

# THE OUTSOURCING OF PUBLIC ACTIVITIES AND ITS LIMITS IN THE COMPARATIVE LAW

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**ABSTRACT:** *This study proposes to perform a short presentation of the limits in which the externalization of the public activities may be performed in a few representative countries in the Romano-German law system (France, Germany, Spain, Italy) and the Anglo-Saxon law system (Great Britain). Although, in principle, the public activities that involve the exercise of sovereignty (justice, police, army) cannot be performed by the private sector, we will observe that there are different nuances from country to country. Finally, the compared analysis is exploited in the Romanian law through legislative (lege ferenda) proposals.*

**KEYWORDS:** *the externalization of public activities, the delegation of public service, the public functions, the contract in the public sector, the public-private partnership, core function*

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## 1. INTRODUCTORY CONSIDERATIONS

The externalization (*outsourcing*) of the administrative functions is defined in the French doctrine as being “the entrustment of the exploitation of an activity by a public authority, temporarily and in exchange for a fee”<sup>1</sup> or “an administration instrument that allows a public organization to delegate certain non-strategical functions, previously exerted by it, to the exterior services providers”<sup>2</sup>. In Italy the externalization was defined as “a complex contractual report designated to the acquisition by an exterior supplier, through a medium term contract, of services previously performed through internal public entity means”<sup>3</sup>.

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<sup>1</sup> Philippe Cossalter, *Les délégations d'activités publiques dans l'Union européenne*, Librairie générale de droit et de jurisprudence, Paris, 2007, p. 3.

<sup>2</sup> Paul Lignières, Laurent Babin, « L'externalisation : au coeur des préoccupations de l'Etat », *Droit Administratif (DA)*, mai 2002, p. 37.

<sup>3</sup> Anna De Blasiis, *Outsourcing e Global service*, Unità di Direzione AA.II. Ufficio Studi, [http://www.provincia.potenza.it/allegati/Outsourcing\\_Global\\_service.doc](http://www.provincia.potenza.it/allegati/Outsourcing_Global_service.doc), Provincia di Potenza (Italie), undated, p. 3 (last consulted on the 15th of July 2009).

Through the externalization the traditional administrative structures are placed between hierarchy and market. The purpose of the externalization of public activities is the enrichment of the service means of the citizens' interests.

In our opinion the externalization does not present an abandonment to the private environment of an activity previously performed by the public authorities<sup>4</sup>. In this meaning we highlight the fact that the transfer of the activity is temporary and the public authority keeps the control right over the way in which the public interest is satisfied by performing the respective activity.

The externalization of the public activities represents a component of the reform of public administration. We mention that numerous questions are asked in the doctrine of the law and management regarding the direction that must be followed in the reform activity – with accent on the administration as public service, according to the French model, or with accent on profitability, efficiency and market, after the American model – and, in consequence, questions about how the relation public law-private law will evolve<sup>5</sup>. Many times, there is the impression that the public law would have abusively occupied a territory belonging to the private law and that the current tendency of introducing the competition and market rules in the functioning of public service would lead to a fall of the administrative law. We appreciate that the reform of the public administration must be performed through a conciliation between the French and the American models, by introducing market rules within the industrial and commercial services in the limits allowed by the public interests, without fearing that they would lead to a non-structuring of the administrative law. In this meaning we share the point of view expressed by Francis Fukuyama who distinguishes between “*the span of the state's activities* [our underlining C.S.S.], which refers to the different functions and purposes assumed by governments and *the force of the state's power* [our underlining C.S.S.] or the possibility of the state to plan and execute policies and to apply the law correctly and transparently – which is currently called the state's capacity or institutional capacity”<sup>6</sup>. The optimum way of the reform, the author appreciates, “consists of reducing the span by increasing the force in the same time”<sup>7</sup>. Agreeing to the opinion of this author's we consider that it is imposed, in the current conditions, the reduction of the span of the state's activities by taking over some of them by the private environment, through the administrative, commercial, civil contracts, etc. concomitantly to performing certain coherent public policies of control and surveillance of the way in which the citizen's interests is satisfied.

We will finally perform a presentation of the public activities that can be externalized in a few representative countries in the Romano-German law system (France, Germany, Spain, Italy) and the Anglo-Saxon law system (Great Britain). Although, in principle, the public activities that involve the exercise of sovereignty (justice, police, army) cannot be

<sup>4</sup> In the private environment the externalization is presently defined as being “an abandonment of the a branch of an activity developed by an enterprise which ceases it to another enterprise after the latest insured, in exchange, the production or service for which that activity branch has been dedicated” - Jacques Dupouey, „Propos sur l'externalisation”, Droit et patrimoine, n°59/avril 1998, p. 42.

<sup>5</sup> See Ioan Alexandru, Dreptul și managementul. Dihotomie sau complementaritate. Impactul informatizării, Editura All Beck, București, 2004, p. 49-61.

<sup>6</sup> See Francis Fukuyama, Construcția statelor. Ordinea mondială în secolul XXI, Editura Antet, 2004, p. 14.

<sup>7</sup> Ibidem, p. 23.

performed by the private sector, we will observe that there are different nuances from country to country.

## 2. THE LIMITS OF THE EXTERNALIZATION OF PUBLIC ACTIVITIES IN GREAT BRITAIN

On the level of the local collectivities *Local Government Act 1972*<sup>8</sup> refers in art. 111(1) to the subsidiary powers of the local authorities showing that: *a local authority shall have power to do any thing (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.* We notice that the local authorities have a large competence in performing their mission of serving the public interests. In the doctrine there was the question if these public authorities have the possibility that using the competence showed by art. 111 of *Local Government Act* to conclude contracts for the externalization of the public activities<sup>9</sup>. Based on these laws, the externalization has been encouraged by the Thatcher government<sup>10</sup>. In order to achieve efficiency and savings in supplying the public services, this government involved through its public authority in the local administration. Thus, the central government settled the specific competences for the local authorities and transferred the authority to the governmental agencies created in the territory<sup>11</sup>.

The Thatcher government oriented to the market and defined the way in which the public services could be supplied by the private sector. In 1980 *Compulsory competitive tendering* (CCT) was created for the putting in compulsory competition the internal administrative services with the private sector, based on the principle of the best advantages-costs report - the principle *value for money*<sup>12</sup>. Through *Local Government Act 1988* the local authorities were requested to contract and offer the private companies the supply of services such as: collecting the litter, cleaning the buildings, supplying the schools, maintaining the roads, managing the sports and entertainment facilities<sup>13</sup>. These activities were proposed for concession. But the concession as legal institution will appear in the English law with the construction of the railroad tunnel under the English Channel, being taken over from the French law.

Through this procedure the local authorities, conceding the public services to the private sector and monitoring the results, became agencies of the central power. The agency model

<sup>8</sup> published in <http://www.england-legislation.hmso.gov.uk> (last consulted on the 15th of July 2009).

<sup>9</sup> Philippe Cossalter, *Le droit de l'externalisation des activités publiques dans les principaux systèmes européens*, online : [http://chairemadp.sciences-po.fr/pdf/seminaires/2007/rapport\\_Cossalter.pdf](http://chairemadp.sciences-po.fr/pdf/seminaires/2007/rapport_Cossalter.pdf), 2007, p. 7 (last consulted on the 15th of July 2009).

<sup>10</sup> Margaret Thatcher was in front of the English government for 11 years, since 1979 until 1990 when she resigned. She was the first prime minister who obtained three mandates in a row.

<sup>11</sup> See Ioan Alexandru, *Administrația publică. Teorii. Realități. Perspective*, ediția a II-a, Editura Lumina Lex, București, 2001, p. 311, 312.

<sup>12</sup> George Boyne, "Competitive Tendering in Local Government: A Review of Theory and Evidence", *Public Administration*, Vol. 76, No. 4/Winter 1998, p. 695-712; Danny Frederick, *Why compulsory competitive tendering for Local Government services is not as good as privatization*, <http://www.libertarian.co.uk/lapubs/econn/econn052.pdf>, 1994, p. 1, 2 (last consulted on the 15th of July 2009).

<sup>13</sup> Peter John, *The Restructuring of Local Government in England and Wales*, în Richard Batley and Gerry Stoker (editors), *Local Government in Europe: Trends and Development*, MacMillan, London, 1991, p. 58-72.

specific to the British administration is based on the development of a powerful and competitive private sector, as basis for supplying quality public services. Without this competitive private sector the agency model would not be possible. The agency model favors the efficiency in supplying services, mixing the areas of services supply with the political authority and highlights the non-governmental actors as services suppliers.

Meanwhile, the public administration and the agencies adopted different acts used for the delegation of the administration of public services<sup>14</sup>. Thus, in the field of public services regarding the water resources, water supply and purification, *Regional Water authorities* elaborated in 1989 « *Water act* », which includes the main clauses in this field and which the private companies must fulfill regarding the consumers (beneficiaries) of these public services<sup>15</sup>. In the field of public telecommunications services, in 1984, in Great Britain, « *Telecommunications act* » was adopted, which sets the functioning regime for the telecommunication services, under the surveillance of the entity entrusted with their supervision, *Office of telecommunications*. Also, in Great Britain other regulations have been adopted that settle the obligations in the field of methane gas – “*Oil-gas enterprise act*” – adopted in 1982, in the field of electricity supply – “*Electricity act*” in 1989, and related to the concessions for the building and exploitation of the highways – “*New roads act and street Work act*”, adopted in 1991<sup>16</sup>.

An impulse regarding “the contractualisation” of the public activities was given by *Deregulation and Contracting Out Act 1994*<sup>17</sup>. This law did not directly authorize the contracting out of public activities, but it gave ministers the ability to adopt a regulatory act (*order*) through which to authorize their contractual delegation. Additionally, the law excludes any possibility of externalization by contract of certain functions provided in art. 71(1): “(a) its exercise would constitute the exercise of jurisdiction of any court or of any tribunal which exercises the judicial power of the State; or (b) its exercise, or a failure to exercise it, would necessarily interfere with or otherwise affect the liberty of any individual; or (c) it is a power or right of entry, search or seizure into or of any property; or (d) it is a power or duty to make subordinate legislation”. In the doctrine these limits of the externalization of the public activities have been discussed<sup>18</sup>. An author highlights that nothing prevents the entrusting to the private sector of the administration of the trade registry or marital status<sup>19</sup>. Another author considers that the exclusions provided by art. 71 of the *Deregulation and Contracting Out Act 1994* do not have an intangible character, a simple amendment being enough to make any jurisdictional functions delegable, including the one exerted by the House of Lords, given the absence of a Constitution<sup>20</sup>. Therefore, it results that the protection

<sup>14</sup> See Olivier Raymundie, *Gestion déléguée des services publics en France et en Europe*, Le Moniteur, Collection: L'actualité Juridique, Paris, 1995, p. 47.

<sup>15</sup> See Andrew Dunsire, „Coûts, progrès et avantages de la privatisation secteur public, secteur privé, l'expérience du Royaume-Uni”, *Revue internationale des sciences administratives*, 1990, p. 102

<sup>16</sup> Olivier Raymundie, *op. cit.*, p. 150

<sup>17</sup> On this law see: Sue Arrowsmith, *The Law of Public and Utilities Procurement*, 1996, Sweet & Maxwell, London, 1996, p. 26, 27; Mark Freedland, “Privatising Carltona; Part II of the Deregulation and Contracting Out Act 1994”, *Public Law*, 1995, p. 21.

<sup>18</sup> Philippe Cossalter, Bertrand du Marais, *La private finance initiative*, Institut de la Gestion Déléguée, online: [www.fondation-igd.org/pdf/Publi/PFI.pdf](http://www.fondation-igd.org/pdf/Publi/PFI.pdf), Paris, 2001, p. 40-42 (last consulted on the 15th of July 2009).

<sup>19</sup> Mark Freedland, *op. cit.* (1995), p. 21, 23.

<sup>20</sup> Paul Craig, «The Contract State: Administrative Law Revisited», in Yvonne Fortin, *La contractualisation dans le secteur public des pays industrialisés depuis 1980*, L'Harmattan, Paris, 1999, p. 368.

of the core public functions is mainly based on the exertion of “self-control” from the public authorities, of an internal discipline, and less on constraining written norms<sup>21</sup>.

One of the limits of the externalization of public competences is given in Great Britain by the accentuation of the principle *delegatus non potest delegare* (“the delegated cannot delegate”) – the interdiction of sub-delegation<sup>22</sup>. This vision opposes to the one developed in the United States, where the field of the public non-delegable activities is seen rather as an ensemble of core non-susceptible functions to be exerted by a private person<sup>23</sup>.

### 3. THE LIMITS OF THE EXTERNALIZATION OF PUBLIC ACTIVITIES IN FRANCE

In the doctrine an author considered that the problem of externalizing the state’s imperial functions cannot be considered, given the incompatibility of the contractual procedure with the administrative police activities<sup>24</sup>.

Currently in the doctrine it is deemed that the public functions involving the exercise of authority prerogatives are not delegable<sup>25</sup>. Also, in the jurisprudence it was appreciated that within the public functions the distinction between the prescription functions that are always non-delegable and the action functions that are delegable when the exercise of authority is not involved must be made<sup>26</sup>.

The French State Council elaborated the distinction between the non-delegable activities in the virtue of legal provisions and non-delegable activities by their nature<sup>27</sup>. The latest may be defined only by referring to the core functions of the state: police, justice, army, normative activity.

Some activities cannot be delegated for a legal regulation attribute the competence of their performance to a determined public institution. Thus, the State Council pronounced regarding the interdiction for French public hospitals to delegate the activity of medical housing to the private environment, expression of the principle that shows that the holder of a competence cannot transmit it unless under the conditions in which the law expressly provides such a possibility<sup>28</sup>.

The Constitutional Council showed that the national public services which have their existence fundament in the dispositions of constitutional nature (“*services publics constitutionnels*,”) cannot make the object of privatization<sup>29</sup>. In spite of all these in the recent jurisprudence is appreciated that

<sup>21</sup> Philippe Cossalter, op. cit. (Le droit de l’externalisation...), p. 9.

<sup>22</sup> Paul Craig, op. cit., p. 368

<sup>23</sup> Philippe Cossalter, op. cit. (Le droit de l’externalisation...), p. 7.

<sup>24</sup> Jacques Moreau, « De l’interdiction faite à l’autorité de police d’utiliser une technique d’ordre contractuel », L’actualité juridique droit administratif (AJDA), Paris, 1965, p. 3-17.

<sup>25</sup> Philippe Terneyre, « Les conventions de délégation globale de stationnement payant », Bulletin juridique des contrats publics (BJCP) nr. 5/1999, p. 404.

<sup>26</sup> The Decisions of the French State Council: Consort Amoudruz (23 May 1958), Dame Verneuil (4 October 1961), <http://www.conseil-etat.fr/cde/> (last consulted on the 15th of July 2009).

<sup>27</sup> Conseil d’État, avis de la section de l’Intérieur, 7 octobre 1986, n° 340.609, Grands Avis du Conseil d’État, 1ère éd., 1997, n° 24, p. 245.

<sup>28</sup> L’avis du Conseil d’État, 16 juin 1994, <http://www.conseil-etat.fr/cde/fr/les-grands-avis/> (last consulted on the 15th of July 2009).

<sup>29</sup> Décision n° 86-217 DC/18 septembre 1986, Loi relative à la liberté de communication; Décision n° 87-232 DC/7 janvier 1988, Loi relative à la mutualisation de la Caisse nationale de crédit agricole ; Décision n° 96-375/9 avril 1996, Loi portant diverses dispositions d’ordre économique et financier – <http://www.conseil-constitutionnel.fr/> (last consulted on the 15th of July 2009).

the sovereignty function performed by the constitutional public services may be decomposed in the core functions and annex functions, with technical character, susceptible of being entrusted to the private persons<sup>30</sup>. Thus, for example the Constitutional Council admitted that art. 49 of the Orientation and Programming Law for justice<sup>31</sup> that allows the entrusting to the private environment of the electronic surveillance tasks of persons under judicial control, only considers “the technical performance that may be detached from the sovereignty functions”<sup>32</sup>. This is also the case of art. 53 of the Law regarding the immigration<sup>33</sup> which allows the entrusting to the private environment of the armed transport of retained persons to/from retaining centers<sup>34</sup>.

The delegation of public service is defined in art. L1411-1 of the General Code of the territorial collectivity (*Code général des collectivités territoriales*) as being a contract by which a moral person of public law entrusts the administration of the public service under its responsibility to a public or private principle, whose fee is substantially related to the service’s exploitation results. The principle may be entrusted to make a paper or to acquire the goods necessary for the service.

It is worth highlighting the fact that the public-private partnership systems have a long tradition in France through the collaboration between authorities and the private sector regarding the concession of public goods, even since the end of the 19<sup>th</sup> century and the beginning of the 20<sup>th</sup> century, period in which the French doctrine of public services is formed<sup>35</sup>. In France, the partnership forms between local authorities and community authorities, in the meaning we accept today, appear from the 80s for the prevention and fighting of delinquency, as well as for the insurance of social cohesion<sup>36</sup>. Presently, the administrative contract for public-private partnership is regulated by the Ordinance no. 559/2004<sup>37</sup>.

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<sup>30</sup> Décision n° 2002-461 DC/29 août 2002, Loi d’orientation et de programmation pour la justice, <http://www.conseil-constitutionnel.fr/> (last consulted on the 15th of July 2009).

<sup>31</sup> Loi n° 2002-1138 du 9 septembre 2002 d’orientation et de programmation pour la justice, « LOPJ », Journal officiel de la République française (JORF) n° 211 du 10 septembre 2002, <http://www.legifrance.gouv.fr> (last consulted on the 15th of July 2009).

<sup>32</sup> Décision n° 2002-461 DC/29 août 2002, Loi d’orientation et de programmation pour la justice.

<sup>33</sup> Loi n° 2003-1119 du 26 novembre 2003, relative à la maîtrise de l’immigration, au séjour des étrangers en France et à la nationalité, JORF n° 274 du 27 novembre 2003, <http://www.legifrance.gouv.fr> (last consulted on the 15th of July 2009).

<sup>34</sup> Conseil Constitutionnel, Décision n° 2003-484 DC/20 novembre 2003, Loi relative à la maîtrise de l’immigration, au séjour des étrangers en France et à la nationalité, <http://www.conseil-constitutionnel.fr/> (last consulted on the 15th of July 2009).

<sup>35</sup> Mariana Stancu-Țișișcă, *Persoanele juridice de drept public*, Editura C.H. Beck, București, 2006, p. 251.

<sup>36</sup> The creation of the Communal Councils for the Prevention of Delinquency (Conseils Cammunaux de Prevention de la Deliquance), and then the Law for the orientation and programming of security (d’Orientation et de Programmation de la Sécurité – 1995) and in 1997 the apparition of „Contrats Locaux de Sécurité” (CLS), created the premises of developing the public-private partnership between the local authorities and the local partners for the prevention of delinquency and insuring social cohesion (Report of the Seminar Public-Private Partnership, Hague, Netherlands, 16 - 17 December, 2002).

<sup>37</sup> Journal officiel n. 141/19.06.2004.

#### 4. THE LIMITS OF THE EXTERNALIZATION OF PUBLIC ACTIVITIES IN GERMANY

In Germany “the contractualisation” of the public action is very advanced, the conclusion of public law contracts through which the provisions of an administrative document are to be replaced being allowed. Thus the Law over the non-contentious federal administrative procedure of 25 May 1976<sup>38</sup> (*Verwaltungsverfahrensgesetz des Bundes – VwVfG*) dedicates one of its parts (4<sup>th</sup> Part, art. 54-62) of the public law contracts. The law shows in art. 54 that “a law report in the field of public law may be founded, modified or terminated by public law contract (*öffentlich-rechtlicher Vertrag*), except for the contrary law regulations. In particular, the administrative authority may, instead of edict an administrative act, conclude a public law contract with the one the administrative act is designated to”.

In spite of all these, in Germany the legislation on the level of the lands interdicts the delegation of functions designated to performing “the social welfare” as the sanitation and treating of wastes. On the other side the German state externalized the entire non-military communications system of the Ministry of Defense<sup>39</sup>. Therefore, the problem is to define the imperial functions exerted exclusively by the public authorities, to identify the content of these functions and the eventual existing exceptions. The German doctrine operated a distinction between “the administration as authority” (*Hoheitverwaltung*) and “the administration as enterprise” (*Betriebsverwaltung*), distinction resembling the one between the public functions and the public services the Italian and Spanish doctrine operate with<sup>40</sup>. Through *Hoheitverwaltung*, the imperial functions (*jus imperii*) of the state which traditionally are non-delegable (public security, defense etc.) are performed. *Betriebsverwaltung* designated those activities usually exerted in the regime of private law and which can be externalized. The German fundamental law explicitly interdicts the externalization of the public functions exerted by *Hoheitverwaltung*. Thus, art. 33(4) of the German fundamental law (*Grundgesetz für die Bundesrepublik Deutschland*, GG) sets as general rule that “the exercise of power of the public authorities must be entrusted with permanent title to the members of the public function in service and fidelity report of public law”<sup>41</sup>. In practice, it was considered that 40% of the functions of such a prison may be entrusted to the private sector without contravening the dispositions of art. 33(4) of the German fundamental law, such an externalization being illicit as long as it does not have a direct connection with the execution conditions of a court of law decision (*Strafvollzug*)<sup>42</sup>. Starting from such empirical studies, we came to interpret art. 33(4) of the German fundamental law in the meaning of separating the exercise of power (exclusively performed by the public authority) from the technical activities (which may be externalized to the private environment)<sup>43</sup>.

<sup>38</sup> Consolidated version (14.06.2005), [www.bijus.de](http://www.bijus.de) (last consulted on the 15th of July 2009).

<sup>39</sup> Philippe Cossalter, op. cit. (Le droit de l’externalisation...), p. 8

<sup>40</sup> Fernando Garrido Falla, «El concepto de servicio público en derecho español», *Revista de Administración Pública* Núm. 135/Septiembre-diciembre 1994, p. 12. <http://www.cepc.es> (last consulted on the 15th of July 2009).

<sup>41</sup> „Die Ausübung hoheitsrechtlicher Befugnisse ist als ständige Aufgabe in der Regel Angehörigen des öffentlichen Dienstes zu übertragen, die in einem öffentlich-rechtlichen Dienst – und Treueverhältnis stehen”. <http://www.bundestag.de/parlament/funktion/gesetze/Grundgesetz/index.html> (last consulted on the 15th of July 2009).

<sup>42</sup> Christean Wagener, „Privatisierung im Justizvollzug - Ein Konzept für die Zukunft“ *Zeitschrift für Rechtspolitik*, 2000, p. 169-216.

<sup>43</sup> Philippe Cossalter, op. cit. (Le droit de l’externalisation...), p. 12.

Beyond the existing restrictions on the level of the federation, the lands have an own legislation for the regulation of the administration of public services that illustrates the heterogeneous conceptions over the public activities that may externalized. Thus, in some lands the interdiction to entrust the private sector with sanitary and social activities is regulated, as well as the water distribution. Also, we notice a tendency to constitute local holdings that allow the financial compensation (*Querverbund*) of the profitable and unprofitable public service activities<sup>44</sup>.

### 5. THE LIMITS OF THE EXTERNALIZATION OF PUBLIC ACTIVITIES IN SPAIN

In Spain the doctrine, beginning with the legal provisions, theorized the distinction between the *public functions* and the *public services*<sup>45</sup>. The public functions are the expression of state's sovereignty and they cannot be externalized. The Law No. 7/1985 regarding the regulation of the fundamentals of the local regime (*Reguladora de las bases del régimen local* - « RBRL »)<sup>46</sup> in art. 92(2) and then the Law No. 7/2007 regarding the fundamental status of the public civil servant (*Ley 7/2007, del Estatuto Básico del Empleado Público*)<sup>47</sup> in the additional dispositions showed that the public functions are those activity that involve the exercise of authority for the achievement of the general interests of the state and public administrations as the budgetary control functions and economic-financial administration functions, accounting and treasury functions. Additionally, the doctrine showed that there are activities involving the exercise of authority: security of public places; directing the traffic and the persons on the public roads, the protection and extinction of fires, the discipline in the field of urbanism. In the jurisprudence it is showed that the service of taxation cannot be externalized, as it is considered a public function involving the exercise of authority<sup>48</sup>.

Regarding the public services with commercial character the Spanish law settles with limits their administration ways. The delegation (externalization) of the public activities cannot manifest except in the field allowed by the legislation. Thus, the regime of contractual ways of administration of public services is regulated through a general law – the Law on public administration contracts No. 13/1995 of 18 May 1995 (*Ley de contratos de administraciones públicas* – LCAP)<sup>49</sup>, reformed by the royal legislative decree No. 2/2000 of 16 June 2000<sup>50</sup>. The Law No. 13/2003 of 23 May 2003 will modify and complete the dispositions of LCAP regarding the concession contract for public works<sup>51</sup>.

<sup>44</sup> Gérard Marcou, « Les modes de gestion des services publics locaux en Allemagne et le problème de l'ouverture à la concurrence », *Revue française de Droit administratif*, nr. 3/1995, p. 476.

<sup>45</sup> See Fernando Garrido Falla, op. cit., p. 12, 13; Amparo Koninckx Frasquet, « La necesaria concreción del contrato de gestión de servicios públicos. Espacial referencia al ámbito municipal », *Revista de Estudios de la Administración Local y Autonómica*, n° 279/enero-abril 1999, p. 177-211.

<sup>46</sup> Boletín Oficial del Estado (BOE) n. 80/3.04.1985, Consolidated version (29.05.2007), <http://www.csieiro.com/ToDoLeyes/LeyesOrdinarias/Ley%207-1985-LBRL.htm> (last consulted on the 15th of July 2009).

<sup>47</sup> BOE 13.04.2007, <http://www.csieiro.com/ToDoLeyes/LeyesOrdinarias/Ley%207-2007-del%20EBEP.htm> (last consulted on the 15th of July 2009).

<sup>48</sup> Sentencias del Tribunal Supremo de 29.01.1990, RJ, n° 561; 5.03.1993, RJ, n° 1555; 31.10.1997, RJ, n° 7242 <http://www.poderjudicial.es> (last consulted on the 15th of July 2009).

<sup>49</sup> BOE n. 119/19.05.1995, <http://www.carreteros.org/legislaciona/contratos/lcap/lcap.htm> (last consulted on the 15th of July 2009).

<sup>50</sup> Real decreto legislativo 2/2000, de 16 de junio, por el que se aprueba el texto refundido de la ley de contratos de las administraciones publicas, BOE n. 148, 21.06.2000.

<sup>51</sup> LEY 13/03, de 23 de mayo, reguladora del contrato de concesion de obras publicas, BOE n. 124, 24.05.2003.



LCAP distinguishes between the administrative contracts and the private contracts of the administration. In Book I is set that the general regime of the administrative contracts, for then Book II defines the specific regime of each type of administrative contract. Four administrative contracts categories are regulated: works contracts (*contratos de obras*), services contracts (*contratos de servicios*), furnishing contract (*contratos de suministro*) and public services administration contract (*contratos de gestión de servicios públicos*). Within the works contracts we distinguish between the simple acquisition contract for works and the concessions of public works (*concesiones de obras*). The category of the public services administration contract includes four form of indirect administration of public services: concession, *concierto*, interested administration and mixed economy company<sup>52</sup>. Regarding the limits in which the externalization of the public services supply can be performed, LCAP provides in art. 63 that “the state may indirectly administer, by concluding contracts, all services in its competence that have an economic content which allows them to be exploited by private enterprisers and which are not the object of the exertion of the sovereign rights (exclusive rights)”.

In 2007 the Law No. 30/2007 of the contract in the public sector (*Ley de contratos del sector público*<sup>53</sup>, LCSP) has been adopted, through which the provisions of the 2004/18/EC Directive are transposed, law that has a larger application sphere than LCAP (is addressed to all public entities) regarding the general collaboration between the public sector and the private sector<sup>54</sup>.

The tendency manifested on the level of the national authorities is in the meaning of the adaptation of “a contractual system” which allows the conclusion of partnerships between the public sector and the private sector regarding the administration of public services with commercial character<sup>55</sup>.

## 6. THE LIMITS OF THE EXTERNALIZATION OF PUBLIC ACTIVITIES IN ITALY

The Italian doctrine, starting from the provisions of the Italian Criminal Code<sup>56</sup> (art. 357 and 358), operated the distinction between the *public functions* including the non-

<sup>52</sup> Artículo 156 LCAP. Modalidades de la contratación. - La contratación de la gestión de los servicios públicos adoptará cualquiera de las siguientes modalidades: a) Concesión, por la que el empresario gestionará el servicio a su propio riesgo y ventura, siendo aplicable en este caso lo previsto en los apartados 1 y 3 del artículo 232 de la presente Ley. (Letra redactada de conformidad con la LEY 13/03); b) Gestión interesada, en cuya virtud la Administración y el empresario participarán en los resultados de la explotación del servicio en la proporción que se establezca en el contrato; c) Concierto con persona natural o jurídica que venga realizando prestaciones análogas a las que constituyen el servicio público de que se trate; d) Sociedad de economía mixta en la que la Administración participe, por sí o por medio de una entidad pública, en concurrencia con personas naturales o jurídicas.

<sup>53</sup> BOE n. 261/31.10.2007, <http://www.derecho.com/1/boe/ley-30-2007-contratos-sector-publico> (last consulted on the 15th of July 2009).

<sup>54</sup> Alfonso Peña Ochoa, « El nuevo contrato de colaboración entre el sector público y el sector privado en la ley 30/2007, de 30 de octubre, de contratos del sector público», Revista Aragonesa de Administración Pública n. 32/junio 2008, Monografías, Zaragoza, p. 87-107, <http://portal.aragon.es/portal/page/portal/IAAP/REVISTA> (last consulted on the 15th of July 2009).

<sup>55</sup> Carmen Chinchilla Marín, “El nuevo contrato de colaboración entre el sector público y el sector privado”, Revista española de Derecho Administrativo, n° 132/2006, p. 609-644.

<sup>56</sup> Consolidated version (7.04.2009), [http://it.wikisource.org/wiki/Codice\\_Penale](http://it.wikisource.org/wiki/Codice_Penale) (last consulted on the 15th of July 2009).

delegable activities and the *public services* including delegable activities. The two articles that are part of the Title II of the Criminal Code called “Crimes against public administration” (*Dei delitti contro la pubblica amministrazione*) distinguish between the persons entrusted with the performance of “a legislative, administrative or judicial public function” and the two that are entrusted with the performance of a public service”<sup>57</sup>. Art. 357 assimilated to the public function “the administrative function submitted to the public law norms and the authority acts and characterized by forming and manifesting the public administration’s will with the help of the authority and certification powers”. Beginning from this definition, in the Italian doctrine it is appreciated that the public function represent the ensemble of activities designated to fulfilling the essential (core) functions of the state (justice, public security, defense) while the public services are those activities that the state undertakes for the performance of the social welfare<sup>58</sup>. The public function is the expression of direct manifestation of authority, sovereignty of the state. Thus, concretely, the activity of the legislative and judicial powers always compose the content of the public function, while the activity of the administrative power does not form its content unless when its manifestations have, in their ensemble, an authority character, like police activities, military activities, fiscal activities; other manifestations form the content of the public services<sup>59</sup>.

Regarding the public services, it is noticed that in Italy the means of administering them are provided with limits by the legislation. On national level in the matter of public concessions, the Law No. 109/11 February 1994 (the Law Merloni - *Legge quadro in materia di lavori pubblici*) modified by the Law No. 415/18 November 1998, with the ulterior modifications, regulated the public works concessions until 2006 when it has been abrogated by the Code of Public Contracts. The community directives in the field of public acquisitions (2004/17/CE and 2004/18/CE) have been transposed in the national law through the Code of the Public Contracts for works, services and furnishings (*Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE*<sup>60</sup>), adopted by the Legislative Decree No. 163/2006.

On local level the means of administering arte expressly determined by art. 113 of the Legislative Decree No. 267/2000 regarding the unique Text of the laws over the organization of the local entities<sup>61</sup> (*Testo unico delle leggi sull’ordinamento degli enti locali* -« T.U.E.L. »)

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<sup>57</sup> Art. 357 Nozione del pubblico ufficiale Agli effetti della legge penale, sono pubblici ufficiali coloro i quali esercitano una pubblica funzione legislativa, giudiziaria o amministrativa. Agli stessi effetti e’ pubblica la funzione amministrativa disciplinata da norme di diritto pubblico e da atti autoritativi e caratterizzata dalla formazione e dalla manifestazione della volonta’ della pubblica amministrazione o dal suo svolgersi per mezzo di poteri autoritativi o certificativi (1). (1) Articolo cosi’ sostituito dalla L. 26 aprile 1990, n. 86 e successivamente modificato dall’art. 4, L. 7 febbraio 1992, n. 181. Art. 358 Nozione della persona incaricata di un pubblico servizio Agli effetti della legge penale, sono incaricati di un pubblico servizio coloro i quali, a qualunque titolo, prestano un pubblico servizio. Per pubblico servizio deve intendersi un’attivita’ disciplinata nelle stesse forme della pubblica funzione, ma caratterizzata dalla mancanza dei poteri tipici di questa ultima, e con esclusione dello svolgimento di semplici mansioni di ordine e della prestazione di opera meramente materiale (1). (1) Articolo cosi’ sostituito dalla L. 26 aprile 1990, n. 86.

<sup>58</sup> Umberto Pototschnig, *I pubblici servizi*, Casa Editrice Dott. Antonio Milani (CEDAM), Padova, 1964, p. 169.

<sup>59</sup> Massimo Severo Giannini, *Diritto amministrativo*, Giuffrè, Milan 1993, 3ème édition, vol. 2, p. 17.

<sup>60</sup> [http://www.simone.it/appalti pubblici/codice/codice\\_appalti.htm](http://www.simone.it/appalti pubblici/codice/codice_appalti.htm) (last consulted on the 15th of July 2009).

<sup>61</sup> *Gazzetta Ufficiale della Repubblica Italiana (GURI) n° 227/28.09.2000. Consolidated version (25.03.2009) ttp://www.finanzalocale.interno.it/docum/studi/varie/testounico267-2000.pdf* (last consulted on the 15th of July 2009).

that operate a distinction between the activities with industrial character (delegable) and without industrial character (non-delegable).

The distinction between the public functions and the public services with industrial character is sometimes blurred. Thus in Italy the Legislative Decree No. 112/1999<sup>62</sup> opened the possibility of delegating by decennial concession of the functions of collecting taxes of any kind from companies, unlike Spain where the Supreme Tribunal interdicted the delegation of these functions<sup>63</sup>. Thus in Italy a part of the imperial activities (*jus imperii*) of the state are exerted concretely by the concessionary, but the state keeps the right to control. Besides, in the Italia law, the notion of concession was based on the idea of transfer through unilateral act of the prerogatives of public power<sup>64</sup>.

In Italy “the contractualisation process” for the administrative action is very advanced, some German influences being felt. Thus, the Law No. 241/1990 regarding the administrative procedure and the right to access to the administrative document (*Legge 241/90 Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi*<sup>65</sup>) allowed the conclusion of agreements (*accordi con gli interessati*) which determine the content of an administrative decision or which substitutes to it (art. 11), like the provision of the German legislation.

## 7. CONCLUSIONS AND THE EXPLOITATION OF THE RESEARCH IN THE ROMANIAN LAW.

The convergence limits regarding the externalization of the public activities in the analyzed countries may be resumed to the graphic below:

<sup>62</sup> Decreto Legislativo 13 aprile 1999, n. 112 “Riordino del servizio nazionale della riscossione, in attuazione della delega prevista dalla legge 28 settembre 1998, n. 337”, Gazzetta Ufficiale n. 97 del 27 aprile 1999, [http://www.giustizia.it/cassazione/leggi/dlgs112\\_99.html](http://www.giustizia.it/cassazione/leggi/dlgs112_99.html) (last consulted on the 15th of July 2009).

<sup>63</sup> Philippe Cossalter, op. cit. (Le droit de l’externalisation...), p. 11.

<sup>64</sup> See for this the Italian theory of the license-concession and the contract- concession developed by the authors Mantellini and Giorgi. These authors start the development of their point of view from an approval of the Italian State Council of March 10th 1879. In essence, the theory recognizes the principle according to which the concession is a unilateral document. But, its nature may be modified depending on certain circumstances, thus becoming contractual. Thus we will have two categories of concessions: on one side the unilateral concessions also called license-concessions and on the other side the bilateral concessions or the contract- concessions. After Mantellini we will be in front of a contract-concession every time the document also contains obligations for administration. But Mantellini shows that “the document will remain a concession document and that the state’s obligations are born more often from laws (or administrative documents) through which the concession is granted, than by contract”. Giorgi includes in the contract-concessions category all the cases in which the concession document is accompanied by a contract or an additional document which imposes mutual obligations and rights – apud Ange Blondeau, La concession de service public, Librairie Dalloz, Paris, 1930, p. 139-141. See in Jurisprudence: Corte di Cassazione, 12 gennaio 1910, Rivista del diritto commerciale (Riv. dir. comm.), 1910, 248; Corte di Cassazione, 1 section, 11 dicembre 1978, Comune di Castelfranco Veneto c/ Soc. Officine gaz Butano, La Settimana Giuridica 1979.II.509; Corte di Cassazione, 3 sect. civ., 3 settembre 1998, Soc. Compagnia Cauzioni ed altro c/ Comune di Barletta ed altri, n° 8768, Giustizia civile massimario (Giust. Civ. Mass.) 1998, p. 1849.

<sup>65</sup> Legge 241/1990 come modificata dalla legge 15/2005 e dal decreto legge 35/2005, <http://www.diritto.it/archivio/1/26488.pdf> (last consulted on the 15th of July 2009).



In Romania we first of all notice that on the local level the Law No. 51/2006 of the public utility community services<sup>66</sup> defines and enumerates these services and then shows that they may make the object of the delegation of administration. Besides these provisions there is no clear delimitation of the public activities regulated on local level that may be externalized by the ones that cannot be. The same thing is noticed regarding the public activities on national level. We notice that references to the essential functions through which the sovereignty prerogatives of the state are exerted, are performed summarily by the Constitution (Title III – Public Authorities). But, besides all these, many times it is very difficult to perform a distinction between the essential (core) functions and the accessory functions. We appreciate that in front of the universal “privatization” phenomena of the public services the clear separation is imposed *de lege ferenda* in the future Administrative Procedure Code of Romania of the basic (core) functions from the appendixes functions, with technical character, susceptible of being entrusted to the private persons. The

<sup>66</sup> Published in the “Monitorul Oficial” (Official Gazette of Romania) no. 254 of 21 March 2006, with the ulterior modifications. Art. 1(2) of this normative act shows that “In the meaning of this law, the community services of public utilities are defined as the totality of action and regulated activities through which the satisfaction of the needs of utility and general public interest of the local collectivities regarding: a) water supply; b) drainage and purification of the used waters; c) collection, drainage and evacuation of pluvial waters; d) the production, transport, distribution and supply of thermal energy in centralized system; e) the cleaning of the cities; f) public illumination; g) administration of public and private domain of the administrative-territorial units, as well as others as such; h) local public transport; is insured”.

development of a coherent externalization frame of the public services with commercial and industrial character and the appendix (accessory) activities to the public functions of sovereignty (*jus imperii*) is hardened also by the fact that in Romania, unlike France (by the Ordinance no. 559/2004) or Ireland (*Public Private Partnership Arrangements Act 2002*), there is no frame-regulation of the public-private partnership, disparated provisions existing in numerous special laws. Additionally, the governmental policies for development of the system of public-private partnership (as it is, for example in England *Public Private Partnerships - the Government Approach 2000*) are almost inexistent.

In Romania, unlike Germany or Italy, the possibility of concluding contracts that determine the content of an administrative decision is not regulated or substituted to it. The contract presents the advantage that it is a more flexible instruments than the unilateral administrative document, allowing the finding of individual solutions, adapted to the needs of the citizens<sup>67</sup>. *De lege ferenda* we propose the regulation in the future Administrative Procedure Code of Romania of the administrative contract of applying the provisions of the normative documents and the unilateral administrative acts. Through such an administrative contract we grant priority to the negotiation techniques and we perform an externalization of the liability regarding the performance of the public interest. We appreciate that such an externalization must have the following limits<sup>68</sup>:

- first of all such a contract cannot have as object the negotiation of the public authority competence (the competence is of public order and cannot be modified through the parties' convention);
- secondly the recurrence to the administrative contract cannot take place when the public interest blazons the taking of urgent measures (for example the recurrence to public requisitions);
- thirdly, if a contract is concluded instead of an unilateral administrative document for the edict of a law rule imposes the approval or the notification of another authority, this contract should not produce effects unless until the authority concerned participates in the form requested by the law; and
- in the case of non-respecting the contractual provisions by the contractor, the public authority maintains the right to recur to the unilateral administrative document for their application.

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<sup>67</sup> Cătălin-Silviu Săraru, *Contractele administrative. Reglementare, doctrină, jurisprudență*, Editura C.H. Beck, București, 2009, p. 367.

<sup>68</sup> *Ibidem*.