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# Constitutional Boundaries of Transfer of Public Functions to Private Sector in Estonia<sup>\*1</sup>

The possibility and necessity of transferring public functions to the private sector has been acknowledged both in Estonian and international legal literature and practice<sup>2</sup> for quite a few years already. The concept of a slim state is mentioned, in which the public authority retains only certain functions as directly executable by it, as well as the concept of an enabling state (*Gewährleistungsstaat*), i.e., the state relinquishes in one way or another or to a certain degree its functions, enabling the private sector to perform them within a nationally governed framework, while the state itself only assumes a so-called enabling function.<sup>\*3</sup>

The other terms used besides ‘transfer of public functions’ often include terms such as ‘grant of authority to perform a public duty (Administrative Co-operation Act<sup>\*4</sup> (ACA)), ‘involvement of the private sector’ (judicial practice<sup>\*5</sup>) and ‘privatisation’. The meaning and scope that is attributed to them often varies greatly depending

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<sup>2</sup> E.g., the Supreme Court of Estonia has analysed the constitutionality of the transfer of the right to impose a fine for misdemeanour to the private sector: SCebd, 16.05.2008, 3-1-1-86-07. – RT III 2008, 24, 159 (in Estonian). Translation into English available at <http://www.nc.ee/?id=908> (9.05.2009). Also, the Supreme Court of Austria has dealt with the problem of constitutional boundaries of the transfer of public functions to private sector in the so-called *Austro Control* judgment (14.03.1996, VfSlg 14.373/1996). Available at <http://www.ris.bka.gv.at/vfgh/>.

<sup>3</sup> For details, see, e.g., F. Schoch. *Gewährleistungsverwaltung: Stärkung der Privatrechtsgesellschaft? – NVwZ 2008/3*, p. 241 *ff.*; C. Franzius. *Der Gewährleistungsstaat – Verwaltungsarchiv 2008 (99)*, p. 351 *ff.*; H. Gersdorf. *Privatisierung öffentlicher Aufgaben – Gestaltungsmöglichkeiten, Grenzen, Regelungsbedarf. – JZ 2008/17*, p. 834; W. Weiß. *Privatisierung und Staatsaufgaben. Tübingen 2002*, p. 291 *ff.*; M. Burgi. *Privatisierung öffentlicher Aufgaben – Gestaltungsmöglichkeiten, Grenzen, Regelungsbedarf. – Gutachten D zum 67. Deutschen Juristentag. Erfurt 2008, E II ff.*

<sup>4</sup> *Halduskoostöö seadus. – RT I 2003, 20, 117; 2009, 23, 143 (in Estonian). ACA § 1 (1): “This Act determines the conditions and procedure for the grant of authority to natural and legal persons to perform public administration duties of the state and of local governments (hereinafter ‘administrative duties’) independently [...]”* See also draft Maintenance of Public Order Act (*korrakaitse seaduse eelnõu*) as of 17.12.2008, No. 49 SE, Ch. VI (“Granting an authority for performing a function of the state to maintain public order based on a contract under public law”); also § 13 (“Mandatory involvement of a person other than the person responsible for maintaining public order in maintenance of public order”). Available at [www.riigikogu.ee](http://www.riigikogu.ee) (in Estonian).

<sup>5</sup> E.g., CCScR, 27.04.2004, 3-2-1-49-04, paragraph 6: “A contract is a contract under public law if a natural person is only involved in performing a public function in the course of procuring the service [...]” – RT III 2004, 12, 157 (in Estonian); ALCSCd, 20.10.2003, 3-3-1-64-03, paragraph 12: “The public authority may, however, enter into both contracts under public law and civil law contracts to secure the performance of a public function. A contract entered into for securing the performance of public functions qualifies as a contract under public law if the authorities of the public authority have been granted to a person in private law under the contract or if the contract governs the subjective rights in public law of third parties. A contract may be a civil law contract if a private person is only involved in the performance of a public function in the course of procuring the service, without conferring any authorised powers to the person or governing the rights of third parties by the contract.” – RT III 2003, 32, 323 (in Estonian).

on the form, legal basis, scope, legal effects, etc. of the transfer of the function to the private sector. Since there is no clear and unambiguous approach to distinguishing between these notions either in Estonian or international literature, the following paper will use the terms ‘transfer’, ‘involvement’ and ‘privatisation’ as synonymous in their widest sense, i.e., as encompassing a transfer of a public function to the private sector in any manner, regardless of the aspects described above.

In brief, the main objective of the transfer of public functions to the private sector may be considered to be the hope of gaining value for money — a less costly, higher quality public service. According to the opinions prevailing in literature, the private sector is reportedly more efficient; also, the private sector is said to possess knowledge and know-how that the public sector lacks. One of the reasons pointed out is naturally the scarcity of public resources, especially staff. Yet there is consensus that the involvement of the private sector must not damage the protection of the rights or public interests of people in whose interests the functions are performed. The possibility of involving the private sector must not serve as a cause or motive for the public sector to be inefficient.<sup>6</sup>

Although the decision to involve the private sector in the execution of a function is, above all, political, there is certainly a clear constitutional dimension to it.<sup>7</sup> We may ask, on the one hand, if an obligation to transfer a public function to the private sector could be derived from the Constitution (e.g., based on the principle of subsidiarity or efficient use of means of the public authority<sup>8</sup>). This aspect is obviously not topical in practice; at least there is no information that the private sector has demanded that or has considered demanding thereof in Estonia. On the other hand, the question is where the boundaries set out in the Constitution lie, what, how and under what conditions the public authority may transfer to the private sector. These are the questions that several officials must answer in their everyday work. However, by merely reading the text, the Constitution as an abstract legislative act does not provide simple ‘may / may not transfer’ answers.

In practice, the notion that has come to denote non-transferable public functions is ‘the core function of the state authority’.<sup>9</sup> Yet the fact that a function is covered or not covered by the notion ‘core function of the authority of the state’ or ‘monopoly of the authority of the state’<sup>10</sup> does not generally answer the question whether involvement of the private sector in performing the particular function is permissible. In other words, labelling a certain function as a core function does not by any means or fully preclude the possibility of involving the private sector — the involvement of the private sector is, in the light of the Constitution, *a priori*, precluded, only when and to the extent of the so-called core of a core function.<sup>11</sup> The same applies the other way round, i.e., the fact that a function is not labelled as a core function does not, in essence, mean that the involvement of the private sector in any form or manner is certainly and without limitations permissible in the light of the Constitution.

Two levels must be distinguished when analysing the question where the constitutional boundaries of transferring the public functions to the private sector run:

- the level of a public function; and
- the level of the form of transferring a public function to the private sector.

These levels are intertwined and a constitutional solution upon determining the transfer of public functions can be found only by analysing these two in conjunction with each other. Thus, for example, the criteria described below and arising from the level of the public function take on a different meaning in various forms of involvement. If, on the level of the public function, an understanding is reached that the involvement of the private sector is completely ruled out, there is naturally no point in analysing the form of the transfer.

<sup>6</sup> For the pros and cons of involvement of the private sector, see, e.g., R. Stober. Privatisierung öffentlicher Aufgaben. Phantomdiskussion oder Gestaltungsoption in einer verantwortungsgeteilten, offenen Wirtschafts-, Sozial- und Sicherheitsverfassung? – NJW 2008/32, p. 2301; F. Schoch (Note 3), p. 242; O. Freitag. Das Beleihungsverhältnis. Rahmen, Begründung und Inhalt. Baden-Baden 2005, p. 16 ff.

<sup>7</sup> For different angles of the discussion of privatisation (theory of the state, public management, legal history, etc. perspective) see, e.g., R. Stober (Note 6), p. 2301.

<sup>8</sup> See, e.g., O. Freitag (Note 6), pp. 81–84; M. Burgi (Note 3), D III.

<sup>9</sup> SCebd, 16.05.2008, 3-1-1-86-07, paragraph 21: “The general assembly agrees with the Chancellor of Justice that also those functions which, pursuant to the Constitution, must be exercised by the state power and which therefore make up the core functions of the state can not be delegated by the state to a legal person in private law.”

<sup>10</sup> It is emphasised in literature that the notion ‘monopoly of power’ (*Gewaltmonopol*) must not be confused with the notions of the monopoly of security and the monopoly of exercising power; its actual content is said to be that the legislator has the monopoly of power and it must not be limited upon establishing the regulations characteristic of a state based on the rule of law. See R. Stober (Note 6), p. 2305.

<sup>11</sup> Or, as one of my colleagues vividly described: if comparing the core functions of the state to a fried egg, the part that the state must by no means renounce is the yolk. It must be admitted, however, that occasionally the yolk is broken and it spreads into the egg white.

# 1. Level of public function

The state is traditionally broken down into three branches of power: the legislative, the executive and the judicial power. Although in practice it is said that the private sector is, above all, involved in the exercise of the executive power (issuing of activity licences, payment of benefits, provision of so-called genuine public services<sup>\*12</sup>), in reality, none of these branches have escaped the discussion of the transfer of the public functions to the private sector.

Even if considering the state monopoly of legislation and administration of justice as self-evident, it is possible to, for example, ask whether a summons or a ruling may be served to the defendant by AS Eesti Post as a private entrepreneur (although the state holds 100% of its shares). How can the monopoly of administration of justice by the state be combined with arbitration proceedings<sup>\*13</sup>, provision of state legal aid by lawyers in judicial proceedings or execution of judgments by bailiffs who stand on the borderline between private and public authority?<sup>\*14</sup> Should publication of legislation in print and/or online be completely in the hands of the state?<sup>\*15</sup> We could carry on with analogous confusing, but in practice topical, questions. That is why a discussion about the constitutionality of the transfer of public functions to the private sector has also been referred to as phantom discussion in literature.<sup>\*16</sup>

A big contribution to the complexity of the discussion of the constitutional boundaries of transferring public functions to the private sector is also presented by the question of what actually is a public function (for example, whether the assignment of domain names or burial of the dead who do not have relatives serve as such), as well as the confusion related to the term in distinguishing (or not distinguishing) between a particular public function and some area (*cf.* conducting tax proceedings and delivery of a notice of assessment).<sup>\*17</sup> A more detailed analysis of these issues unfortunately exceeds the limits of this paper. Below, we will proceed, above all, from the narrow approach to the function of the state, i.e., denoting particular functions that are vested in the state in general understanding.

Based on the causes of the restrictions, the boundaries of the involvement of the private sector arising from the Constitution can be divided into three on the level of a public function: objective boundaries, subjective boundaries (as an individual right) and their connection. Such a division is naturally only conventional and serves the purpose of a better understanding. These three also partly overlap (e.g., the protection of fundamental rights and the principle of a state based on the rule of law).

<sup>12</sup> Explanations about the narrow and wide approach to the notion 'public service' have been given, e.g., by the State Audit Office in its report of 1.11.2007 "Quality of public service in information society", p. 66: "Public services can be divided into two large groups: firstly, the issue of beneficial administrative acts (e.g., award of a benefit) and creation of an environment for exercising rights (e.g., voting at the elections) and performing duties (e.g., reporting taxes); secondly, the so-called genuine public services, such as waste handling, supply of water and energy, public transport, medical care." Available at [www.riigikontroll.ee](http://www.riigikontroll.ee) (9.05.2009) (in Estonian).

<sup>13</sup> In Estonia, arbitration proceedings are governed by Part XIV of the Code of Civil Procedure (*tsiviilkohtumenetluse seadustik* – RT I 2005, 26, 197; 2008, 59, 330 (in Estonian)) as well as by the Rules of the Arbitration Court of the Estonian Chamber of Commerce and Industry (*Eesti Kaubandus-Tööstuskoja Arbitraažikohtu reglement*), approved by the resolution of the board of the Estonian Chamber of Commerce and Industry on 13.12.2007 (entered into force on 1.01.2008). Available at <http://www.koda.ee/?id=44245> (29.03.2009) (in Estonian).

<sup>14</sup> Subsections § 2 (1) and (2) of the Bailiffs Act (*kohtutäituri seadus*): "A bailiff is an independent person who holds an office in public law. A bailiff engages in liberal profession and holds office in his or her own name and at own liability. An undertaking or a state official shall not be a bailiff. In the taxation of professional activities of bailiffs, provisions applying to sole proprietors are applied." – RT I 2001, 16, 69; 2008, 59, 330 (in Estonian).

<sup>15</sup> The publication of *Riigi Teataja* (State Gazette) is organised by the State Chancellery, more precisely the Riigi Teataja Department (§ 6<sup>1</sup>, § 17 (1) 3) of Government of the Republic Regulation No. 267 of 21.12.2006 "Statutes of the State Chancellery" (*Riigikantselei põhimäärus* – RT I 2006, 60, 449; 2007, 73, 450 (in Estonian)); State Secretary directive No. 3 of 12.01.2007 "Statutes of the Riigi Teataja Department". At the same time, the Riigi Teataja Act (*Riigi Teataja seadus* – RT I 1999, 10, 155; 2008, 59, 330 (in Estonian)) provides a possibility of transferring the task also to the private sector: the State Secretary may, inter alia, enter into a contract under public law for the performance of the functions of the authorised processor of the electronic *Riigi Teataja* (§ 7<sup>2</sup> (3)), the functions of the authorised processor of the electronic *Riigi Teataja* may also be performed by a legal person in private law on the basis of a contract under public law (§ 7<sup>3</sup> (2)).

<sup>16</sup> See R. Stober (Note 6), p. 2302.

<sup>17</sup> It is emphasised in the theory that the term 'state function' has to be distinguished from similar terms, such as 'state objective' (i.e., the question about what justifies the existence of a state as it is; so to say the reason of the existence of the state) and 'public function' (i.e., all the functions falling within the scope of public interest or that serve the common good). A duty of the state is above all a formal notion. For details, see, e.g., BVerfGE 12, 205 (243); W. Weiß (Note 3), p. 53 *ff.*; R. Stober (Note 6), p. 2303 *ff.*; M. Burgi (Note 3), B I; A. Mackeben. *Grenzen der Privatisierung der Staatsaufgabe Sicherheit*. Baden-Baden 2004, p. 35 *ff.*; M. Gamma. *Möglichkeiten und Grenzen der Privatisierung polizeilicher Gefahrenabwehr*. Bern, Stuttgart, Wien 2001, p. 9 *ff.*; C. Gramm. *Privatisierung und notwendige Staatsaufgaben*. Berlin 2001, p. 50 *ff.* See also K. Merusk. *Avalike ülesannete eraõiguslikele isikutele üleandmise piirid* (Boundaries of Transfer of Public Functions to Persons Governed by Private Law). – *Juridica* 2000/8, p. 500 *ff.* (in Estonian).

## 2. Objective boundaries

The objective boundaries of the involvement of the private sector in performing public functions encompass the principle of a state based on the rule of law and democracy and a criterion that can be characterised by ‘the ability of a state to act as a state’.

### 2.1. Principles of state based on the rule of law and democracy

Based on the Constitution<sup>18</sup> (§§ 59 *ff.*, 102 *ff.*, 87 (6), 94 (2), § 146 *ff.*) it is unambiguously clear that the adoption of legal provisions by a parliament elected in free, general, uniform and secret elections (and by the executive power as delegated by the parliament<sup>19</sup>) as well as administration of justice by independent courts in accordance with law and the Constitution (in its narrow sense)<sup>20</sup> are areas in which the sole authority of state power must be preserved. The sole power of the state in these areas can be derived from the principles of democracy<sup>21</sup> and a state based on the rule of law (§§ 1 (1), 10 of the Constitution).

Thus, the principle of a state based on the rule of law presumes, for example, the recognition of the existence of fundamental rights (see Part 3 of the paper) and that the state ensures their protection through the activities of independent courts. A part of the principle of democracy is democratic legitimation, i.e., the authorities exercising state power must be connected to the people. In this, democracy presumes that the more important the decision is, the stronger and the more direct must be the legitimation of the authority making the decision.<sup>22</sup> Hence, the principle of the parliament reservation or the principle of importance arising from § 3 (1) of the Constitution obliges the legislator to independently decide on all the issues that are important regarding the functioning of the public authority and fundamental rights.

Democratic legitimation, above all, signifies the exercise of the supreme power of state by the people through their participation in the elections of the *Riigikogu* and in a referendum (§ 56 of the Constitution). The principle of importance is usually discussed in relation to the relationship of competence between the legislator and the executive power. Considering the topic, the latter, above all, means when the executive power needs the legislator’s permission to involve the private sector, when it is not necessary.<sup>23</sup>

In addition to the above, democratic legitimation and the principle of importance deriving from the principle of democracy also carry considerable weight when an administrative organisation decides on the involvement of the private sector.

Proceeding from democratic legitimation, a minister shall manage issues within the area of government of the ministry, be responsible for the implementation of legislation, appoint to and release from office more important officials (e.g., directors general of agencies) and has an extensive supervisory control over public servants of the state agencies falling within the area of government of the ministry to exercise his or her liability (§§ 49 (1), 95 of the Government of the Republic Act). In doing so, the minister directing the ministry and the agencies within its area of government have political liability<sup>24</sup> to the parliament as a representative body elected

<sup>18</sup> Põhiseadus. – RT I 1992, 26, 349; 2007, 33, 210 (in Estonian).

<sup>19</sup> Regulations are issued in Estonia by the Government of the Republic, ministers, local governments (based on the autonomy of local governments set out in § 154 (1) of the Constitution), by a council of a university in public law (based on the autonomy set out in § 38 (2) of the Constitution), by the President of the Bank of Estonia (based on § 111 of the Constitution), and by the National Electoral Committee.

<sup>20</sup> Imposition of a punishment for misdemeanour by a body conducting extra-judicial proceedings is in principle also exercise of a jurisdictional function, not issue of an administrative act (SCebd, 28.04.2004, 3-3-1-69-03, paragraph 24. – RT III 2004, 12, 143 (in Estonian); CCSCr, 13.06.2006, 3-1-2-2-06, paragraph 10. – RT III 2006, 24, 218 (in Estonian)).

<sup>21</sup> The principle of democracy is one of the fundamental principles and values applicable in the European judicial area (CRCSCd, 17.02.2003, 3-4-1-1-03, paragraph 15. – RT III 2003, 5, 48 (in Estonian)), also defined as “Government of the people, by the people, for the people” — from Abraham Lincoln’s Gettysburg address of 1869.

<sup>22</sup> T. Annus. *Riigiõigus* (Constitutional Law). Tallinn 2006, p. 48 (in Estonian).

<sup>23</sup> E.g., according to the Administrative Co-operation Act, a law must contain a provision delegating authority to enter into a contract under public law (ACA § 3 (1) and (2); the same is stated in § 97 of the Administrative Procedure Act (*haldusmenetluse seadus*. – RT I 2001, 58, 354; 2009, 1, 3 (in Estonian)) and § 41 (5) of the Government of the Republic Act (*Vabariigi Valitsuse seadus*. – RT I 1995, 94, 1628; 2009, 11, 67 (in Estonian)), whereas the private sector may be involved without the provision to delegate authority only based on a contract in private law if all the terms and conditions set out in ACA § 3 (4) have been met (i.e., the Act does not only prescribe entry into a contract in public law, the contract is not used to regulate the rights or duties of a person using a public service or any other third party, the state or a local government is not released from its duties and the authorities of the executive power are not used in performing the function). The Supreme Court has discussed the criteria of distinguishing between a contract in public law and a contract in private law in the following decisions, for example: CCSCr, 27.4.2004, 3-2-1-49-04, paragraph 15; ALCSCd, 20.10.2003, 3-3-1-64-03, paragraph 12. For the distinction between secondment and so-called administrative assistance in Germany and when a provision delegating authority is required for involving the private sector, see, e.g., C. Sellmann. *Privatisierung mit oder ohne gesetzliche Ermächtigung*. – NVwZ 2008/8, p. 817 *ff.*

<sup>24</sup> The principle of political liability arises from the principle of democracy and ensuring it is a constitutional value (SCebd, 19.04.2005, 3-4-1-1-05, paragraph 26. – RT III 2005, 13, 128 (in Estonian)).

by the people through democratic elections (e.g., the right to express no confidence according to § 97 of the Constitution). This represents the, so to say, legitimisation chain of the administrative organisation directed by the minister (retraceability to the people's will or departure from the people's will) upon the implementation of the liability accompanying the performance of public functions. The latter is particularly important in areas in which the legal regulation allows for extensive freedom of decision (unspecified legal notions, right of discretion).<sup>\*25</sup> Because of the principle of importance, the administrative organisation directed by the minister must decide on the more important functions assigned by the legislator to the executive power and may not transfer the functions to independent subjects. Important issues cover decisions that are significant with regard to both the organisation of the state as well as the fundamental rights and freedoms of an individual. Pursuant to the Constitution, the functions must be performed on behalf of the administrative organisation directly by the persons appointed to the office (§ 30 of the Constitution).

Hence, the principle of democracy presumes that upon the performance of public functions, important issues are decided directly by a legitimised legislator and the administrative organisation legitimised by the latter. Proceeding from the principle of a state based on the rule of law, issues related to the infringement of fundamental rights and freedoms, *inter alia*, must certainly be considered important.

## 2.2. Ability of state to act as a state

The criterion 'the ability of a state to act like a state' can, in turn, be divided into two: monopoly of power and the obligation to preserve minimal resources.

### 2.2.1. Monopoly of power

According to the preamble to the Constitution, the Republic of Estonia has been established to protect internal and external peace. The internal and external peace are legal rights that, in encompassing a number of legal rights of an individual (e.g., life, health, and honour) and collective (e.g., functional legal order) nature, obligates the state to guarantee the protection thereof.<sup>\*26</sup>

The ability of the human community to ensure internal peace and order and to protect themselves against external enemies is exactly that which has been associated with the origin and development of a state.<sup>\*27</sup> In order to control a blood feud violating peace and order (including the legal order) and to put an end to a feud between rival groups, the state assumed social regulation in medieval times, taking upon itself the right to impose sanctions and use the force necessary therefor, indicating that not only moral, but also justice are the valid standards of community. In doing so, the administration of retributions and the use of force required therefor became an issue in the exclusive competence of the state.<sup>\*28</sup> The state institutionalised organisation of

<sup>25</sup> E.-W. Böckenförde distinguishes between organisational and personal democratic legitimisation (related to appointments to office, etc.) and material and substantive democratic legitimisation (related to the determination of the substance of laws). It is important that although these aspects of legitimisation may counterbalance each other (e.g., when one of them is weaker) but are not fully substitutable. See E.-W. Böckenförde. *Staat, Verfassung, Demokratie*. Frankfurt am Main 1992, p. 11, paragraphs 11–25. See also H.-H. Trute. *Die demokratische Legitimation der Verwaltung. – Grundlagen des Verwaltungsrechts*. Band I. München 2006, § 6; O. Freitag (Note 6), p. 86 ff.

<sup>26</sup> See also, e.g., K. Jaanimägi. *Politsei sisemise rahu tagajana (Police as Guarantor of Internal Peace)*. – *Juridica* 2004/7, p. 453 (in Estonian). The explanatory memorandum to the draft Maintenance of Law and Order Act explains the interrelationship between internal and external peace as follows: "In addition to the concept of public order, the Constitution also operates with the concepts of internal and external peace, the protection of which is pursuant to the preamble one of the fundamental functions of the Estonian State. The protection of external peace is the protection of the state against all dangers, originating from outside, first and foremost, the dangers of military nature (national defence function). Compared to the public order, the internal peace can be viewed as a wider concept, the protective scope of which encompasses the protection of public order against all the threats posing danger to it (in the wider sense given to the concept of public order by this draft Act) on the one side and the proceeding of offences in the criminal and misdemeanour proceedings on the other side. As the third tool for the protection of internal peace would be possible to perceive the activities performed by the security authorities pursuant to the Security Authorities Act [...], which can be understood as the protection of 'national security', the latter being mentioned by §§ 47 and 130 of the Constitution, clearly distinguishing it from the maintenance of public order. The protection of national security can be directed, besides the internal peace, also to the guarantee of external peace." See the explanatory memorandum to the Draft Maintenance of Public Order Act (*korrakaitse seaduse eelnõu seletuskiri*) as of 10.05.2007, No. 49 SE. Available at [www.riigikogu.ee](http://www.riigikogu.ee).

<sup>27</sup> E.g., R. Narits. *Õiguse entsüklopeedia (Encyclopaedia of Law)*. Tallinn 2002, pp. 169, 175 (in Estonian). The evolution of the state has been explained in this way also in theories of contract. See, e.g., J. Locke. *Teine traktaat valitsemisest (Second Treatise on Government)*. – *Akadeemia* 2007/3 – 2007/7, e.g., p. 912: "But because no *political society* can be, nor subsist, without having in itself the power to preserve the property, and in order thereunto punish the offences of all those of that society, there, and there only, is *political society* where every one of the members hath quitted this natural power, resigned it up into the hands of the community in all cases that exclude him not from appealing for protection to the law established by it."

<sup>28</sup> J. Sootak. *Kriminaalpoliitika (Criminal Policy)*. Tallinn 1997, p. 59 (in Estonian); J. Sootak. *Karistusõiguse alused (Foundations of Penal Law)*. Tallinn 2003, pp. 16, 141 (in Estonian). See also W. Gropp. *Füüsilise jõu kasutamise õiguslikud alused (Legal Foundations of Using Physical Force)*. – *Juridica* 2007/2, p. 75 (in Estonian). For the historical development of the national monopoly of power (from the Middle Ages up to this day, including, e.g., the theories of Bodin, Hobbes and Weber), see, e.g., M. Gamma (Note 17), p. 50 ff.

settlement of (legal) disputes. For the first time in history, this allowed for guaranteeing peace for all members of the community.<sup>\*29</sup>

The state tolerates the use of physical force by someone else (other than the state itself) only up to a limited extent and only in extremely exceptional situations. Using physical force for the enforcement of one's rights at one's own discretion is precluded in principle — a person has to have recourse to public authority (court, investigative body, etc.) for that.<sup>\*30</sup>

A private person has a legitimate authorisation to use physical force against another private person only in limited cases.<sup>\*31</sup> A state can tolerate the use of physical force by someone else (other than the state itself) only when the state is unable to use force or do it on time. For example, in the case of a collision of self-defence, necessity or duties<sup>\*32</sup>, in which case the state itself is unable, due to some objective reason (generally the speed at which the situation is played out), to provide sufficient protection for the person.<sup>\*33</sup> Security services rendered by a licensed security services company on the basis of a contract for the supply of security services also serve as an exception: one natural or legal person governed by private law enters into a contract with a security services provider as another legal person governed by private law in order to gain protection against a third person governed by private law.<sup>\*34</sup> In such a case, an employee of the security services company applies the right of self-defence, if necessary. These are the national powers vested in a private person to legitimately apply force against another private person. Using force beyond these powers is prohibited and generally entails a national punishment. Pursuant to the aforementioned, it is necessary to emphasise the keyword 'governed by private law', i.e., the use of force does not take place in the name of public authority (a state), but in the name of a private individual — a natural or legal person.

Monopoly of punishment is part of the monopoly of power. There are two aspects to the punishment of the offender. Firstly, this involves the application of physical force (or at least a possibility thereof) and through that, the restriction of the rights and freedoms of the person to a greater or lesser extent. Secondly, the state expresses its reproachful attitude to committing the act. The constraints applied through punishment of the offender are, above all, based on the guilt of the person<sup>\*35</sup> and the resulting repression — a so-called idea of

<sup>29</sup> C. Gramm (Note 17), p. 38.

<sup>30</sup> A. Krölls. *Privatisierung der öffentlichen Sicherheit in Fußgängerzonen?* – NVwZ 1999/3, p. 234. See, e.g., CCSCd, 4.02.2005, 3-1-1-111-04, paragraph 13: "For example, a failure to act in performing a financial obligation does not create a self-defence status, as the injured party has an opportunity to take recourse for the protection of their rights to the proceedings provided by law (for example civil proceeding). Otherwise the whole state system set in place for the purposes of resolving conflicts would lose its meaning, which in turn would present a serious danger to the legal peace." – RT III 2005, 6, 53 (in Estonian); CCSCd, 30.10.2006, 3-1-1-95-06, paragraph 9 *ff.* explains issues related to the application of self-defence and necessity as circumstances precluding unlawfulness of an act. – RT III 2006, 40, 339 (in Estonian); SCEbd, 30.11.2005, 3-2-1-123-05, paragraph 30: "In the civil society the financial claims are realised first and foremost through the court and not by self-help." – RT III 2005, 43, 427 (in Estonian).

<sup>31</sup> According to § 19 (2) of the Constitution, everyone shall honour and consider the rights and freedoms of others, and shall observe the law, in exercising his or her rights and freedoms and in fulfilling his or her duties. This provision firstly gives rise to the universal obligation of members of the society to abide by law and secondly to the principle that fundamental rights also apply in relationships between private persons.

<sup>32</sup> In Estonian law, the relevant provisions are the following: §§ 28–30 of the Penal Code (*karistusseadustik*). – RT I 2001, 61, 364; 2009, 19, 114 (in Estonian); § 217 (4) of the Code of Criminal Procedure (*kriminaalmenetluse seadustik*). – RT I 2003, 27, 166; 2008, 52, 288 (in Estonian); §§ 140 and 141 of the General Part of the Civil Code Act (*tsiviilseadustiku üldosa seadus*). – RT I 2002, 35, 216; 2009, 18, 108 (in Estonian); § 41 of the Law of Property Act (*asjaõigusseadus*). – RT I 1993, 39, 590; 2008, 59, 330 (in Estonian); § 1045 (2) 3) and 4) of the Law of Obligations Act (*võlaõigusseadus*). – RT I 2001, 81, 487; 2009, 18, 108 (in Estonian).

<sup>33</sup> See also C. Gramm (Note 17), p. 39; A. Mackeben (Note 17), p. 95 *ff.*; S. Schoch. *Polizei- und Ordnungsrecht. – Besonderes Verwaltungsrecht. E. Schmidt-Aßmann u.a. (Hrsg.). Berlin 2003, I 2 paragraph 27; W. Gropp (Note 28), p. 76 ff.; A. Krölls (Note 30), p. 233. See also judgment of the European Court of Justice dated 31.05.2001 in case No. C-283/99, *Commission v. Italy*, paragraphs 20–21: "[...] the activities of undertakings providing caretaking and security services are not normally directly and specifically connected with the exercise of official authority [...]. In particular, as regards the arguments relating to the power of sworn private security guards employed by security firms to arrest persons engaged in the commission of offences, suffice it to note that, as pointed out by the Advocate General in paragraph 45 of his Opinion, such guards have no more power to do so than any other ordinary member of the public." (Judgment dated 13.12.2007 in case No. C-465/05, *Commission v. Italy*, paragraph 42.)*

<sup>34</sup> In Estonia, it is governed by the Security Act (*turvaseadus*). – RT I 2003, 68, 461; 2008, 28, 181 (in Estonian), e.g., § 4 (1) (types of security services), § 14 (principal functions of security firms), § 32 (rights of security agents).

<sup>35</sup> SCEbd, 25.10.2004, 3-4-1-10-04, paragraph 18: "In its essence a punishment means a restriction of a person's rights or freedoms. Nevertheless, not any restriction of rights and freedoms amounts to a punishment, even if the reason for the restriction is an offence. The difference between a punishment applicable for an offence and a non-punitive coercive measure lies in the following. Guilt of a person is an inevitable basis for a punishment, a punishment means a reproach manifested in the restriction. On the other hand, it is not the guilt of a person which is the basis for imposition of a non-punitive coercive measure, but the danger emanating from the person, indicated by the actions he or she has committed." – RT III 2004, 28, 297 (in Estonian). CCSCd, 20.02.2007, 3-1-1-99-06, paragraph 14: "Proceeding from § 56 of the Penal Code, after it has been established that the criminal offence has been committed, the court must give, proceeding from the guilt, a reasoned evaluation under penal law of the offence committed, which contains the type and term of punishment. According to the spirit of the Penal Code, the evaluation must be focused primarily on the offence and the personality of the accused as separated from the offence may not serve as the basis for imposing the type and term of punishment. Above all, the latter encompasses a prohibition to evaluate instead of the particular offence the earlier life of the accused and his or her traits in general when choosing the type and term of punishment." – RT III 2007, 8, 65 (in Estonian). See also CCSCd, 14.06.2006, 3-1-1-43-06, paragraph 13.1: "It is a classical concept that penal law is primarily aimed at the offence, not the

requittal —, not a threat resulting from the person (social prevention, e.g., prevention of a harmful consequence). The latter is characteristic of administrative coercive measures. Although the punishment carries certain (general and special) preventive goals, the main aspect of a punishment is still the **national** negative assessment of the act that violated the rules of conduct. It is a reproach, the essential part of which is the fact that it originates from the state, not from any other person.

### 2.2.2. Obligation to maintain minimal resources

The state must be able to perform all the functions vested in it based on the Constitution, including the function to protect the fundamental rights of people (see also Part 3 of the paper). Upon performing its functions, the state has to be capable of acting like a state — to direct or prohibit independently, at its own discretion. This presumes the ability of the state to have an overview of its means and maintain the minimal resources necessary for the performance of public functions when cooperating with the private sector in order to uphold its identity as a state and exercise its discretion without any internal or external restrictions. It has to be emphasised that the minimum resources are meant to include both legal instruments and organisational measures (e.g., appointment of the composition of the supervisory board of a foundation, the consent of a national authority for performing certain actions or other) as well as personnel, technical equipment, financial resources, etc.<sup>\*36</sup> Most certainly the state has to avoid the possibility of being kept on a leash, where the public authority has to submit themselves to the dictate of the private sector in relation to the performance of a public function.

The obligation to maintain minimal resources does not solely apply to the monopoly of power discussed above. It extends to all areas, including the so-called soft areas. The refusal of the continuation of a public service contract concerning the shipping service between Saaremaa Island and the mainland by AS Saaremaa Laevakompanii in 2004<sup>\*37</sup> was obviously a lesson to be learned for the Estonian State as to what may happen when the public authority loses its ability to dictate. The provision of a public transport service is not traditionally one of the core functions of the state. Yet, the acts (omissions) of a company could have led to an unconstitutional situation in the case of which part of the people living in Estonia would have been completely cut off from the rest of Estonia — the state would have been unable to perform the constitutional functions vested in it.

Hence, the involvement of the private sector also in the performance of public functions outside the core functions to an extent in which the state fully relinquishes its possibility (capacity) of directing and/or interfering, may be unconstitutional.

## 3. Subjective limits

The subjective limits of the involvement of the private sector in the performance of public functions relate to the infringement of the fundamental rights and freedoms accompanying the activities of the public authority — the individual rights aspect of the performance of a public function.

When analysing whether the involvement of the private sector in the performance of some public function should be permissible, the definition of the public function does not give us the answer to what extent the fundamental rights or freedoms of an individual may be infringed upon in the performance of a public function. It is true that the performance of the core functions, for example, usually presumes the existence of authorised powers (orders, prohibitions, duress) but not unavoidably and always. Yet a need may arise in essentially soft areas to apply authorised powers. In other words, when deciding on the involvement of the private sector, after the delimitation of the function, one must always proceed to the level of powers in order to identify the powers presupposed by the performance of a particular function.<sup>\*38</sup> Hence, besides core functions we can certainly speak about core powers. For example, the guarding of the building of a ministry as state assets, in which case the state acts to a great extent as an ordinary owner comparable to a private person, does not yet serve

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offender — an evaluation under penal law is generally based on the offence committed by the person, not the person himself or herself and the punishment is above all founded on the guilt of the person.” – RT III 2006, 25, 226 (in Estonian).

<sup>36</sup> In German legal theory, the responsibility of the state to guarantee (*Gewährleistungsverantwortung*) is used when speaking about the enabling state. For details about the potential ways of it (proprietary prerequisites, organisational and procedural measures, use of self-regulation, etc.). See M. Burgi (Note 3), E II; R. Stober (Note 6), p. 2305; F. Schoch (Note 3), p. 245 ff.; W. Weiß (Note 3), p. 300 ff.

<sup>37</sup> AS Saaremaa Laevakompanii provided public transport services between mainland Estonia and Saaremaa Island. Negotiations for the renewal of the contract started in relation to the expiry of the term of the contract entailed serious disagreements between the state and the company over the compensation paid by the state. AS Saaremaa Laevakompanii was at that moment the only carrier owning the ferries necessary for providing the service (because of the natural peculiarities of the sea, the ferries had to have a special construction), while the state itself lacked the necessary vessels to continue the ship traffic. This put the state in a very uncomfortable situation in negotiating the terms and conditions of the contract.

<sup>38</sup> That is why the study of the monopoly of power has also been considered as oriented to powers (*Lehre vom Gewaltmonopol ist befugnisbezogen*). See M. Burgi (Note 3), D I 2 a.

as a core function of the state. However, if this involves the guard's right to decide on access to the ministry, to identify the person and/or search, X-ray or feel the person or his or her belongings for ensuring security, a different position must be adopted thereto.

Everyone's right to the protection of the state and of law has been set out in § 13 (1) of the Constitution, while according to § 14, the guarantee of rights and freedoms is the duty of the legislative, executive and judicial powers, and of local governments. The state may restrict rights and freedoms, but only in accordance with the Constitution and if the restrictions are necessary in a democratic society and do not distort the nature of the rights and freedoms restricted (§ 11 of the Constitution). Regardless of the fact, whether it is a right of performance (right to demand positive action from the state) or a right to freedom (right to demand non-interference from the state), the state must, in any case, be able to ensure the minimal level of protection of fundamental freedoms arising from the Constitution.

Although the fundamental rights are not classified as more important and less important ones, there are certain fundamental rights that are deemed to be more substantial than others, such as human dignity (§ 10 of the Constitution), the right of recourse to the courts (§ 15 of the Constitution), the right to life (§ 16 of the Constitution), the prohibition of torture or cruel or degrading treatment or punishment (§ 18 of the Constitution) as well as the right to liberty and security of a person (§ 20 of the Constitution).<sup>39</sup> For example, the performance of public functions that presume the powers to use physical force and special equipment, including firearms (core powers) and which may bring about the violation of the corporeal integrity of a person, restriction and deprivation of liberty and danger to life should certainly be at the heart of the core functions not subject to transfer on the basis of the Constitution. The latter also applies if the infringement of a fundamental freedom may become particularly intense (e.g., the inviolability of home during a search (§ 33 of the Constitution)).

The importance of the fundamental rights subject to infringement and/or the intensity of the infringement necessitate the preclusion of violations from early on. The, so to say, preventive measures (including, e.g., professional training of officials) has a very big role here because it may not be possible to remedy the consequences of using physical force, for example.

## 4. Requirement to use public servants

The constitutional requirement to use public servants links the objective and subjective limits of the involvement of the private sector in the performance of public functions. The reason is that, on the one hand, the requirement of using public servants relates to the requirement of legitimation that derives from the principle of democracy and the ability of the state to act as a state (public servants as a resource), on the other hand, it relates to the need to ensure the maximum protection of fundamental rights and freedoms.

The state, as such, is an abstraction and the authority of the state is exercised directly by the people "of special status" working in the state organisation, who have to guarantee the protection of public interests through their activities.<sup>40</sup> Section 30 of the Constitution emphasises the importance of the public service. This means that presumably<sup>41</sup> the executive power is exercised by a public servant working in a government agency, the activities of which are directed and coordinated by the Government of the Republic (§ 87 2)) of the Constitu-

<sup>39</sup> E.g., SCALCd, 9.06.2006, 3-3-1-20-06, paragraph 15: "[...] the right of the individual that was restricted constituted one of the most important fundamental rights — liberty." — RT III 2006, 27, 251 (in Estonian). ALCSCd, 10.01.2008, 3-3-1-65-07, paragraph 19: "The Chamber is of the opinion that the use of force serves as a preventive measure the application of which infringes with one of the most significant fundamental freedoms of a person — the security of a person." — RT III 2008, 4, 32 (in Estonian). The significance of various fundamental rights (the right to liberty, the freedom of self-realisation, etc.) have been addressed also in, e.g., CCSCr, 20.05.2003, 3-1-1-69-03. — RT III 2003, 20, 190 (in Estonian). Deprivation and restriction of liberty have been distinguished based on the practice of the European Court of Human Rights regarding the intensity of the infringement of fundamental rights. E.g., ALCSCd, 24.11.2005, 3-3-1-61-06, paragraph 33: "[...] upon deciding whether liberty is deprived for the purposes of Article 5 of the Convention or restriction of liberty, account must be taken of all the circumstances, including the type, duration, consequences and manner of application of the measure. Deprivation of liberty and restriction of liberty only differ by the level of intensity of the infringement [...]" — RT III 2005, 42, 416 (in Estonian).

<sup>40</sup> The European Court of Justice furnishes the notion 'public service' found in the Treaty (on the basis of which a member state can limit, e.g., the free movement of workers) with a very narrow content: "[...] the person working in it directly or indirectly participates in the exercise of public authority and performs his or her duties, the objective of which is to protect the overall interests of the state and other administrative units." See, e.g., the judgment of the European Court of Justice dated 26.04.2007 in the case C-392/05, *Georgios Alevizos v. Ipourgos Ikononikon*, paragraph 69. That is why the employees of private security companies, for example, are not considered as members of public service and the member state may not impose restrictions on their citizenship. See the judgment of the European Court of Justice dated 31.05.2001 in the case C-283/99, *Commission v. Italy*, paragraph 25.

<sup>41</sup> See R. Stober (Note 6), pp. 2304, 2306: the state in principle has a freedom to choose how to perform a function and to what extent it involves the private sector; Article 33 (4) of the German Constitution, according to which the exercise of sovereign authority is, as a rule, entrusted to a member of the public service who stands in a relationship of loyalty with the state, cannot be used as an argument directly impeding privatisation; we can speak about Articles 33 (4) as a constitutional restriction only in the case of secondment. An identical position: M. Burgi (Note 3), D 1 2 b; O. Freitag (Note 6), p. 58 ff.



tion) or at the agency governed by that. A public servant should be, *a priori*, the one who, pursuant to § 14 of the Constitution, guarantees the fundamental rights, according to § 3 (1) exercises the state authority and pursuant to § 13 (1) fulfils the duty of the state to protect everyone. This is the priority of the public exercise of the public authority.<sup>\*42</sup>

The service requirements of the public servants who are officials have been formed in such a way that they will guarantee the achievability of these values and aims that the service relationship of the officials is meant to serve, including the ability of the authority of a state to guarantee the protection of the fundamental rights and freedoms and peace set forth in the preamble to the Constitution.

For example, the Constitution establishes the requirement of citizenship for the officials, emphasising their obligation of loyalty to the state, arising from their citizenship bond (§ 30 (1) of the Constitution).<sup>\*43</sup> In addition, the Constitution sets forth a restriction on the freedom to engage in enterprise and the freedom of political beliefs, directing the attention to the need to avoid the conflict of interests of the officials in order to ensure independence and impartiality. The obligation of loyalty to the state and the performance of duties that is independent (also ostensibly) from private, political etc., interests and impartial, is extremely important in the case of the Defence Forces and the police, but also in other areas where an intense infringement (including the use of physical force) with the fundamental rights and freedoms of the persons may occur. We cannot agree with the opinion that the obligation of loyalty arising from citizenship is merely an abstract declaration that is irrelevant in practice. The news about an employee of a security services provider who performs several public functions in the name of the state or local government and has joined an anti-Estonian campaign, is somewhat unsettling.<sup>\*44</sup>

The ability of the state to establish itself and ensure the performance of minimal public functions also relates to the international principle, according to which officials performing the core functions may be subjected to the prohibition to go on a strike.<sup>\*45</sup>

We should not forget the specialised professional training of the officials and the special requirements established therefor. For example, the state has enacted separate service regulations for the agencies employing force (such as the police service, prison service, service in the Defence Forces and border guard service), and also on the basis of such regulations the requirements for professional qualifications for their physical condition, education and state of health.<sup>\*46</sup> In the course of the relevant professional training, the officials acquire the knowledge required for the performance of their functions in the form of in-depth theoretical and practical training that is meant to ensure their ability to make an expert decision, taking into account all the material circumstances even in extreme circumstances and within the legal framework of extensive freedom to exercise will (unspecified legal definitions, discretion). The requirement to have sufficient language skills

<sup>42</sup> The Supreme Court has noted: "It is not possible to fully distinguish between private and public law in practice. In many cases, both provisions in private and public law have to be applied to the activities of administrative agencies. Such a situation may evolve in the course of the participation of a legal person governed by public law in private law relationships because even in such relationships, the legal person governed by public law must take into account fundamental freedoms, proportionality, equal treatment, legitimate expectations as well as any other principles and provisions of public law." See SPSCd, 20.12.2001, 3-3-1-15-01, paragraph 12. – RT III 2002, 4, 34 (in Estonian).

<sup>43</sup> Subsection 30 (1) of the Constitution: "Positions in state agencies and local governments shall be filled by Estonian citizens, on the basis of and pursuant to procedure established by law. These positions may, as an exception, be filled by citizens of foreign states or stateless persons, in accordance with law."

<sup>44</sup> R. Poom. Pihl: tuututamise jäi vahele ka Falcki auto (Falck Vehicle Also Caught Blowing the Horn). – Eesti Päevaleht, 4.05.2007 (in Estonian). The first sentence of § 22 (1) of the Security Act: "A person who is an Estonian citizen or a person to whom a permanent residence permit has been issued in Estonia, who is at least 19 years of age, who has completed basic education and who holds the qualifications of a security guard, who is proficient in Estonian at the level established by law or by legislation issued on the basis thereof, and who is capable of performing the duties of a security guard in terms of his or her personal characteristics, moral standards, physical condition and health may work as a security guard." The European Court of Justice has established that the oath ('solemn oath of allegiance') that the employees of private security undertakings are obliged to swear to the republic of Italy and its head of state, because of its symbolic significance for the undertakings located outside Italy, serves as an impediment to the exercise of the freedom of establishment and the freedom to provide services and thus is in conflict with the Treaty. See judgment dated 13.12.2007 in case No. C-465/05, *Commission v. Italy*.

<sup>45</sup> The right to strike has been provided in: § 29 (5) of the Constitution (the right to strike is a fundamental right that comes with a simple reservation), it has been noted in Article 6 of the European Social Charter and Article 8 (1) d) of the UN Covenant on Economic, Social and Cultural Rights. ILO has noted that restrictions relating to strikes may be imposed on persons working in the public sector but the restrictions must be established in the minimum necessary extent; prohibition on the right to strike of police officers, members of the Defence Forces and court officials has been regarded explicitly as permissible. For details, including references to international practice, see presentation of Chancellor of Justice No. 2 "Kollektiivse töötüli lahendamise seaduse § 21 lõike 1 põhiseaduslikkus" (Constitutionality of § 21 (1) of the Collective Labour Dispute Resolution Act). Available at <http://www.oiguskantsler.ee/index.php?menuID=15> (in Estonian).

<sup>46</sup> However, in the case of the so to say regular officials, who lack the right to violate the fundamental rights of persons in such intense way as it could happen in the course of application of physical force, the legislator has given the right to enact the qualification requirements to the head of the agency — the second sentence of § 17 (2) of the Public Service Act (Avaliku teenistuse seadus. – RT I 1995, 16, 228; 2009, 15, 94; in Estonian). "The head of an administrative agency, or a person or administrative agency superior to him or her may establish supplementary qualification requirements."

to ensure problem free communication by the person performing a public function and a person subjected to the activities of the public authority is no less important.<sup>\*47</sup>

## 5. Level of form of transfer of function

Traditionally, the theory distinguishes between material privatisation (the state fully relinquishes the performance of the function) and formal privatisation (e.g., the state participates in legal persons governed by private law) and a form that lies in between these two — functional privatisation (e.g., transfer of public function to private sector on the basis of a contract under civil law or public law, so-called secondment (*Beleihung*) and administrative assistance (*Verwaltungshilfe*) in Germany).<sup>\*48</sup> It is often debated in literature for which type a particular form of transfer should qualify, for example, whether secondment is part of functional privatisation or something separate therefrom.<sup>\*49</sup> Different forms may also be interrelated, such as the formal and functional (e.g., the state established a foundation to organise the use of funds collected from environmental charges, with whom the state entered into a contract under public law).

No categorisation serves as a goal in itself; instead, it should contribute to informed choices in practice, clarifying presumptions of law and potential legal consequences.

Since the above division into three has become somewhat outdated, with regard to both practice (e.g., authorised and recognised agencies, accreditation institutions, universal services, etc.) as well as the developments in European Union law<sup>\*50</sup> (above all, service concessions<sup>\*51</sup>), there is a need for new classifications. A distinction has been made, for example, between contractual public private partnership (PPP) and organisational PPP.<sup>\*52</sup>

In the practical sense, the following may be considered as one of the best classifications of the forms of transfer of public functions:

<sup>47</sup> Clause 4 of § 14 (2) of Government of the Republic Regulation No. 5 of 26.06.2008 “Avalike teenistujate, töötajate ning füüsilisest isikust ettevõtjate eesti keele oskuse ja kasutamise nõuded” (Requirements for the Estonian skills and the use of Estonian by public servants, employees and sole proprietors) (RT I 2008, 26, 176; 2009, 8, 55; in Estonian): private security agents whose duties are related to maintaining public order or who carry firearms or use special equipment must know Estonian at least on level B2 (§ 6 (2): “A level B2 user can understand the main ideas of complex text on both concrete and abstract topics, including technical discussions in his/her field of specialisation. Can interact with a degree of fluency and spontaneity that makes regular interaction with native speakers quite possible without strain for either party. Can produce clear, detailed text on a wide range of subjects and explain a viewpoint on a topical issue giving the advantages and disadvantages of various options.”)

<sup>48</sup> See, e.g., K. Merusk (Note 17), pp. 505–506; T. Annus. Riigi funktsioonide delegerimine eraõiguslikele isikutele kohtutäiturite näitel (Delegation of the Functions of the State to Persons Governed by Private Law, Case Study on the Bailiffs.). – *Juridica* 2002/4, p. 225 (in Estonian); H. Gersdorf (Note 3), pp. 831–832; R. Stober (Note 6), p. 2302. For different categorisation, see also, e.g., W. Weiß (Note 3), p. 29 ff.; A. Mackeben (Note 17), p. 18 ff.; F. Schoch (Note 3), p. 243.

<sup>49</sup> For a summary, see, e.g., O. Freitag (Note 6), p. 27 ff.

<sup>50</sup> See, e.g., Commission interpretative communication on concessions under Community law (2000/C 121/02); The public consultation on the Green Paper on Public-Private Partnerships and Community law on public contracts and concessions (30.04.2004, COM(2004) 327); Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Public-Private Partnerships and Community Law on Public Procurement and Concessions (15.11.2005, COM(2005) 569). About the transfer of functions to the private sector by the European Union institutions see, e.g., P. Graig. *EU Administrative Law*. Oxford 2006, pp. 15 ff., 32; U. Mörth. *Public and Private Partnerships as Dilemmas between Efficiency and Democratic Accountability: The Case of Galileo*. – *European Integration* 2007/5, p. 601 ff.; *Privatization Experiences in the European Union*. M. Köthenbürger, etc. (ed.). London 2006.

<sup>51</sup> Subsection 6 (2) of the Public Procurement Act: “For the purposes of this Act, a concession of services is granted by a procurement contract, the object of which is contracting for services set out in Annex 2 to this Act and according to which the fee for the provision of the service consists in the right given to the concessionaire to provide the service and obtain a fee for the provision of the service from the users of the service or in such a right together with a monetary payment of the tenderer.” – RT I 2007, 15, 76; 2008, 14, 92 (in Estonian). See also ALCSC, 15.12.2005, 3-3-1-59-05, paragraph 16: “First of all, the Administrative Law Chamber of the Supreme Court considers it necessary to point out that although the courts have regarded the contracts serving as the object of the appeal as civil law contracts, their content and objective differ from the contracts entered into by a public authority acting under private law. These contracts have the features of the concession contracts entered into by public authority. By these contracts, public authority grants a private person use of an important public resource (in this case, streets or areas bordering on the streets), giving its permission to erect there facilities that are used for a charge or free of charge both in public and private interests, while the risks arising from the contract rest with the private person that is a party to the contract. The preamble to the contested contracts contains references to the function of public authority performed through the contract.” – RT III 2006, I, 12 (in Estonian).

<sup>52</sup> See COM(2005) 569; H. Gersdorf (Note 3), p. 832 ff.; M. Burgi (Note 3), D 31. A relevant US council may be pointed out as an example: <http://www.ncppp.org/>. For the complexity of defining PPPs, see, e.g., J. Ziekow. *Public Private Partnership – auf dem Weg zur Formierung einer intermediären Innovationsebene?* – *Verwaltungs Archiv* 2006/3–2006/4, p. 627 ff. (“defining a PPP is just as complicated as nailing pudding on the wall”); see also H. Gersdorf (Note 3), p. 833; J.A. Kämmerer, P. Starski. *Über Nutz und Frommen einer ÖPP-Gesetzgebung*. – *Zeitschrift für Gesetzgebung* 2008/3, p. 227 ff.

1. privatisation of a function;
2. a contractual PPP and other forms of functional privatisation, where the public authority does not renounce the function and the person performing the function does not act in place of the public authority but works for the public authority.  
Subcategories:
  - administrative assistance or transfer of an administrative function based on a civil law contract and service concession;
  - project-based PPP (PPP in its narrow sense);
3. institutionalised PPP;
4. secondment and accreditation.<sup>\*53</sup>

Different forms of transferring public functions come with a differing intensity of the involvement of the private sector (e.g., either only assists the public authority or fully performs the entire function) and different legal consequences. In the latter case, the most important question is whether the performance of the public function remains within the sphere of public law (imperativeness dominates) or it fully transfers to the domain of private law (non-mandatory capacity dominates). Secondly, we must ask whether and between whom legal relationships evolve when performing a public function.

For example, upon the transfer of an administrative function by a contract under public law, legal relationships develop immediately between the person performing the function and the person in respect of whom the function is performed. In this, the relationships between the person performing the function and the person in respect of whom the function is performed generally remain governed by public law — the person performing the function is an administrative body together with all the resulting rights and obligations, e.g., development into a holder of public information as defined in the Public Information Act<sup>\*54</sup> (PIA), the obligation to pursue all the requirements arising from the Administrative Procedure Act, including to ensure the rights of the participants in the proceeding, serve as a respondent in an administrative court if dissenting opinions arise during the performance of administrative function, including the presumed obligation to incur legal costs as a natural part of or risk accompanying service as an administrative body<sup>\*55</sup>, etc. However, in the case of material privatisation, all the relationships between the person performing the function and the person are governed by private law.

It is essentially important for the person in respect of whom a function is performed to know the liability based on specification of the legal consequences described above. In other words, the question is whether compensation for damage is governed by substantive and procedural law contained in public law, i.e., above all in the State Liability Act<sup>\*56</sup> and Code of Administrative Court Procedure<sup>\*57</sup>, or in private law, i.e., above all in the Law of Obligations Act and the Code of Civil Procedure. As it is known, the requirements for liability and the procedural principles differ greatly.

It may also be asked to what extent the penal provisions applied to a recipient of a public service upon non-compliance regarding the person performing the function differ. Division 3 (Offences Against Exercise of Public Authority) of Chapter 16 (Offences Against Public Peace) of the Penal Code contain provisions that prescribe liability for obstruction of state supervision (§ 279), violence against a representative of state authority or other person protecting public order (§ 274) or defamation or insult (§ 275) or disregard of lawful order given by a representative of state authority (§ 276) that are rather ambiguous to provide clear answers whether and to what extent the legal consequences would differ in the case of different forms of transfer.

As regards different forms of the involvement of the public sector, keeping in mind the permissible restrictions on the freedom of enterprise set out in § 31 of the Constitution<sup>\*58</sup>, it certainly differs to what extent the

<sup>53</sup> M. Burgi (Note 3), D 32 ff.

<sup>54</sup> Avaliku teabe seadus. – RT 2000, 92, 597; 2008, 35, 213 (in Estonian). PIA § 5 (2): “The obligations of holders of information extend to legal persons in private law and natural persons if the persons perform public duties pursuant to law, administrative legislation or contracts, including the provision of educational, health care, social or other public services, — with regard to information concerning the performance of their duties.” Indeed, the obligations set out in PIA in certain cases also extend to other private persons, e.g., sole proprietors, non-profit associations, foundations and companies — with regard to information concerning the use of funds allocated from the state or a local government budget for the performance of public duties or as support are deemed to be equal to holders of information (PIA § 5 (3)).

<sup>55</sup> ALCSCd, 19.06.2007, 3-3-1-24-07, paragraph 16: “AS Falck Eesti (regardless of its private law form) participates in the proceedings in relation to the settlement of a dispute arising in the course of the performance of an administrative function acquired under a contract under public law; as a result, the right of AS Falck acting pursuant a contract under public law to the compensation for legal costs must be handled just as in the case of any other administrative body.” – RT III 2007, 27, 226 (in Estonian). *Ibid.*, 15.11.2007, 3-3-1-58-07, paragraph 13. – RT III 2007, 41, 330 (in Estonian).

<sup>56</sup> Riigivastutuse seadus. – RT I 2001, 47, 260; 2006, 48, 360 (in Estonian).

<sup>57</sup> Halduskohtumenetluse seadustik. – RT I 1999, 31, 425; 2008, 59, 330 (in Estonian).

<sup>58</sup> CRCSCd, 12.06.2002, 3-4-1-6-02, paragraph 9: “The freedom to engage in enterprise is infringed if the liberty is adversely affected by the public power.” – RT III 2002, 18, 202 (in Estonian); 10.05.2002, 3-4-1-3-02, paragraph 14: “The second sentence of § 31 of the Constitution,

state can interfere with the activities of the person performing the function through legislation (developing the organisation<sup>\*59</sup>, imposing restrictions on the activities<sup>\*60</sup>, establishing additional responsibilities<sup>\*61</sup>) or exercising supervision later on (state supervision, state audit, Chancellor of Justice, etc.).

In summary, we may conclude about the form of transfer of a public function that the more intense the involvement of the private sector in the performance of a public function, the greater the extent to which the performance of the public function transcends the domain of public law, and the more powers of the public authority the private individual performing the function may use, the more conservative the attitude towards transfer should be.

## 6. Conclusions

There are very few black-and-white solutions, i.e., simple yes/no answers to the questions whether a public function can be transferred to the private sector in the light of the Constitution or not, while there are many grey areas.

Both objective and subjective limits are decisive when deciding on the permissibility of constitutional restrictions on the transfer of public functions to the private sector: the principles of democracy and a state based on the rule of law, the ability of a state to act like a state (encompassing the monopoly of power of the state and the obligation to maintain minimal resources) as well as the intensity of interference with the fundamental rights of a person. These two are, in turn, bound by the constitutional requirement to use officials. Assessing the limits in conjunction in the particular case allows for deciding whether a public function can, in principle, be transferred to the private sector and what could be the permissible form of transferring the function. There are various types and classifications to the latter, such as material, formal and functional privatisation.

However, besides the constitutional dimension of the issue, one must not lose contact with reality when deciding on the transfer of a public function to the private sector: “these partnerships have not been marriages based on love, or even on respect for the qualities each could bring to the relationship, but rather marriages for money.”<sup>\*62</sup>

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which provides that conditions and procedure for the exercise of the freedom to engage in enterprise may be provided by law, gives the legislator much freedom to regulate the conditions of exercise of freedom to engage in enterprise and to impose restrictions thereon. Any reasonable ground is sufficient for the restriction of the freedom to engage in enterprise. Such a ground must follow from public interest or necessity to protect the rights and freedoms of others, it must be weighty and, certainly, lawful. The more intense the infringement into the freedom to engage in enterprise, the stronger must be the grounds justifying the infringement.” – RT III 2002, 14, 157 (in Estonian).

<sup>59</sup> For example, regulate the composition of a supervisory board of a foundation by law.

<sup>60</sup> For example, by listing prohibited activities or imposing the agreement of a public authority as a precondition on an activity (e.g., economic activity, pricing or transformation of a legal person).

<sup>61</sup> Such as the obligation to disclose the amount of salary, based on the Anti-corruption Act (korruptsioonivastane seadus. – RT I 1999, 16, 276; 2008, 59, 330 (in Estonian)) or other.

<sup>62</sup> T. Bovaird. Public-private partnerships: from contested concepts to prevalent practice. – *International Review of Administrative Sciences* 2004/7, p. 201. Cited from: J. Ziekow (Note 52), p. 631.