The Nature of Legal Acts Issued under Law No. 206/2004 on Good Conduct in Scientific Research, Technological Development and Innovation: From Administrative Litigation to Labor Law Disputes

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Abstract

Law no. 206/2004 regulates the principles and procedures in the field of ethics in scientific research, technological development and innovation activities, as well as the sanctions that may be applied to persons in case of breach of the rules of good conduct. The competence for the administrative settlement of an alleged act falling under Law no. 206/2004 lies with the institutions that are part of the national research-development (R&D) system, the units and/or institutions that conduct R&D programs, as well as the units that ensure the exploitation of the results, and the National Ethics Council. In judicial practice, the problem of the material jurisdiction of the courts in the case of challenging acts issued by these institutions/authorities has been raised. Through the jurisdiction rules issued, the Court of Cassation has established the jurisdiction of the administrative contentious courts when challenging either only decisions issued by the Ethics Council or decisions of this authority. On the other hand, the jurisdiction over legal acts issued only by the employer in application of Law no. 206/2004 has not yet been settled in a uniform manner at the highest court level, with solutions oscillating between administrative contentious and labor law disputes. The aim of the article is to analyze the dividing lines between the two types of court actions, starting from a particular case.

Keywords: *administrative act, administrative litigation, disciplinary sanction, employment relationship, employment law disputes*.

JEL Classification: K41

1. Introduction

Law no. 206/2004 regulates the principles and procedures in the field of ethics in scientific research, technological development and innovation activities, as well as the sanctions that can be applied to individuals in case of misconduct[2]. The procedures regulated by this normative act are atypical in that they involve analysis and decision-making in two stages: at the level of the institution where the alleged misconduct occurred and at the level of the National Ethics Council. In practical work, the question has arisen as to whether the legal acts thus adopted should be classified as acts of administrative law or acts of labor law.

The tendency at the level of the High Court of Cassation and Justice is to qualify the decisions issued by the National Council of Ethics as administrative acts. On the other hand, the competence over legal acts issued by the employer in application of Law

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[2] For an analysis of the institutions regulated by Law no. 206/2004, see Mircea Ursuța, *Unele aspecte privind procedurile de sancționare a plagiatului în România*, „Curierul Judiciar" no. 9/2017, p. 481-488; Lucian T. Poenaru, *O cercetare a plagiatului: implicațiile penale ale fenomenului*, „Curierul Judiciar" no. 9/2017, p. 499-510.

no. 206/2004 is not yet consensual within the Court of Cassation and Justice. Our opinion on the latter issue is expressed in the *Conclusions* section.

2. Law no. 206/2004 - same act, several distinct procedures and legal acts issued by different entities

Law no. 206/2004 regulates the principles and procedures in the field of ethics in scientific research, technological development and innovation activities, as well as the sanctions that can be applied to individuals in case of misconduct. The procedures regulated by this normative act are atypical, as they imply the analysis and adoption of decisions in two stages: at the level of the institution where the alleged breaches of the rules of good conduct occurred and at the level of the National Ethics Council, "the complaints concerning breaches of the rules of good conduct in research and development activity are analyzed in two stages detailed in the Code of Ethics: a) analysis at the level of the institution where the alleged breaches occurred, called the first stage, which is carried out according to art. 11 and the provisions of the Code of Ethics; b) analysis at the level of the National Council of Ethics, called the second stage".

The National Council of Ethics is a consultative body, without legal personality, established within the Ministry of Education and Research, with the purpose of coordinating and monitoring the application of moral and professional conduct in research and development activities. Its tasks include issuing decisions establishing whether there has been a breach of the rules of good conduct; in cases where breaches have been found, the decisions name the individual or individuals guilty of the breach and determine the penalties to be applied. The Council examines complaints or appeals if the first stage, carried out at the level of the institution, has produced a report within 45 calendar days of receipt of the complaint, as well as if such a report has not been adopted within the time limit provided for by law. According to art. 4 index 2 para. 5 of the Law no. 206/2004, the National Ethics Council may also analyze deviations from the rules of good conduct following self-reporting.

If the National Ethics Council is notified or self-reports, it shall issue a report within a maximum of 90 calendar days from the date of receipt of the complaint or appeal or from the date of self-reporting. This report shall contain the reasoned judgment on the existence of a breach or breaches of good conduct in the research and development activity, as well as the identification of the guilty persons and the proposed sanctions.

Since the units and institutions that are part of the national R&D system, the units and/or institutions that conduct R&D programs, as well as the units that ensure the exploitation of the results are responsible for the respect of ethical norms and values in R&D, they are obliged to set up ethics committees[3]. In their turn, these ethics committees appoint *review committees* to examine complaints of misconduct in R&D brought to their attention as a result of complaints or self-referrals (Art. 10 letter b) of Law no. 206/2004).

According to Art. 5 of the Law no. 206/2004, the report of the review committee

[3] On the legal norms concerning the ethics committees, see Cristina Mihaela Salcă Rotaru, Laura Manea, *De lege ferenda cu privire la reglementările cu impact asupra activității comisiilor de etică universitară, Revista Etică și Deontologie*, „Revista Etică și Deontologie", 1(1), 32-43, DOI: https://doi.org/10.52744/RED.2021.01.05.

may be challenged before the National Ethics Council by the person or persons found guilty or by the author of the complaint. If no such appeal has been lodged, the sanctions established by the review board are implemented by the head of the institution or by the board of directors.

Therefore, the Council does not have the exclusive competence to deal with possible preliminary complaints as they are regulated in the typical administrative litigation, nor the profile of an administrative jurisdiction. In our opinion, the competence to settle for the first time, from an administrative point of view, an alleged fact falling within the scope of Law no. 206/2004, is not clearly delimited between the two holders: *the review committees* appointed by the ethics committees of the institutions that are part of the national R&D system, the units and/or institutions that conduct R&D programs, and the units that ensure the exploitation of the results, namely the *National Ethics Council*.

What is certain is that both R&D institutions, units and/or institutions conducting R&D programs, as well as units that ensure the exploitation of the results, and the National Ethics Council can apply sanctions, some of which are identical[4] , through legal acts that the interested parties will challenge in court. The main issue that arises is the subject-matter jurisdiction of the courts to deal with such claims. Another problematic issue could be the association of Art. 10 para. 5 of the Act with the establishment of a *sui-generis* preliminary procedure and the consequences of the plaintiff's failure to follow this procedure.

3. Administrative disputes vs. employment disputes. Conflicts of jurisdiction settled by the High Court of Cassation and Justice

In the recitals of the **decision no. 2614/7 December 2023**, having as a subject regulating competence, the High Court of Cassation and Justice, Second Civil Section, held that the substantive action was aimed at the annulment of a decision and ruling issued by the National Council for Ethics in Scientific Research (hereinafter CNECSDTI), of a report prepared by the National Institute for Research and Development for Biological Sciences - Bucharest, and the order to pay moral damages.

The plaintiff had been disciplined in the first stage by the report of the National Research and Development Institute for Biological Sciences; the National Ethics

[4] The sanctions that can be applied by institutions are regulated by Art. 11 index 1 of the law, being the following: written warning, withdrawal and/or correction of all works published in violation of the rules of good conduct; reduction of the basic salary, cumulated, where appropriate, with the management, guidance and control allowance; suspension, for a fixed period of between 1 and 10 years, of the right to apply for a competition for a higher position or for a management, guidance and control position or as a member of competition committees; dismissal from the management position in the R&D institution; disciplinary termination of the employment contract. The sanctions that can be applied by the Council are more numerous and consist of: written warning; withdrawal and/or correction of all papers published in breach of the rules of good conduct; withdrawal of academic title or research grade or demotion; dismissal from the management position in the R&D institution; disciplinary termination of employment contract; ban, for a fixed period, from access to public funding for R&D; suspension, for a fixed period of between 1 year and 10 years, of the right to apply for a competition for a senior position or for a management, guidance and control position or as a member of a competition committee; removal of the person/persons concerned from the project implementation team; termination of project funding; termination of project funding, with the obligation to return the funds (Art. 14 paragraph 1).

Council rejected her appeal against the earlier report. The applicant lodged a preliminary complaint under Article 7 of Law No. 554/2004, which was rejected by decision of the CNECSDTI.

The High Court found that the acts issued by the CNECSDTI (judgment, decision, final report) were administrative acts of an individual nature, within the meaning of Article 2 para. (1) letter c) of Law no. 554/2004, because the issuer of these acts is a public authority, within the meaning of Art. (1) letter b) of the same normative act, and the contested acts produced legal effects.

The fact that according to the provisions of Art. (1) of Law no. 206/2004, the CNECSDTI is a consultative body, without legal personality, attached to the State authority for research and development, does not preclude its status as a public authority, having regard to the powers conferred on it by Law no. 206/2004. These powers confirm that the CNECSDTI acts under public authority in order to satisfy a legitimate public interest, namely to coordinate and monitor the application of the rules of moral and professional conduct in R&D activities.

Given the fact that the CNECSDTI is empowered to issue administrative acts in the exercise of prerogatives of public power, acting in the exercise of public authority, in order to satisfy a legitimate public interest, the nature of the dispute before the court is administrative contentious.

The High Court also held that the plaintiff was not an employee of the CNECSDTI, so that the jurisdiction of the specialized labor litigation division of the court could be retained, pursuant to Article 267 letter b) Labor Code. The Council did not have the capacity to be a party to a labor dispute by virtue of a provision of Law no. 206/2004, as a referral rule within the meaning of Article 267(d) of the Labor Code.

The fact that a possible disciplinary investigation should have a unitary character or that a legal act cannot give rise to two legal relationships is not such as to remove the cause of the claim, expressed by the plaintiff as being the liability of the issuer of an administrative act and the restoration of the right injured by the administrative act. The Court held that the plaintiff expressly relied on the provisions of Law no. 554/2004.

Given that CNECSDTI is a public institution of national interest established within the state authority for research and development, in relation to Article 10 of Law no. 554/2004, the supreme court established the competence to resolve the claim in favor of the Bucharest Court of Appeal, Section... administrative and tax litigation.

By the **decision of the Second Civil Section of the High Court of Cassation and Justice no. 1485/2019,** another conflict of jurisdiction was resolved, the conflicting courts being the Court of Appeal Iasi, administrative and tax litigation section and the Iasi Tribunal, labor litigation section.

The subject-matter of the claim was the annulment of legal acts based on the provisions of Law no. 206/2004, issued both by the University "Alexandru Ioan Cuza" of Iași and by the National Council for Ethics of Scientific Research, Technological Development and Innovation.

The Court held that the penalty imposed on the applicant, consisting in a percentage reduction of her salary entitlement, was a sanction specific to employment law. However, determining the nature of the dispute requires an examination of the form of liability for breach of the rules of academic ethics and good conduct in research governing plagiarism, the act of which the defendant is accused.

The status of teaching and research staff in higher education, their rights and

obligations, as well as the sanctions that may be applied to them are regulated in Chapter II of Title IV of Law no. 1/2011 on national education[5]. According to Art. 304 para. (1) of Law no. 1/2011, "higher education staff have rights and duties deriving from the University Charter, the Code of University Ethics, the individual employment contract, as well as from the legislation in force." In Section 5 of the same normative act, the legislator regulated university ethics and the sanctions that may be applied by the University Ethics Commission, within the procedures established by the Code of University Ethics and Deontology, respectively by Law no. 206/2004, as subsequently amended and supplemented, in Section 7 established the disciplinary sanctions for violation of the duties established in the individual employment contract, as well as for violation of the rules of conduct that harm the interest of education and the prestige of the unit or institution, and in Section 8 sanctions are established for violation of university ethics and good conduct in research.

The Court concluded that the law establishes two different sanctioning regimes for research teaching staff in higher education: sanctions for disciplinary misconduct (as a result of breach of duties assumed by the individual employment contract, as well as for breach of rules of conduct that harm the interest of education and the prestige of the unit/institution) and sanctions for breach of academic ethics and good conduct in research.

According to art. 313 of Law no. 1/2011, the sanctions for disciplinary offenses, for violation of the duties established by the individual employment contract and of the rules of conduct that harm the interest of education and the prestige of the unit/institution, are established and applied by the employer. In the case of violations of the provisions of the Code of Ethics and Professional Conduct, in accordance with Articles 320-323, the sanctions are determined by the Ethics and Professional Conduct Commission or the National Council for Ethics in Scientific Research, Technological Development and Innovation and implemented by the head of the higher education institution.

Therefore, in addition to the duties established by the individual employment contract, in the field of research activity, the teacher is required to respect good conduct in scientific research, enshrined in Law no. 206/2004, for the violation of which the liability is administrative, according to the provisions contained in Section 8 of Law no. 1/2011.

In the present case, the decision to sanction the appellant was issued for the purpose of implementing by the head of the higher education establishment the sanctions already established by the decisions of the Ethics and Deontology Commission and the National Council for Ethics of Scientific Research, Technological Development and Innovation, following the finding of a breach of the Code of Ethics and Professional Deontology.

Work discipline summarizes all the obligations incumbent on employees, and disciplinary misconduct is defined by the Labor Code as an act by which the employee violates the legal rules, internal regulations, individual or collective employment contract, orders and legal provisions of hierarchical managers.

A detailed examination of the contested acts reveals that what is challenged in the present case are not acts issued by the employer with a view to sanctioning a disciplinary breach, but acts of an administrative nature, issued by the head of the higher

[5] Law no. 1/2011 was repealed by Law no. 198/2023 and Law no. 199/2023 as of September 3, 2023.

education establishment, following the application of a decision of the Ethics Commission and the National Council for Ethics in Scientific Research, Technological Development and Innovation.

Such liability is administrative, since it is not established by the employer but by bodies independent of the employer, concerns breaches of research ethics and professional conduct and is incurred on the basis of a complex administrative procedure, under which administrative acts are issued, on an individual basis.

This conclusion also derives from the definition of the National Council for Ethics in Scientific Research, Technological Development and Innovation, according to art. 5 of Law no. 206/2004, as amended, as a consultative body, without legal personality, attached to the Ministry of Education and Research. According to Art. 1 para. (1) of the Charter of the "Alexandru Ioan Cuza" University of Iași, this institution is a public law institution, and according to art. 4 of the General Regulation of Organization and Functioning of the University, it is a state higher education institution, under the coordination of the Ministry of Education and Research.

The High Court of Cassation and Justice referred to Art. 1 para. (1) and Art. (1) of Law 554/2004. Having established the subject matter of the case as being the challenge of acts issued by a state higher education institution, under the coordination of the Ministry of Education and Research, following the application of a decision of the Ethics Commission and the National Council for Ethics of Scientific Research, Technological Development and Innovation, a consultative body, without legal personality, attached to the Ministry of Education and Research, the conflict of jurisdiction was to be resolved in relation to Article 10 para. (1) sentence II of Law 554/2004, in favor of the Iași Court of Appeal.

In another jurisdiction regulator, settled by decision no. 849/2023, the Court of Cassation - Second Civil Section, the underlying dispute concerned the annulment of legal acts issued only by the National Ethics Council. The Court referred to art. 231 of the Labor Code, according to which "labor conflicts are understood as conflicts between employees and employers concerning economic, professional or social interests or rights arising from the conduct of employment relations."

Having regard to the subject-matter of the action, consisting in the annulment of acts issued by a structure of a ministry, a body of the central public administration, having regard to the legal basis of the claim, the Administrative Litigation Law no. 554/2004 and having regard to the procedural framework established by the plaintiffs, the High Court found that it cannot be a labor law relationship since *the plaintiffs are not employees of the defendant Council of Ethics*.

According to Article 7 letter f)[1] of the Law no. 206/2004 on good conduct in scientific research, technological development and innovation, the Ethics Council "issues decisions establishing whether a deviation from the rules of good conduct has been realized; in cases where deviations have been found, the decisions name the person or persons guilty of such deviations and establish the sanctions to be applied."

It is clear from the content of the judgment annulment of which is sought that the members of the Ethics Committee were given a penalty of a warning and that the judgment was communicated to the employing institution for implementation. The Court held that *employment law could have been applicable if the applicants had challenged the sanctions imposed by their employer, the National Institute for Laser, Plasma and Radiation Physics, on the basis of the decision of the Ethics Council.*

As a result, having regard to the provisions of Article 10 para. (1) of Law no. 554/2004 on administrative litigation, the supreme court found that the dispute falls within the scope of administrative litigation and is within the jurisdiction of the administrative and tax litigation division of the Bucharest Court of Appeal.

4. Conclusions

As a preliminary point, it should be emphasized that "the determination of a given act as an administrative act is the exclusive prerogative of the courts called upon to resolve a dispute"[6]. The starting point is the definition contained in Art. 2 para. 1 letter c) of Law no. 554/2004, i.e. the unilateral individual or normative act issued by a public authority, under public power, in order to organize the execution of the law or the concrete execution of the law, which gives rise to, modifies or extinguishes legal relations. On the other hand, "under labor law, the application of disciplinary measures concerns not only the obligation of the employee to comply with the conventional legal rules, as well as the internal rules communicated when signing the employment contract, but also the disciplinary prerogative of the employer, which is defined as the monitoring of the employee's performance of his work, as well as the employer's authority to sanction violations of the rules"[7]. Somewhat reversing the steps, the determination of the court having substantive jurisdiction also determines the legal rules according to which the dispute will be resolved, an aspect which has a crucial stake[8]. Thus, if the contested act is issued in the context of labor law, the disciplinary investigation must be carried out under the sanction of absolute nullity (Art. 251 para. 1 Labor Code), a situation that is not found in administrative litigation. On the other hand, administrative contentious proceedings allow the suspension of the enforcement of the act, a procedural advantage not found in labor disputes.

According to the previous section, the tendency at the level of the High Court of Cassation and Justice is to qualify the decisions issued by the National Council of Ethics under Law 206/2004 as administrative acts. In the application of this normative act, the Council exercises prerogatives of public power, it acts under public authority in order to satisfy a legitimate public interest, and the legal liability of the person is engaged by virtue of an administrative procedure. Secondly, there is no specific employment law relationship between the Council and the person concerned, based on an individual employment contract. As *a consequence, the practice of the Court of Cassation of the Court of Justice when challenging either only decisions issued by the Council, or both decisions/judgments/letters issued by the Council and by R&D institutions, units and/or institutions conducting R&D programs or units ensuring the exploitation of the results is to establish subject matter jurisdiction in the area of the administrative courts, while the Council's status as a central public authority places jurisdiction at the level of the*

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[6] Gabriela-Victoria Bîrsan, Eugenia Marin, *Legea contenciosului administrativului nr. 554/2004 adnotată*, Ed. Hamangiu, Bucharest, 2021, p. 22.

[7] Mihaela Emilia Marica, *Considerations on Disciplinary Sanctions Applicable to Employees. Elements of Comparative Law*, „Perspectives of Law and Public Administration", Volume 12, Issue 2, June 2023, p. 185.

[8] For the relationship between the competent court and the applicable legal rules, see Andreea Tabacu, *Procedural rules applicable in litigation concerning civil servants*, „Transylvanian Journal of Administrative Sciences" 2(49)/2021, pp. 158-174.

courts of appeal[9] .

The legal situation has not been fully clarified with regard to the material competence to bring actions against decisions/orders/ratios issued only by the management of the unit or institution in the case of R&D institutions, units and/or institutions conducting R&D programs or units ensuring the exploitation of results.

Thus, the decision of the Second Civil Section of the the High Court of Cassation and Justice no. 1485/2019, shows that even in such a circumstance, the jurisdiction remains in the realm of administrative litigation. The Supreme Court made a distinction between disciplinary sanctions for breach of duties established in the individual employment contract, as well as for breach of rules of conduct that harm the interest of education and the prestige of the unit or institution, on the one hand, and sanctions for breach of academic ethics and good conduct in research, on the other hand. It *would follow from the considerations of this decision that the nature of the dispute remains one of administrative litigation in the case of sanctions for breaches of university ethics and good conduct in research, irrespective of the entity which applies them.*

In support of this interpretation, we also refer to the decision of the Craiova Court of Appeal no. 2793/2023, which established the nature of a sanctioning decision issued by the C-tin Brâncuși University of Targu-Jiu under Law no. 206/2004, with regard to a teacher employed under an individual employment contract, as an act of administrative law. "The appellant has not been sanctioned for the breach of a specific obligation that would have been incumbent on her under her individual employment contract, but for the breach of a general rule that applies to any person who carries out scientific research, technological development and innovation activities (Law no. 206/2004). Both the misconduct and the sanction are regulated by this normative act. Also, the procedure leading to the application of the sanction is governed by Law no. 206/2004, involving the exercise of specific powers by certain structures acting as public authorities. Decision no. 604/2023 was issued for the implementation of Law no 206/2004 in a concrete case, being an individual administrative act. Decision no. 604/2023 is a unilateral administrative act of individual character, issued by a public authority, under public power, in order to implement Law no. 206/2004 in concrete terms. Disputes related to this act fall under the administrative contentious, one of the parties being a public authority, and the conflict arising from the issuance of an administrative act"[10]. Therefore, the specificity of the administrative act is that it is issued under public power, defined as "all the prerogatives and constraints provided by law for the exercise of the powers of public administration authorities and institutions and which enable them to impose themselves with binding legal force in their relations with natural

[9] According to Art. 10 para. 1 of Law no. 554/2004. For a detailed analysis of the rules of jurisdiction established by this article, as well as for the material and territorial jurisdiction of the administrative contentious courts established by special rules, see Oliviu Puie, *Tratat teoretic și practic de contencios administrativ*, vol. II, Ed. Universul Juridic, Bucharest, 2021, p. 445-587; Gabriela Bogasiu, *Legea contenciosului administrativ comentată și adnotată*, 5th edition revised and added, Ed. Universul Juridic, Bucharest, 2022, p. 232-263.

[10] For an analysis on the cumulation of the employee's disciplinary liability with other forms of legal liability, see Mihaela Emilia Marica, *Cumulation of Disciplinary Liability with Other Forms of Legal Liability*, study published in Cristina Elena Popa Tache, Renata Treneska Deskoska, Nathaniel Boyd (coordinationg eds.) *Adapting to Change Business Law Insights from Today's International Legal Landscape*, ADJURIS - International Academic Publisher, Bucharest, Paris, Calgary, 2024, p. 208 et seq.

or legal persons, in order to protect the public interest"[11] .

On the other hand, by Decision no. 849/2023 of the Second Civil Section of the the High Court of Cassation and Justice held that labor law could be applicable if the claimants had challenged the sanctioning measures ordered by their employer, the National Institute for Laser, Plasma and Radiation Physics, on the basis of the decision of the Ethics Council. Therefore, the resolution of the question of subject-matter jurisdiction in the latter case does not enjoy consensus in the highest court. "We emphasize that not all disputes between public authorities and private individuals are administrative disputes. Thus, disputes concerning the private domain of the State and administrative-territorial units as well as disputes relating to civil, commercial and labor contracts will be judged by the competent courts according to the rules of common law. Therefore, in order to be in the presence of administrative litigation, it is necessary that, in addition to the participation of a public authority as a party to the dispute, the dispute must have as its subject matter the violation of public law rules, through the action of the public authority and be judged according to specific rules of public law"[12] .

With regard to the *sui-generis* nature of Article 11 para. 5 of the Law, it is clear from the provisions of the normative act that the person who considers himself aggrieved is not obliged to challenge the decision of the review committee before the Council in order to subsequently have the possibility of bringing the matter before the courts. Therefore, it cannot be considered that the law establishes such a preliminary procedure, and the decisions issued by the management of the unit or institution in the case of research and development institutions, units and/or institutions conducting research and development programs or units which ensure the exploitation of the results issued under Law no. 206/2004 may be challenged directly in court.

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[11] See Ovidiu Podaru, *Administrative Law*, vol. I, 2nd revised and added edition, Ed. Hamangiu, Bucharest, 2022, p. 14, 15. The author referred to art. 5 letter jj) Administrative Code.

[12] Cătălin-Silviu Săraru, *Tratat de contencios administrativ*, Ed. Universul Juridic, Bucharest, 2022, p. 27, 28.

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