

Research Article

REGULATION OF PUBLIC SERVICES IN THE ADMINISTRATIVE CODE OF ROMANIA: CHALLENGES AND LIMITATIONS

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Submitted on 15 Oct 2022 / Revised 23 Nov 2022 / Approved **25 Nov 2022**

Published online: **07 Dec 2022**

Summary: 1. Introduction. – 2. Adoption of the Administrative Code in Romania. – 3. Public Services in the Legislation of the EU. – 4. Public Services in Comparative Law. – 5. Challenges and Limitations in the Regulating of Public Services through the Administrative Code in Romania. – 6. Conclusions.

ABSTRACT

Background: In 2019, in Romania, a legislative event of special importance took place – the adoption of the Administrative Code. The scientific problem addressed in this article refers to the way in which the recently adopted Code realises the general regulation of public services respecting the best practices in order to create a good administration that is flexible and adaptable to the constantly changing needs of citizens today.

Methods: This article investigates how the general regulation of public services in the Administrative Code is realised, taking into account the trends manifested in the field at the EU level and in comparative law. The categories of public services with which the EU operates

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Managing editor – Dr. Oksana Uhrynovska. **English Editor** – Dr. Sarah White.

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How to cite: Cătălin-Silviu Săraru 'Regulation of Public Services in the Administrative Code of Romania: Challenges and Limitations' 2022 Access to Justice in Eastern Europe 1-15. Published online: 07 Dec 2022 <https://doi.org/10.33327/AJEE-18-6.1-a000110>

(services of general economic interest, non-economic services, and social services of general interest) and the concept of universal service are highlighted. Then, the principles of organisation and functioning of public services in France, Germany, Italy, Spain, and the UK are investigated. In a separate section, the challenges and limitations in the regulation of local public services are analysed critically against the Administrative Code of Romania, starting from the regulation of the EU and the good practices observed in comparative law.

Results and Conclusions: *At the end of the article, I proposed we use the observations resulting from research on the Administrative Code to increase the degree of administrative convergence with the other member states of the EU*

Keywords: *public service, administrative law, Administrative Code, EU, comparative law*

1 INTRODUCTION

The scientific problem addressed in this article refers to the way in which the recently adopted Administrative Code in Romania realises the general regulation of public services, respecting the best practices in order to create a good administration that is flexible and adaptable to the constantly changing needs of citizens in the 21st century. In order to research this topic, the article uses a complex structure, focusing on the following scientific aspects:

- underlining the need to codify the administrative law norms in Romania and highlight the steps taken to adopt the Administrative Code;
- research into public services in EU legislation to unravel the typology and features of regulated public services and how the principle of the priority of EU law over national law is respected (provided by Art. 148 (2) of the Constitution of Romania).
- analysis of key elements of public services in comparative law in France, Germany, the UK, Spain, and Italy to observe regulatory trends and examples of good practice.
- critical research into the challenges and limitations in the regulation of public services through the Administrative Code in Romania, starting from the regulation of the EU and from the good practices observed in comparative law.
- conclusions regarding the aspects that should be improved in the general regulation of public services through the Romanian Administrative Code.

The article deals with a topic of maximum novelty, highlighting for the first time aspects regarding public services in the Romanian Administrative Code, which was recently published in the context of EU regulations and comparative law.

The objective of the research is to see how the regulation of public services in the Romanian Administrative Code responds to the modern challenges launched at the level of the EU and in states with experience in providing services of general interest.

In the present research, I have used the comparative method, the historical method, and the logical method. I considered that only by interweaving these methods can we answer the essential questions of any research: *When? How? Why? Quo vadis?* Through the comparative method, I analysed the doctrine, jurisprudence, and legislation of the member states in the EU. Using the principle of functionality, I tried to identify the substance of the legal rights and obligations recognised and imposed in different systems. With the help of the historical method, I analysed the institution from an evolutionary perspective. Legal logic was used in the legal reasoning to find solutions adapted to the needs of citizens.

2 ADOPTION OF THE ADMINISTRATIVE CODE IN ROMANIA

Romania adopted the Administrative Code through the Government Emergency Ordinance No. 57/2019,¹ which entered into force on 5 July 2019. Romania thus joined the countries that have an administrative codification.

In Romania, until the adoption of the Administrative Code, the legal norms that formed the branch of administrative law, unlike other branches of law that were codified (the norms of the civil law are systematised within the Civil Code, the norms of the civil procedural law within the Code of Civil Procedure, the norms of the criminal law within the Criminal Code, the norms of the criminal procedural law in the Code of Criminal Procedure, the norms of the labour law in the Labor Code), were found in disparate normative acts and not in a unitary code that would ensure unity and cohesion based on common principles, the unity of the regulatory method, and the precision and clarity of the rules.²

The adoption of the Administrative Code represents a legislative event for Romania of great importance, and we appreciate, along with other authors, that it will stimulate interest and also motivate other states where we find the same natural concerns regarding systematising the legislation.³

The adoption of an Administrative Code in Romania was a goal for over 100 years, underlined by the great theorists from the interwar period: Paul Negulescu, Anibal Teodorescu, and Constantin G. Rarincescu. Administrative coding has a long-standing tradition in European countries. Thus, many countries have imposed general administrative codifications: Austria – 1925, Belgium – 1979, Denmark – 1985, Germany – 1976, Hungary – 1957, the Netherlands – 1994, Poland – 1960, Portugal – 1991, and Spain – 1958.⁴

In France, there is no single, general administrative code, but the subject of administrative law is codified in several codes, including the *Code des communes*, the *Code du domaine de l'Etat*, the *Code de l'expropriation pour cause d'utilité publique*, the *Code général des collectivités territoriales*, the *Code général de la propriété des personnes publiques*, and the *Code de justice administrative*.

Recently, at the EU level, the Research Network on EU Administrative Law – (ReNEUAL) has elaborated the draft of the *ReNEUAL Code of administrative procedure of the European Union*.⁵ The project was presented in the plenary of the European Parliament and was the basis of the European Parliament Resolution of 15 January 2013, which asked the European Commission to present a proposal for an act on the administrative procedure of the EU [2012/2024(INL)].

The codification of the norms that regulate the action of the public administration presents an undeniable advantage for citizens, who will find regulated in a single normative act all the rights and obligations that fall within the content of the legal relation of administrative law.⁶

1 Published in the Official Gazette, Part I No. 555 of 5 July 2019.

2 C-S Săraru, Administrative Law in Romania (ADJURIS – International Academic Publisher 2019) 25-27.

3 NT Godeanu, 'Aspects regarding the impact of the Administrative Code on the specialized central public administration in Romania. Special attention to the Ministry of National Education' (2018) 8 Juridical Tribune – Tribuna Juridica (Special Issue) 213.

4 C-S Săraru, European Administrative Space – recent challenges and evolution prospects (ADJURIS – International Academic Publisher 2017) 110.

5 HCH Hofmann, JP Schneider, J Ziller, DC Dragos, Codul ReNEUAL de procedura administrativa a Uniunii Europene (Universul Juridic 2016).

6 Săraru (n 5) 26.

The administrative codification, as expressed in the literature, must ensure in a unitary conception: the rational organisation of the entire specialised apparatus of the public administration in order to increase its efficiency; the precise establishment of the rights and obligations of civil servants and of their responsibility for the acts of service; citizens' knowledge of their rights and obligations as subjects of legal relationships with the public administration.⁷

The doctrine also highlights the difficulties raised by the codification of administrative law:⁸

- the diversity and heterogeneous nature of the matters that constitute the object of regulation of administrative law;
- the large number of competent public authorities to publish administrative rules;
- the multitude of normative texts that regulate the activity of the public administration;
- the specific of the public administration, the main object of regulation of the administrative law, which is in a continuous state of transformation in order to be able to face the new challenges of social reality.

After 1990, the concerns for administrative codification determined the elaboration in 2000-2003 by specialists in the field of public administration within the Regional Training Center for Continuing Public Administration in Sibiu, in collaboration with the Academy of Civil Servants in Germany of two draft codes: the *Administrative Code*, which regulates matters of substantive law, and the *Code of Administrative Procedure*, which contains aspects of contentious and non-contentious procedure. These projects were subsequently analysed within the Institute of Administrative Sciences 'Paul Negulescu' (the Romanian national section of the International Institute of Administrative Sciences) and then within working groups set up over time by the relevant ministry (the working groups for the finalisation of the draft of the Administrative Code and the elaboration of the draft of the Administrative Procedure Code constituted by the Order of the Minister of Regional Development and Public Administration No. 2394/2013). In 2008, the Government approved *the preliminary theses of the draft Administrative Procedure Code* through Government Decision No. 1360/2008,⁹ and recently, *the preliminary theses of the draft Administrative Code* were approved by Government Decision No. 196/2016.¹⁰ Unfortunately, we find that these codes have not been adopted so far, although they are required by theorists and practitioners of administrative law.

The Administrative Code adopted for the first time in Romania in 2019 regulates the general framework for the organisation and functioning of public administration authorities and institutions, staff status within them, administrative responsibility, and public services, as well as some specific rules regarding public and private property of the state and of the administrative-territorial units.

The Administrative Code was not free of criticism. Among the issues contended by critics were the politicisation of the public servants working in public administrations, the promotion of the 'governing program' of the ruling party among the sources of legality for the whole public administration alongside laws and secondary legislation, and the granting

7 IM Nedelcu, 'Considerații privind necesitatea adoptării unui Cod de procedură administrativă cu trimiteri la instituții juridice civile' (2006) 2 Revista de Științe Juridice 116; M Anghene, 'Necesitatea codificării normelor de procedură administrative' (1973) 11 Revista Română de Drept 62; L Vișan, 'Necesitatea codificării normelor de procedură administrative' (2005) 2 Revista de Drept Public 71.

8 V Vedinaș, *Drept administrativ* (9th edn, Universul Juridic 2015) 79; Săraru (n 5) 26.

9 Published in the Official Gazette, Part I No. 734 of 30 October 2008.

10 Published in the Official Gazette, Part I No. 237 of 31 March 2016.

of special pensions for mayors and members of city councils and the limitation of liability of public servants for illegal administrative acts.¹¹

3 PUBLIC SERVICES IN THE LEGISLATION OF THE EU

Public services are enshrined in the *acquis communautaire* and legal literature at the level of the EU under the name of services of general interest.¹² The legislation of the EU refers to three categories of services of general interest: *services of general economic interest*, *non-economic services*, and *social services of general interest*.

Art. 14 of the Treaty on the Functioning of the European Union (TFEU) emphasises the place occupied by the **services of general economic interest** within the common values of the Union, as well as their role in promoting social and territorial cohesion of the Union. The EU and the member states ensure the functioning of these services, within the limits of their competences and within the scope of the treaties, on the basis of principles and conditions that allow them to carry out their missions.

The Protocol No. 26 'On services of general interest' in the TFEU specifies in Art. 1 the common values of the Union within the meaning of Art. 14 of the TFEU:

- the essential role and the wide discretion of national, regional, and local authorities in providing, commissioning, and organising services of general economic interest as closely as possible to the needs of the users;
- the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social, or cultural situations;
- a high level of quality, safety, and affordability, equal treatment, and the promotion of universal access and of user rights.

The *Charter of Fundamental Rights of the EU*¹³ shows in Art. 36 that the Union recognises and respects access to services of general economic interest, as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union.

Services of general economic interest are provided for a fee (e.g., postal services). They are subject to European competition and internal market rules, according to the provisions of the Commission staff working document: 'Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest'.¹⁴ If it is necessary to protect the access of citizens to some basic services, derogations from these rules may apply.

In Art. 2 of Protocol No. 26, it is noted that the provisions of the Treaties do not affect the competence of the member states regarding the provision, commissioning, and organisation of non-economic services of general interest. These services are not subject to specific European rules on competition and the internal market. There are such non-economic services – police, justice, and compulsory social security systems.

11 DC Dragoş, R Vornicu, 'Tendencies and Developments in Romanian Administrative Law' in J-B Auby (ed), *The future of administrative law* (LexisNexis 2019) 155.

12 D Focşăneanu, C Şuţa, C Tatu, M Popescu, 'Serviciile publice. Considerații asupra legislației și practicii comunitare în domeniu, în contextul elaborării proiectului codului administrativ' (2011) 1(28) *Revista Transilvană de Științe Administrative* 32.

13 Published in OJ C 326, 26.10.2012.

14 Brussels, 29 April 2013 SWD (2013) 53 final/2.

The EU carries out, in the pursuit of its objectives, numerous policies which are either in its exclusive competence or are performed as common or supportive one in relation to the member states.¹⁵ One of the most important policies of the EU is the social policy regulated by the TFEU in Title X of Part III. An important role in the realisation of social policy is played by social services of general interest, which can have both an economic and a non-economic character. The development of the concept of social services of general interest was achieved at the level of the EU through two Commission Communications: COM (2006) 177 final of 26 April 2006 'Implementation of the Community Lisbon program: Social services of general interest in the European Union' and COM (2007) 725 final of 20 November 2007 'Services of general interest, including social services of general interest: a new European commitment'.¹⁶ Social services of general interest respond to the needs of vulnerable citizens and are based on the principle of solidarity and equal access. These include social security systems, employment services, social housing systems, etc.

In 2011, the European Commission adopted the Communication 'A Quality Framework for Services of General Interest in Europe'.¹⁷ The Commission's approach to providing a quality framework was based on three strands of action: first, increasing clarity and legal certainty regarding the EU rules that apply to these services; second, providing the tools that enable member states to ensure that citizens have access to essential services and reviewing the situation on a regular basis; third, promoting quality initiatives in particular for social services which address particularly important needs.

EU law uses the concept of universal service when setting the requirements designed to ensure that certain services are made available to all consumers and users in a member state, regardless of their geographical location, at a specified quality and, taking account of specific national circumstances, at an affordable price (Communication from the European Commission 'A Quality Framework for Services of General Interest in Europe').

The EU has adopted regulations establishing a specific set of rules for the provision of universal service in all member states as an essential component of market liberalisation of service sectors, such as electronic communications, post, and transport. These regulations include, for example, Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services.¹⁸

4 PUBLIC SERVICES IN COMPARATIVE LAW

At the beginning of the 20th century, under the influence of industrialisation, urbanisation, and trade union movements, the role of the state often shifted from an authoritarian and repressive one to that of a social actor and service provider. In France, the *Ecole du service publique* is represented by Léon Duguit, Gaston Jèze, and Roger Bonnard, who conceived of the state as the whole of public services.¹⁹

In French law, a distinction operates between the public service and the activity of general

15 T Malatinec, J Kyjovský, 'European Grouping of Territorial Cooperation – a legal form supporting cross-border cooperation in the European Union' (2019) 9(1) *Juridical Tribune – Tribuna Juridica* 261.

16 Foçșăneanu, Șuța, Tatu, Popescu (n 13) 34.

17 Brussels, 20 December 2011 COM (2011) 900 final.

18 Universal Service Directive published in Official Journal L 108, 24/04/2002, as amended.

19 L Duguit, *Traité de droit constitutionnel* (3rd edn, Ancienne Librairie Fontemoing & C 1927); G Jèze, *Les principes généraux du droit administratif* (3 volumes): vol. 2 – La notion de service public, reedited (Daloz 2004); R Bonnard, *Précis de droit administratif* (4th edn, Librairie générale de droit et de jurisprudence 1943).

interest.²⁰ Thus, for example, the management of the private domain (including financial holdings) or the maintenance of churches by public authorities are simple activities of general interest, while hospitals or universities perform services of public interest.²¹

Louis Roland lays down certain rules (principles) that apply only to the public service: *the principle of continuity of provision, the principle of equality* which prohibits discrimination between users of the service, *the principle of adaptability* to the current needs of users, and *the principle of neutrality*, which shows that those who provide the public service must refrain from communicating their own political and social opinions.²²

The French legislation and doctrine operate the distinction between the public services of an economic, commercial character (the provision of public utility services against a tax) and non-economic public services (the public judicial service, the public order assurance service through the police, etc.). The management of public services of economic character can be delegated, usually to private operators through concession contracts or through a mixed economy company.²³ The French Constitutional Council has shown that the national public services which have their basis of existence in the provisions of a constitutional nature ('*services publics constitutionnels*') cannot be subject to privatisation (*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*). However, in recent case law, it is appreciated that the sovereign function achieved by the constitutional public services can be broken down into core functions and annexe functions of a technical nature, which may be entrusted to private persons (*Décision n° 2002-461 DC/29 août 2002, Loi d'orientation et de programmation pour la justice*). Thus, for example, the Constitutional Council has recognised that Art. 49 of the Law 'On guidance and programming for justice' (*Loi n° 2002-1138 du 9 septembre 2002 d'orientation et de programmation pour la justice, Journal officiel de la République française n° 211 du 10 septembre 2002*), which allows the entrustment to the private environment of the tasks of electronic supervision of the persons under judicial control, takes into account only 'the technical benefits removable from the sovereignty functions' (*Décision n° 2002-461 DC/29 août 2002, Loi d'orientation et de programmation pour la justice*). The same is true in the case of Art. 53 of the Law 'On immigration' (*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*), which allows the entrustment to the private environment of the armed transport of the detained persons in/from the detention centres (*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*).

In the UK, the model of agencies with managerial autonomy was imposed starting with Thatcher's government, but under the tutelage of the various ministries and local authorities through which the public services were managed. The agency model, specific to the British administration, is based on the development of a strong and competitive private sector as a basis for the provision of quality public services. Without this competitive private sector, the agency model would not be possible. The agency model favours efficiency in providing services, intertwines the areas of service provision with political authority, and highlights non-governmental actors as service providers.²⁴

20 P Weil, *Le droit administratif* (15th edn, Presses Universitaires de France 1992) 62-64.

21 *Ibid*, p. 62.

22 *Ibid*, p. 63.

23 J-C Ricci, *Droit administratif* (13th edn, Hachette 2019) 101,102.

24 Săraru (n 3) 27.

In the UK, the distinction is made between economic public services and non-economic public services. Through the Deregulation and Contracting Out Act 1994, ministers were empowered to adopt an order regulating the contractual delegation of public economic services.²⁵ In addition, Art. 71 (1) of this act stipulated the functions that could not be outsourced: a) exercising the jurisdictional functions; b) the attainment or restriction of individual freedoms; c) limitation of the exercise of the property right; d) legislative and regulatory functions. The distinction between core functions and annexe functions is discussed in the doctrine.²⁶ Thus, for example, one author points out that nothing prevents the management of the trade register or civil status from being entrusted to the private sector.²⁷

In Germany, Forsthoff speaks for the first time in 1938 of the extension of the role of the state from the authoritarian function, which was initially exclusive, to that of a public service provider in which the social responsibility of the state is emphasised.²⁸ Thus, under the imperative of the 'welfare clause', the administration will set up municipal public utilities and public transport corporations and provide social and cultural services.

In time, the German doctrine distinguished between *Hoheitverwaltung* (administration as authority) and *Betriebsverwaltung* (administration as enterprise), a distinction similar to that between public functions and public services with which Italian and Spanish doctrine operate.²⁹ Through the *Hoheitverwaltung*, the royalist functions (*jus imperii*) of the state are realised, which are traditionally non-delegable (public security, defence, etc.). *Betriebsverwaltung* designates those activities that are usually carried out under private law and are outsourced. The German Fundamental Law explicitly prohibits the outsourcing of public functions exercised by *Hoheitverwaltung* (Art. 33 para. 4 of *Grundgesetz für die Bundesrepublik Deutschland*, GG).

In practice, the distinction was made between the core public functions, through which the exercise of power is performed by the public authority, and the annexed functions, understood as technical activities that can be outsourced to the private environment. Thus, for example, it was considered that 40% of the functions of a prison could be entrusted to the private sector without contravening the provisions of Art. 33 para. 4 of the Fundamental Law, such outsourcing being lawful as long as it has no direct connection with the conditions of execution of a court sentence – *Strafvollzug*.³⁰ Likewise, it was allowed to outsource the non-military fixed communications system of the Ministry of Defense.

In Germany, the contracting of public action is very advanced, allowing for the conclusion of some contracts of public law by which to replace the provisions of an administrative act.³¹ Thus, the Law on the Federal Non-Contentious Administrative Procedure (*Verwaltungsverfahrensgesetz des Bundes – VwVfG*) of 25 May 1976 dedicates one of its parts (Part IV, Arts. 54-62) to public law contracts. The law shows in Art. 54 the fact that 'a law report in the field of public law can be founded, modified or cancelled by a public law contract (öffentlich-rechtlicher Vertrag), except for the rules of contrary law. In particular,

25 S Arrowsmith, *The Law of Public and Utilities Procurement* (Sweet & Maxwell 1996) 26, 27; M Freedland, 'Privatising Carltona; Part II of the Deregulation and Contracting Out Act 1994' (Spring 1995) *Public Law* 21.

26 P Cossalter, B du Marais, *La private finance initiative* (Institut de la Gestion Déléguée 2001) 40-42.

27 Freedland (n 26) 21, 23.

28 E Forsthoff, *Die Verwaltung als Leistungsträger* (Kohlhammer 1938) 25.

29 FG Falla, 'El concepto de servicio público en derecho español' (1994) 135 *Revista de Administración Pública* 12

30 C Wagener, 'Privatisierung im Justizvollzug – Ein Konzept für die Zukunft' (2000) 5 *Zeitschrift für Rechtspolitik* 169.

31 Săraru (n 3) 31.

the administrative authority may, instead of enacting an administrative act, conclude a public law contract with the person to whom the administrative act was intended⁷.

We note that the German Länder legislation in the field of public services is heterogeneous. Thus, in some Länder, it is forbidden to delegate the functions destined to achieve 'social welfare', such as waste management and treatment, and in others, the prohibition to entrust the private sector with sanitary and social activities, such as water distribution, is regulated. A trend observed in the Länder is to establish the local holding companies that allow financial compensation (*Querverbund*) for profitable and unprofitable public service activities.³²

In Spain, the doctrine and the legislation (*Ley 7/1985, del Reguladora de las bases del régimen local* - 'RBRL, Boletín Oficial del Estado No. 80/3.04.1985 and then *Ley 7/2007, del Estatuto Básico del Empleado Público*, Boletín Oficial del Estado 13 April 2007) made a distinction between the public functions that involve the exercise of authority in order to achieve the general interests of the state and the local authorities (such as the functions of budgetary control and economic-financial management, accounting and treasury) and public services³³ comprising activities normally performed under private law and which are outsourced.

The management of the public services of a commercial character can be realised by delegation to the private environment through a contract of management of the public service. The category of public service management contracts comprises four forms of indirect management of public services: concession, *concierto*, interested management, and the mixed economy company (Art. 156 of *Ley 13/1995 de contratos de administraciones públicas* - *LCAP, BOE 119, de 19 de mayo de 1995*). Regarding the limits on which the outsourcing of public services can be performed, the Law 'On public administration contracts' No. 13/1995 (*LCAP*) provides in Art. 63 that 'the state can indirectly manage, through the conclusion of contracts, all the services within its competence that have an economic content that allows them to be exploited by private entrepreneurs and which are not subject to the exercise of (exclusive) sovereign rights'.

Lately, at the level of the Spanish public authorities, there has been a tendency to adopt a 'contractual system' that will allow for the conclusion of partnerships between the public sector and the private sector regarding the management of public services of a commercial nature.³⁴

In Italy, the legislation (Arts. 357 and 358 of the Italian Criminal Code) and the doctrine operate a distinction between the public functions that carry out non-delegable activities and the public services that include delegable activities. In the Italian doctrine, it has been appreciated that the public functions represent all the activities destined to perform the essential functions of the state (justice, public security, defence), while the public services are those activities that the state undertakes in order to achieve social welfare.³⁵

The Italian legislation indirectly operates a distinction between core public functions and annexe functions. Thus, Legislative Decree No. 112/1999 (*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*) opened the possibility of delegating by decennial concession of the functions annexed for collecting the taxes of any kind of companies.

32 G Marcou, 'Les modes de gestion des services publics locaux en Allemagne et le problème de l'ouverture à la concurrence' (1995) 3 *Revue française de Droit administrative* 476.

33 Falla (n 30) 12, 13; AK Frasquet, 'La necesaria concreción del contrato de gestión de servicios públicos. Espacial referencia al ámbito municipal' (1999) 279 *Revista de Estudios de la Administración Local y Autonómica* 177-211.

34 CC Marín, 'El nuevo contrato de colaboración entre el sector público y el sector privado' (2006) 132 *Revista española de Derecho Administrativo* 609-644.

35 U Pototschnig, *I pubblici servizi* (Casa Editrice Dott. Antonio Milani 1964) 169.

At the local level in Italy, Legislative Decree No. 267/2000 'Regarding the unique text of the laws on the organization of local entities' (*Testo unico delle leggi sull'ordinamento degli enti locali* – T.U.E.L., *Gazzetta Ufficiale della Repubblica Italiana* n° 227/28.09.2000) operates a distinction between industrial activities (delegable) and non-industrial activities (non-delegable).

In Italy, the process of contractualising administrative action is very advanced, with some German influences being felt.³⁶ Thus, Law No. 241/1990 'Regarding the administrative procedure and the right of access to administrative documents' (*Legge 241/90 Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi come modificata dalla legge 15/2005 e dal decreto legge 35/2005*) allowed the conclusion of agreements (*accordi con gli interessati*) that determine the content of an administrative decision or to replace it (Art. 11), similar to the provision in German law.

5 CHALLENGES AND LIMITATIONS IN THE REGULATING OF PUBLIC SERVICES THROUGH THE ADMINISTRATIVE CODE IN ROMANIA

The Administrative Code adopted in Romania in 2019 consecrates Part VIII of the general regulation of public services. Over time, the diversity and specificity of public services have imposed a sectoral approach³⁷ through special legislation that contains specific rules for each service.

Thus are, for example, the Law 'On community services for public utilities' No. 51/2006,³⁸ Government Ordinance No. 71/2002 'Regarding the organization and functioning of the public services for the administration of the public and private domain of local interest',³⁹ the Law 'On the water supply and sewerage service' No. 241/2006,⁴⁰ the Law 'On the public lighting service' No. 230/2006,⁴¹ the Law 'On sanitation services of localities' No. 101/2006,⁴² the Law 'On the public transport services for persons in the administrative-territorial units' No. 92/2007,⁴³ the Law 'On the public service of thermal energy supply' No. 325/2006,⁴⁴ and the Law 'On electricity and natural gas' No. 123/2012⁴⁵ regulating the distribution services of electricity and natural gas. In the face of this multitude of special laws regulating various types of public services, the doctrine demanded common organisation and functioning principles through a general regulation. The Administrative Code has the role of responding to this wish.

At the level of the EU, as we have shown above, a functional approach was chosen regarding the definition of public services, the central element being represented by the notion of 'general interest'. In the Romanian doctrine, taking into account the practice of the EU, it was recommended to use a functional approach in the definition of public services in the draft of Administrative Code so as to ensure a uniform and easy application of the norms to

36 Săraru (n 3) 36.

37 Foçșăneanu, Șuța, Tatu, Popescu (n 13) 38.

38 Republished in the Official Gazette, Part I No. 121 of 5 March 2013, as subsequently amended.

39 Published in the Official Gazette, Part I No. 648 of 31 August 2002, as subsequently amended.

40 Republished in the Official Gazette, Part I No. 679 of 7 September 2015.

41 Published in the Official Gazette, Part I No. 517 of 15 June 2006.

42 Republished in the Official Gazette, Part I No. 658 of 8 September 2014

43 Published in the Official Gazette, Part I No. 262 of 19 April 2007, as subsequently amended.

44 Published in the Official Gazette, Part I No. 651 of 27 July 2006, as subsequently amended.

45 Published in the Official Gazette, Part I No. 485 of 16 July 2012, as subsequently amended.

be adopted at the European level in this field.⁴⁶ The Administrative Code takes into account these observations and defines the public service in Art. 5, letter kk) as the activity or the set of activities organised by a public administration authority or by a public institution or authorised/delegated by it in order to satisfy a general need or a public interest regularly and continuously.

The structures responsible for the provision of public services are set up by the central public administration authorities by means of normative acts in the case of public services of national interest, by the authorities of the local public administration, and by administrative acts in the case of public services of local interest (Art. 589 of the Administrative Code). Respecting the principle of symmetry of legal acts, the termination of public services will be done by the public authorities that established them in the situation where the service no longer responds to a need of public interest by an act of the same level as the one by which it was established, following public consultation (Art. 595 of the Administrative Code).

The Administrative Code regulates the specific principles applicable to public services that were previously deduced from the doctrine. Thus, Art. 580 (1) of the Administrative Code shows that the setup, organisation, and delivery of public services are carried out in accordance with the principles of transparency, equal treatment, continuity, adaptability, accessibility, responsibility, and the provision of public services to quality standards. We note that the enumeration of the legislative text lacks a very important principle underlined by the French⁴⁷ and Romanian⁴⁸ legal doctrine, namely the *principle of neutrality*, which shows that those who provide the public service must refrain from communicating their own political, social, and political opinions – public services are organised and function to serve general interests, not merely interests for the benefit of some.

A special merit of the Administrative Code is that it establishes for the first time the principle of providing high-quality public services and establishes the obligation for public administration authorities and bodies providing public services to comply with the quality and/or cost standards established for public services.

Another positive aspect is the consecration through Art. 583 of the Administrative Code of the obligation to comply with the EU legislation on services. Thus, it is shown that 'the establishment of the component activities, the mission, the award procedure, the compensation, as the case may be, and the provision of public services are carried out in accordance with the standards and requirements established by the relevant legislation of the European Union applicable in the Member States'. This has been implemented to emphasise the principle laid down in Art. 148 (2) of the Constitution of Romania of the priority of the law of the EU over the contrary provisions of the internal laws, in compliance with the provisions of the act of accession.

In Art. 586, the Administrative Code operates the distinction between activities of general interest and public services, having as a criterion the fact that the public service character of an activity or of a set of activities is recognised by normative acts.

The normative act by which a public service is regulated must, according to Art. 587 of the Administrative Code, contain at least the following elements: the activity or activities constituting the respective public service; the objectives of the public service; the type of

46 Focșăneanu, Șuța, Tatu, Popescu (n 13) 38.

47 J-P Colson, *Droit public économique* (3rd edn, Librairie générale de droit et de jurisprudence 2001) 107-111; J Fougereuse, *Le droit administratif en schémas* (Ellipses Édition Marketing SA 2008) 32-39.

48 C Manda, D Banciu, C Manda, *Administrația Publică și Cetățeanul. Structuri. Autorități. Informație publică* (Technical Publishing House 1997) 73-74; M Văraru, *Tratat de drept administrativ român* (Editura Librăriei Socec & Co. 1928) 94-103.

public service; the public service obligations, if applicable; the structure responsible for providing the public service; the management modalities; the sources of financing; the ways of monitoring, evaluating, and controlling the way of providing the public service; the sanctions; the quality and cost standards if they are established according to the law; other elements established by law.

In the Romanian legal doctrine prior to the entry into force of the Administrative Code, it was stressed that in order to harmonise with the legislation and practice at the level of the EU, it was necessary to introduce into the Romanian legislation the concepts of services of general economic interest and non-economic services of general interest.⁴⁹ The Administrative Code, in a positive approach, achieves this distinction between the two categories of services.

The services of general economic interest are defined by the Administrative Code in Art. 584 (1) as 'the economic activities that are carried out in order to satisfy a/some needs of public interest, which the market would not provide or would provide under other conditions, in terms of quality, safety, accessibility, equal treatment or universal access, without public intervention, for which the public administration authorities establish specific public service obligations'. The economic character of a public service is determined by the nature of the activities related to the service and by the way in which the activities are provided, organised, and financed.

The non-economic services of general interest are defined by the Administrative Code in Art. 585 as 'activities that are not economic in nature and are carried out in order to satisfy one/some needs of public interest directly by an authority of the public administration or by the bodies providing public services under its monitoring and control or mandated by it'.

Unfortunately, the Administrative Code does not contain general rules regarding the regulation of social services of general interest, although this would have been imposed, given the neglected importance of this sector and its role in the EU strategies that promote sustainable development and social progress. Thus, the TFEU refers in Title X of Part III to the Social Policy, which shows that the Union and the member states have as objectives the promotion of employment and the improvement of living and working conditions, allowing these to be harmonised in conditions of progress, adequate social protection, social dialogue, and human resources development that will foster a high and sustainable level of employment and combat exclusion.

Currently, in Romania, the field of social services of general interest is reserved only for the subsequent sectoral legislation, as in the Law 'On social assistance' No. 292/2011.⁵⁰ According to the provisions of Art. 27 (1) of Law No. 292/2011, social services represent the activity, or the set of activities realised to respond to social needs, as well as to the special needs of an individual, family, or group in order to overcome difficult situations, to prevent and combat the risk of social exclusion, to promote social inclusion, and to increase the quality of life.

Equally important are the medical services, which, unfortunately, are not mentioned in the Administrative Code. Health care is the main element of the social sphere and is of particular interest for ensuring human security as a determining factor in the quality of life of the population and the quality of medical services received.⁵¹

In Art. 590, the Administrative Code shows the modalities of management of public services: a) direct management; b) delegated management.

49 Focșăneanu, Șuța, Tatu, Popescu (n 13) 38.

50 Published in the Official Gazette of Romania No. 905/2011 of 20 December 2011, as subsequently amended.

51 O Shevchuk, N Matyukhina, O Babaieva, A Dudnikov, O Volianska, 'The human right to security in the implementation of the concept of the "right to health protection"' (2021) 11(3) Juridical Tribune – Tribuna Juridica 536.

Direct management can be carried out by an authority of the public administration, by the structures with or without legal personality of it, or by the companies with integral social capital of the state or of the administrative-territorial unit established by the authorities of the public administration or other legal persons of private law, as the case may be, in compliance with legal provisions (Art. 591 (2) of the Administrative Code).

Delegated management is the management mode by which the provision of the public service is performed on the basis of a delegation act and/or authorisation from the competent public administration authority, in compliance with the provisions of the law on public procurement, sectoral procurement, and the concession of services, or by the bodies providing public services other than those that carry out direct management⁵² Art. 592 (1) of the Administrative Code,.

The provision of services of general economic interest may be performed in accordance with Art. 593 (1) of the Administrative Code.

Unfortunately, the Administrative Code does not make the distinction between the core public functions, through which the exercise of power is performed by the public authority, and the annexed (accessory) functions, understood as technical activities that can be outsourced to the private environment, although the social reality demands this. Currently, references to the essential functions of exercising the prerogatives of the sovereignty of the state are carried out summarily in the Constitution (Title III – *Public authorities*). However, beyond these, it is often very difficult to make a distinction between the core functions and the accessory functions that guide the universal phenomenon of the 'privatisation' of public services. In the absence of such a distinction, it remains to establish empirically (legal and administrative practice) and doctrinally the criteria according to which some functions auxiliary to the sovereign functions may be entrusted by delegation to the private environment in order to increase the efficiency in the public activity.

Another negative aspect is that the Administrative Code does not provide general quality standards for universal services. The Code only indicates the compulsory existence of specific quality standards in the sectoral legislation for each public service separately (Art. 587 of the Administrative Code). The absence of general quality standards for the universal service determines a heterogeneity of solutions approached by the specialised legislation in the absence of a reference standard.

Finally, we note that, unlike Germany or Italy, the Administrative Code of Romania does not regulate the possibility of concluding agreements (contracts) that determine the content of an administrative decision or which are substituted in the matter of performing public services. The contract has the advantage that it is a more flexible instrument than the unilateral administrative act, allowing for individual solutions adapted to the needs of citizens.⁵² Through such an administrative contract, priority is given to negotiation techniques, and the responsibility regarding the realisation of the public interest is externalised.

6 CONCLUSIONS

The emergence of the Administrative Code has meant progress, bringing stability, clarity, coherence, and legitimacy by unifying the legislation on public administration.⁵³ The Administrative Code facilitates the division of the roles and the collaboration between

52 C-S Săraru, *Contractele administrative. Reglementare. Doctrină. Jurisprudență*, (Bucharest: CH Beck 2009) 367.

53 Dragoș, Vornicu (n 12) 156.

the public and private actors in the realisation of public services, being an instrument of flexibility and of adaptability for the legislation, allowing it to react to the ever-changing economic and social environment. The regulation of public services in the Administrative Code of Romania generally takes into account the recent trends observed in the regulation in the fields of EU law and the comparative law of the European countries with legal-administrative traditions in the provision of public services.

However, there are some gaps in the regulation of the Administrative Code, as we have shown above, regarding the lack of regulation of the category of social services of general interest and the distinction between the core public functions through which the exercise of power is performed by the public authority and the annexe functions that can be outsourced to the private environment. By outsourcing, the traditional administrative structures are placed between hierarchy and market. The purpose of outsourcing is to improve the way public activities serve the interests of citizens. Further, the Administrative Code does not provide general quality standards for universal services and does not regulate the possibility of concluding agreements that determine the content of an administrative decision or which may be substituted. In order to increase the degree of administrative convergence between the member states of the EU, we consider it imperative to modify the Administrative Code in order to include these aspects.

The way in which the public services in a state are regulated shows the degree of democratisation, of being open to the needs of citizens, and of building the future administrative law based on the qualitative and quantitative increase of the intervention of the public power and the need to share the general interest between the state and the private actors – companies, associations of public utility, etc.⁵⁴

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⁵⁴ P Lignières, 'Imaginer et construire le futur du droit administrative', in J-B Auby (ed), *The future of administrative law* (LexisNexis 2019) 170.

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