to the company, and must inform the board when such a situation occurs. In particular, board members must refrain from participating in deliberations or from taking any decisions that would contravene to the company's interest, and are prohibited to use the company's confidential information for commercial and personal purposes, the company name in his/her own interest or in the interest of another, as well as to request or accept business related directly or indirectly to the production of goods and services in the same sector of operation as the company (including its competitors or clients). Of note, interim board members are also required to abide by these provisions. In practice, conflicts of interest are monitored by the National Integrity Agency, and board members can be revoked for conflicts of interests and incompatibility.

Table 2.5. Cases of conflicts of interest involving board and executive members of SOEs

SOE	Case details
	Unjustified wealth
CFR Calatori	In August 2011, ANI ascertained in the case of NOAPTEŞ ALEXANDRU, an unjustified wealth between the acquired wealth and the incomes earned between 2005 – 2007, amounting to RON 9 825 978,49 (EIUR 2 795 601,03), while acting as General Director and Board Chair of the National Railway Transport Company "C.F.R. Călători"- SA. Through the civil sentence from May 2013, the Bucharest Court of Appeal ordered the confiscation of RON 6 364 413 (EUR 1 438 567). The evaluation report remained definitive and irrevocable through the High Court of Cassation and Justice Decision.
	Administrative conflict of interest
Romanian Radio Broadcasting Company (SRR)	In November 2016, ANI has ascertained that FUGARU MIRELA IOANA, former Member within the Administration Council of the Romanian Radio Broadcasting Company, breached the legal regime of administrative conflicts of interest. Thus, between 29 June 2010 – 29 June 2014, FUGARU MIRELA IOANA participated and voted as a full member of the Administration Council on the occasion of the adoption of some decisions regarding the managerial plan of the cultural events on the S.R.R. agenda. Subsequently, having a personal interest of a patrimonial nature, FUGARU MIRELA IOANA concluded with SRR several service contracts for the organisation and monitoring of cultural events, amounting to RON 63 842. Through the High Court of Cassation and Justice Decision from January 2021, the evaluation report remained definitive and irrevocable. Between 28.01.2021 – 28.01.2024, FUGARU MIRELA IOANA is under the interdiction to exercise a public office or dignity.

SOE	Case details
	In September 2014, ANI has ascertained that MICULESCU OVIDIU breached the legal regime of administrative conflicts of interest, as in his capacity of President – General Director of the Romanian Radio Broadcasting Company (SRR), signed his own appointment order as Institutional Co-ordinator within a project funded through European Funds, acquiring a net income in the amount of RON 42 710. Through the High Court of Cassation and Justice Decision from May 2018, the evaluation report remained definitive and irrevocable. Previously, in October 2013, ANI has also ascertained the state of incompatibility in the case of MICULESCU OVIDIU.
Incompatibility	
Romanian Television Company (SRTv)	In October 2020, ANI has ascertained the state of incompatibility in the case of LAZEA DORIN DAN, as during his capacity as Member in the Administration Council of the Romanian Television Company (SRTv), LAZEA DORIN DAN also held the position of advisor (contract staff) within a parliamentary group of a political party. The case is still pending before the High Court of Cassation and Justice.

Source: Information provided by ANI.

2.7.6. Role and responsibilities of the Chair

> *F. The Chair should assume responsibilities for boardroom efficiency, and when necessary in co-ordination with other board members, act as the liaison for communications with the state ownership entity. Good practice calls for the Chair to be separate from the CEO.*

According to applicable provisions, in the absence of contrary provisions in companies' articles of association, the chair represents the board of directors in relation to third parties and in court. The articles of incorporation may authorise the chair and one or several board members to represent the company, acting either jointly or separately. Based on unanimous agreement, the board of directors may authorise one of them to conclude certain operations or types of operations. In the case of SOEs, the chair of the board of directors may not at the same time be appointed as CEO of the company (as per GEO no. 109/2011). In spite of this provision, some cases where the CEO also acts as the chair of the board have been found by the DNA and ANI in the context of investigations for corruption and conflicts of interests. It should also be noted that this separation (between the CEO and chair of the board) is not provided by the Companies Law no. 31/1990.

According to the Romanian authorities, the chair of the board acts as the primary point of contact between the ownership entity and the board. While this stands in line with best practice – in particular by ensuring formal communication channels with line ministries, cases where the board chair is directly appointed by the state for an interim period of six months may give rise to concerns, as it may lead to informal exchanges with the state, which may in turn lead to information asymmetries in SOEs where the state is not the sole shareholder. As previously mentioned, until 2016 these informal communication practices were widespread, with the state very often "calling the executive managers of SOEs for bilateral meetings on operational management issues" (as posited by Romania's state ownership policy). While the legal framework on SOEs was amended in 2016 to address these concerns, evidence suggests that these issues might be allowed to persist with the current practice of temporary appointments.

2.7.7. Employee representation

> *G. If employee representation on the board is mandated, mechanisms should be developed to guarantee that this representation is exercised effectively and contributes to the enhancement of the board skills, information and independence.*

According to applicable laws and regulations, employee representation is not mandated on the board of SOEs in Romania, and employee representatives may only participate in board meetings which debate upon issues related to the company's employees.

2.7.8. Board committees

> *H. SOE boards should consider setting up specialised committees, composed of independent and qualified members, to support the full board in performing its functions, particularly in respect to audit, risk management and remuneration. The establishment of specialised committees should improve boardroom efficiency and should not detract from the responsibility of the full board.*

According to the provisions of Law no. 111/2016 (amending and approving GEO no. 109/2011), SOE boards are required to establish two board committees – an audit committee, and a nomination and remuneration committee – and follow specific requirements regarding their composition. In particular, the audit committee must be comprised of at least three non-executive and independent members, out of which at least one must have competencies in the field of accounting and statutory audit (according to Article 140 of the Companies Law no. 31/1990). The nomination and remuneration committee must be composed of non-executive members, out of which at least one is independent. The independence criteria are those set out by the Companies Law (Article 198).

While it is unclear whether these committees have been duly established in all SOEs, it is also unclear how these independence requirements can be complied with in practice, considering the widespread practice of interim appointments and the relatively low share of independent directors serving on boards on average. According to Article 34 of Law no. 111/2016, other committees may be established at the discretion of the board (such as strategy committees), with duties and responsibilities established by statute or internal regulation. For large SOEs where these committees have been established, it seems that they are not composed of independent members.

Consideration could also be given to requiring SOEs to establish risk management committees, which is identified as an area for improvement. Indeed, as far as could be established by the review team, internal management control systems, risk management policies and risk monitoring are required to be implemented in SOEs as part of the "corporate governance KPIs" set for individual board members and executive managers upon their appointment, as part of the objective-setting process. However, as this process is often bypassed and KPIs are not set for interim appointees, it is unclear whether adequate risk management frameworks are actually established in SOEs.

2.7.9. Annual performance evaluation

> *I. SOE boards should, under the Chair's oversight, carry out an annual, well-structured evaluation to appraise their performance and efficiency.*

According to the provisions of Law no. 111/2016 (amending and approving GEO no. 109/2011) and the methodological norms set by GD no. 722/2016 (Annex no. 1b), the board can carry out internal annual self-evaluations, but it is not mandatory. According to applicable norms, internal self-evaluations generally refer to assessments of the following considerations:[25]

- how the legal reporting requirements provided by the legislation on corporate governance, asset protection, risk management, financial reporting requirements have been fulfilled
- how the activity of the executive management has been supervised, how the achievement of the revenue and expenditure budget has been sought, the investment programme
- how the implementation of the shareholders' decisions, of the legal provisions in force has been sought; the opinions of the independent financial auditor, the decisions of the control bodies
- the degree of fulfilment of the financial and non-financial performance indicators
- how the measures from the integrated administration plan have been implemented (the administration component and the management component)
- board members' conduct (participation to the activity of consultative committees, attendance of the meetings of the board of directors).

Overall, however, it is unclear whether and to what extent this is effectively practiced by SOE boards. Notwithstanding this, SOE boards are however required to undergo annual performance evaluations aiming to assess performance against the measures included in the board administration plan and the mandate contracts of individual board members (the latter including the negotiated and approved financial and non-financial KPIs). While the annual performance evaluation is conducted by the line ministry for **autonomous administrations**, and by the general shareholders' meeting for **fully incorporated companies**, they both may be supported by independent experts. According to applicable provisions, board members who fail to achieve the performance indicators established in their mandate contract may be removed by the general shareholders' meeting, after which they may not apply for SOE board positions for five years. However, as previously mentioned, many SOE boards currently include a majority of temporary members appointed without negotiated KPIs. As such, in practice, their performance is assessed against the degree of achievement of the quarterly financial indicators, derived from the approved income and expenditure budget.

2.7.10. Internal audit

> *J. SOEs should develop efficient internal audit procedures and establish an internal audit function that is monitored by and reports directly to the board and to the audit committee or the equivalent corporate organ.*

All Romanian SOEs are subject to Law no. 672/2002 on internal public audit, which requires internal auditors to independently assess risk management, control and governance processes. While according to the law, internal auditors of public entities should report to the "head of the institution", in the case of SOEs the board is inferred as the highest level of decision within the entity.[26] This stands in line with the provisions of Law no. 111/2016, which require internal auditors of SOEs to report to the board audit committee (in line with the recommendation of the SOE Guidelines).

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Notes

[1] As previously mentioned, interim board members are appointed for four months with the possibility of extension for another two months; however, If the selection procedure is suspended or cancelled by the court of law, the mandate of the interim director continues until the new board member is appointed according to due process.

[2] In practice, sanctions are issued the General Directorate of Economic and Financial Inspection (DGIEF), a control body within the Ministry of Finance. According to the Romanian authorities, in 2021, DGIEF initiated 35 investigations, out of which 16 were finalised. Of these, 30 sanctions were issued, including 28 fines amounting to RON 92 000, as well as two warnings.

[3] Law no. 111/20116 requires that board members should, at a minimum: (i) have the minimum knowledge, skills, and experience necessary to fulfil the mandate successfully; (ii) know the responsibilities of the position and be able to have both medium- and long-term perspectives; (iii) be able to assume the duties towards the whole board and demonstrate integrity and independence; and (iv) have the necessary knowledge, skills, and experience in constructive criticism, teamwork, communication, financial culture, decision-making, and pattern detection to contribute to the board's work as a whole.

[4] The order also provides that any change in the information to be transmitted by line ministries (detailed in the annexes no. 1-3 of the S1100 form) is to be made at the request of the General Directorate of Legislation and Regulation in the field of state assets, by a note approved by the co-ordinating secretary of state. Any new version of the online application of the S1100 form is to be published on the Ministry of Finance's website.

[5] According to applicable provisions, line ministries are required to prepare annual reports on the activity of SOEs in their respective portfolios, which should be made publicly available on their website in June of each year (see Section 2.6.3 for details).

[6] For instance, in the case of Hidroelectrica, following the appointment of board members according to due process, the remuneration of non-executive directors almost doubled.

[7] https://balkangreenenergynews.com/romanian-hidroelectrica-not-insolvent-ipo-to-follow-soon/#:~:text=Hidroelectrica's%20troubles%20were%20caused%20by,could%20not%20have%20been%20ended

[8] https://www.imf.org/external/pubs/ft/scr/2015/cr1580.pdf

[9] https://www.bvb.ro/info/Rapoarte/Ghiduri/ESG_Reporting_Guidelines.pdf

[10] The establishment of a risk committee within the board of directors is only required by law for credit and financial institutions. While this is not mandatory for other SOEs, a risk committee can be established by the board at the discretion of individual SOEs.

[11] This includes (i) autonomous administrations, (ii) companies established pursuant to the Companies Law in which the state holds a majority or controlling stake, and (iii) subsidiaries (i.e. companies where one or more SOE(s) (described in (i) and (ii)) hold(s) a majority or controlling stake).

[12] This excludes two SOEs exempted from the application of Law no. 111/2016 on national security grounds – namely, Rasirom and Romtehnica, as well as credit institutions.

[13] According to Article 51(1) of Law no. 111/2016, the Ministry of Finance can issue a warning or fine of between RON 1 000 and RON 3 000 to the chairman of the supervisory board of majority-owned SOEs that fail to comply with disclosure requirements.

[14] In particular, no information was reported from the Ministry of Public Works and Administration, Ministry of Culture, Ministry of National Defence, and Agency of the State Domain about SOEs in their portfolios. The Ministry of Research and the Ministry of Agriculture did not report information for around half of SOEs in their respective portfolios, while the Ministry of Economy, the Ministry of Energy and the Authority for Managing State Assets did not report information about only a few SOEs under their oversight (Ministry of Finance, 2021[3]).

[15] These include: Posta Romana, CFR, Oltenia Energy Complex, CFR Calatori, CFR Marfa, CNAIR, Hidroelectrica, Metrorex, Electrocentrale Bucharest, National Lottery Company, Tarom, Hunedoara Energy Complex, Salrom, Romatsa, Bucharest Airports, Romanian Car Registry, and the National Society of Radio Communications.

[16] While according to the legal framework these general objectives should underpin more detailed strategies elaborated by board and executive members in the administration plan, in turn informing the selection of granular performance indicators to be included in the mandate contracts of SOE directors and monitored by the ownership entity and the Ministry of Finance on a regular basis, these provisions remain rarely implemented, due to the widespread practice of interim appointment in SOE board and executive positions. As such, in practice, for interim board members, only financial indicators – derived from the approved budget – are set on a quarterly basis.

[17] However, in practice, some large SOEs do publish their "administration plan" (elaborated by SOE board and executive members upon their appointment, based on the objectives of the letter of expectations), but this seems to be done on an ad-hoc and voluntary basis.

[18] According to a review of the websites of 16 large and economically important SOEs (identified in Table 2.4), it seems that only some SOEs publish this annual report.

[19] Disclosure requirements of the quarterly and half-yearly reports are also provided by Law.

[20] According to GO no. 11/2016 (amending GO no. 26/2013), unlisted SOEs are required to submit the income and expenditure budget (as approved by the general shareholders' meeting) for approval by the government within 45 days from the date of approval of the Annual State Budget Law. According to the Romanian authorities, the government approves these budgets within 45 days from the date of submission (see section 1.4.3 for details).

[21] As mentioned above, it is also worth noting that while the due selection process was initiated in 92 central SOEs in 2020 to comply with legal requirements, it was completed in only one-third of them (31 SOEs). While the cause is unclear, this may be taken to indicate that the due selection process may be too cumbersome for ownership entities (i.e. line ministries) in the current institutional set-up.

[22] In particular, a 2018 report illustrates the frequent change of SOE executive members in line with electoral cycles (State capture, 2018[20]).

[23] According to the provisions of Law no. 111/2016 and GD no. 722/2016, the remuneration of executive directors should consist of a fixed and variable component. The fixed component should not exceed six times the average for the last 12 months of the average gross monthly salary in the sectors in which SOEs operate according to the classification of activities in the national economy, communicated by the National Institute of Statistics prior to the appointment. The variable component should be based on the financial and non-financial performance indicators, negotiated with and approved by the line ministry, and should be different from those approved for non-executive administrators.

[24] It should however be noted that financial directors of SOEs are required to be appointed according to the provisions of GEO no. 109/2011.

[25] These areas of self-evaluation suggest that boards of Romanian SOEs consider themselves as "compliance boards" rather than strategic players in the company. In best practice boards, the main focus of self-evaluations would be board efficiency.

[26] According to the Romanian authorities, internal auditors of SOEs are only administratively subordinated to the management of SOEs as per the provisions of Law no. 672/2002 (by concluding work contracts with internal auditors).

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