

Examining the Unfolding of Disciplinary Proceedings from Various Perspectives within the Context of Belgian and European Law

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ABSTRACT

The exploration of disciplinary law and proceedings reveals a complex nature, marked by uncertainties related to the application of essential guarantees and challenges, such as the right to remain silent and the non bis in idem

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principle. The evolving case law in Belgium on petitioner conduct during administrative appeals, which extends beyond disciplinary cases, raises further questions about the feasibility of restricting court access based on a party's behavior. The Whistleblower Protection Directive signifies progress in establishing common standards across European Union (EU) countries, offering broad protection to various individuals vulnerable to work-related retaliation. While the directive lacks specific guidance on penalties, the implementation of effective, proportionate, and dissuasive penalties remains essential.

Keywords: Disciplinary Law, Criminal Law, Administrative Law, Administrative Procedures, Whistleblowers Protection, Comparative Law, EU Law.

Examen del desarrollo de los procedimientos disciplinarios desde distintas perspectivas en el contexto del derecho belga y europeo

RESUMEN

La exploración del derecho y los procedimientos disciplinarios revela una naturaleza compleja, con incertidumbres derivadas de la aplicación de garantías esenciales y desafíos planteados por la no aplicabilidad de ciertos principios como el derecho a permanecer en silencio y el principio de *non bis in idem*. La jurisprudencia en evolución en Bélgica sobre la conducta del peticionario durante las apelaciones administrativas, que se extiende más allá de los casos disciplinarios, plantea preguntas sobre la viabilidad de restringir el acceso al tribunal basado en el comportamiento de una parte. La Directiva de Protección a Denunciantes señala avances en el establecimiento de normas comunes en los países de la UE, ofreciendo amplia protección a diversas personas vulnerables a represalias laborales. Aunque la directiva carece de orientación específica sobre sanciones, es esencial contar con sanciones eficaces, proporcionadas y disuasorias.

Palabras clave: derecho disciplinario, derecho penal, derecho administrativo, procedimientos administrativos, protección de denunciantes, derecho comparado, derecho de la UE.

INTRODUCTION

Disciplinary law applies today to a variety of categories of people.⁴ On the one hand, the 'public' categories going from judges, prosecutors and clerks to civil servants, teachers, police agents and officers or even prisoners. On the other hand, the 'private' categories regarding a variety of liberal professions like lawyers, doctors, architects, accountants and revisors, journalists, students and researchers at universities, sportspeople etc. A special category envelops the private-public distinction with people like bailiffs and notaries who combine a liberal profession with a public task. Common to all is that they stand under a hierarchy or under a professional body. Diverse law sources have given the public or private professional bodies the possibilities to draft rules regarding the organisation of the profession and the duties of the people falling under these rules on the one hand, to ensure the good service or performance of the profession and, on the other hand, to safeguard the dignity and the honour of the function or the profession.⁵ Disciplinary law punishes the violation of these professional or service rules. It also tries to prevent a person from continuing to infringe these rules, which can lead to the temporary or definitive destitution from the service or the profession.

The first part of this paper focuses on disciplinary law through the lens of criminal law. By delving into the nature of disciplinary law and its procedures, we will scrutinize their implications by analyzing relevant case law from the European Court of Human Rights and the Constitutional Court of Belgium. This examination extends to essential guarantees inherent in criminal law, exploring the intricate relationship and intersection of criminal and disciplinary proceedings. Notably, we will address challenges arising from the right to remain silent within this context. The second part adopts an administrative law perspective. We will examine various methods of organizing administrative appeals procedures, followed by an in-depth analysis of the Council of State of Belgium's case law regarding the posture of appellants in organized administrative appeals. This section will explore whether the Council of State's jurisprudence is confined solely to disciplinary proceedings or if its scope extends beyond this specific domain. The concluding third part scrutinizes the diversion of disciplinary proceedings

4 See Jacques Joseph Haus, *Principes généraux du droit pénal belge*, 2.^a ed., Gent: Hoste, 1874, t. I, n.º 251.

5 See amongst others Jean Dujardin, "Rechtspraak in tuchtzaken door de beroepsorden: toetsing van de wettelijkheid door het Hof van Cassatie" (Opening Speech September 2000), Brussel, Supreme Court, 2000, hofvancassatie.be/nl/Pub.html#sec-20c9, p. 5 and 9 [consulted on 10 January 2024]; see also André Mast, Jean Dujardin, Maxim van Damme, Johan Vande Lanotte, *Overzicht van het Belgisch administratief recht*, Mechelen: Kluwer, 2021, n.º 303.

to discourage officials from reporting illegal conduct. This will be achieved through a specific examination of the whistleblower protection legislation of the European Union, shedding light on the mechanisms in place to safeguard individuals who expose illicit activities within organizations.

1. DISCIPLINARY LAW: A CRIMINAL LAW PERSPECTIVE

As former Attorney-General of the Belgian Supreme Court⁶ (Hof van Cassatie/Cour de Cassation), Jean Dujardin wrote, "the normalising, moralising and punitive aims of disciplinary law mean that disciplinary law tends to use the punitive law par excellence, namely criminal law, as a role model".⁷ Nobody contests anymore the existence of disciplinary law as an autonomous part of the law and that even with the diversity of rules regarding different functions and professions, a common disciplinary law and procedure exist with general rules and principles applicable to all these categories.⁸

However, this second evolution (to accept common procedural rules) sometimes struggles against reminders of the past coming from traditions or ideas, which tend to prove the autonomy of disciplinary law and thus the existence of specific (not common) procedural rules for the different disciplinary matters. The conflict between both visions (common procedural rules influenced by the criminal law vs. specific procedural rules) has led in Belgium today to different interpretations of how the law and the procedure should be or take place in relation to disciplinary matters.

In this part we examine these problems by drafting a scheme of the actual debates in the field. We will first address the question of the nature of the disciplinary laws and whether the general rules and principles of criminal law and procedure are applicable or not. The focus will be on the case law of the European Court of Human Rights and the Belgian Constitutional Court. We will also look at some opinions in the literature and the practice in the case law of the Belgian Supreme Court, the highest Criminal Court in Belgium.⁹ Afterwards, we will address some topics in the material law and

6 For more pragmatic reasons we will further use the term Supreme Court. However, the reader must keep in mind that this court is not a Constitutional Court like the Supreme Court of the USA or UK. However, there is no other equivalent English word. The abbreviation 'Cass.' is also used.

7 Jean Dujardin, *op. cit.*, p. 2.

8 See Jean Dujardin, *op. cit.*, p. 61; Koen Baert and Philipp Leroy, "Een tuchtrechtelijk procesrecht in dienst van het tuchtrecht", *Rechtskundig Weekblad*, 1977-78, pp. 2317-2330.

9 The case law of the Council of State, the highest Administrative Court in Belgium, will be treated in other parts of this article (see also André Mast, Jean Dujardin, Maxim van Damme, Johan Vande Lanotte, *op. cit.*, n.º 330 et seq., Ingrid Opdebeek, "Interferentie

related procedure. Again, the focus will be the practice of the case law of the Belgian Supreme Court. Finally, we will suggest some ideas and paths for further research.

1.1. GENERAL PRINCIPLES: THE NATURE OF DISCIPLINARY LAW AND PROCEDURE AND THE CONSEQUENCES OF THIS

1.1.1. The problem

The main question remains, not if disciplinary law exists or what it is, but what is the nature of this law?

As previously stated, some scholars tend to link disciplinary law and procedure with criminal law and procedure. In filling the gaps, the criminal law and procedure principles and rules will act as a default rule or common principles applicable to disciplinary law and procedure. Other scholars claim that disciplinary law has its own reasons, grounds, and principles which are sometimes opposite to the general principles and rules of the criminal law and procedure. Some of these principles or rules follow from the main characteristics of disciplinary law or from the basic ideas and principles that form the base of disciplinary law. To illustrate, as disciplinary law follows from the authority of the hierarchy, or the attendance to a corporation, organisation or profession, the judges would necessarily come out of this hierarchy, or are peers from the profession or organisation. Whether a judge is involved in a disciplinary law case is of no relevance, while a judge in a civil or criminal trial in the same circumstances would be unfit to sit in court because of the principle of impartiality.

Perhaps, therefore, there is a closer relationship with administrative law. But maybe, as no single rule from other disciplines of the law (like administrative or criminal law) is fit for the disciplinary law, only a *sui generis* approach will be satisfactory. Thus, the question of the nature of disciplinary law and procedure is an essential one. First, we will analyze how the European Court of Human Rights has dealt with this problem and then how the Belgian Constitutional Court views matters. After, we will consider the opinions of some criminal scholars and the practice of the Belgian Supreme Court.

tussen ambtenarentucht recht en strafrecht", in Piet Taelman (ed.), *Efficiënt procederen voor een goede rechtsbedeling*, Gandaius–Postuniversitaire Cyclus Willy Delva, nr. 41, Mechelen: Kluwer, 2016, pp. 191-232).

1.1.2. THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Whether international or inadvertent, the European Court of Human Rights (*hereafter* ECtHR) has delivered in several Belgian cases some answers to the question of the nature of disciplinary law and procedure. However, this question was framed slightly different as the scope of Article 6 or 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms¹⁰ (*hereafter* ECHR) was examined.

In the first case of *De Wilde, Ooms and Versyp*, one of the first cases brought before the Court on this specific topic, the ECtHR examined the situation of three vagrants who for their non-compliance to certain orders of the government were disciplinary sanctioned. The Court only examined the applicability of Article 7 ECHR. It stated unanimously: "As to Article 7 (art. 7), it is clear that it is not relevant. Simple vagrancy is not an "offence" under Belgian law and the magistrate did not find the applicants "guilty" nor impose a "penalty" on them".¹¹

In the case *Lecompte, Van Leuven and De Meyere*, the Court decided on the request of three Belgian doctors that their disciplinary case fell under Article 6.1. of the ECHR, the core of Article 6, regarding the fair trial.¹² The ECtHR had to rule on different points, but here it is sufficient to note that the Court found that there was a 'contestation' (dispute) related to 'civil rights and obligations', in other words that the 'result of the proceedings' was directly 'decisive' for such a right.¹³

The Court made a further statement regarding the question of whether civil rights were at stake:

[...] it is by means of private relationships with their clients or patients that medical practitioners in private practice, such as the applicants, avail themselves of the right to continue to practice; in Belgian law, these relationships are usually contractual or quasi-contractual and, in any event, are directly established between individuals on a personal basis and without any intervention of an essential or determining nature by a public authority. Accordingly, it is a private right that is at issue, notwithstanding the specific character of the medical profession – a profession which is exercised in the general interest

10 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5.

11 ECtHR *De Wilde, Ooms and Versyp v. Belgium*, 18 juni 1971, Series A-12, § 87.

12 Article 6 of the ECHR further entails the presumption of innocence (art. 6.2.) and specific rights of defense (art. 6.3.), but these are only applicable to real criminal procedures.

13 ECtHR *Lecompte, Van Leuven and De Meyere*, 23 June 1981, Series A-43, § 47; see also Pierre Lambert, "La procédure disciplinaire et la Convention de sauvegarde des droits de l'homme", *Journal des tribunaux*, 1981, vol. 96, n.° 5184, pp. 625-627.

– and the special duties incumbent on its members. The Court thus concludes that Article 6 par. 1 (art. 6-1) is applicable.¹⁴

The fact that the doctors only were suspended for a relative short period of time, like two dissenting judges of the Court noted, did not bring the Court to another conclusion in their decision.

Because different from other sanctions like warning, censure, and reprimand, "the suspension constituted a direct and material interference with the right to continue to exercise the medical profession. The fact that the suspension was temporary did not prevent its impairing that right; in the 'contestations' (disputes) [...] the actual existence of a 'civil' right may, of course, be at stake but so may the scope of such a right or the manner in which the beneficiary may avail himself thereof".¹⁵

The Court further stated that in case of an administrative body which does not comply with the guarantees of Article 6 ECHR, it is sufficient that the Appeal Court or body satisfies the exigencies of Article 6 ECHR. This case law was repeated many times thereafter.¹⁶ However the procedure before the appeal body did not take place in a public hearing, Article 6.1. of the Convention was violated.

From then on,¹⁷ the European Court ruled in many cases that the disciplinary procedure fell under Article 6.1, civil limb, of the ECHR.¹⁸ However for some, this did not finally rule on the question of the nature of disciplinary law, which asked whether the general rules and principles of criminal law were also applicable. In the mind of the Convention and the Court there is a question of whether sometimes the more extensive or special guarantees of Article 6 in his criminal limb or Article 7 of the Convention would be

14 *Ibid.*, § 48.

15 *Ibid.*, § 49.

16 *Ibid.*, § 50; Daniel de Wolf, *De rol van de rechter bij de waarheidsvinding in de correctionele procedure. Een rechtsvergelijkend onderzoek naar Belgisch, Frans en Nederlands recht*, Heule/Brugge: UGA/Die Keure, 2011, n.º 63.

17 In fact, before the case of *Le Compte, Van Leuven and De Meyere*, the Court stated in *König v. Germany* (28 June 1978, Series A, n.º 27) that the administrative withdrawal of his authorisation to run his clinic and then his authorisation to practise medicine, fell under Art. 6.1. ECHR. This case was however considered as 'administrative' and not as "disciplinary". In the case *Engel and others v. the Netherlands*, of 8 June 1976, the Court already stated that for two persons their case fell under the Art. 6 of the Convention because 'civil rights and liberties' were at stake and that therefore the procedure before the appeal court which happened *in camera* violated art. 6 (see § 89).

18 See amongst others *ECHR Albert and Lecompte v. Belgium*, 10 February 1983, §§ 25-29; *Diennet v. France*, 26 September 1995, § 27, Series A no. 325 A; *Philis v. Greece* (no. 2), 27 June 1997, § 45, Reports of Judgments and Decisions 1997 IV; *Gautrin and Others v. France*, 20 May 1998, § 33, Reports 1998 III; *W.R. v. Austria*, no. 26602/95, §§ 28-30, 21 December 1999; and *Gorjani v. Austria*, no. 31356/04, § 21, 10 December 2009.

applicable to disciplinary procedures. The case law is not very clear on this point. In our opinion, we can distinguish three time frames in the case law.

In the first period, from 1970 to 1993, case law was divided into two groups. In some cases, the Court decided that it was not so relevant to examine if the case fell under 'civil rights and liberties' or under the term 'criminal charge', as both the guarantees of Article 6.1. applied. Although it is true that §§ 2 and 3 of Article 6 of the Convention are only applicable in criminal cases, the rights in Article 6.1. ECHR are the same under the civil and criminal limb.¹⁹ In other cases the Court decided that, in general, the criminal limb would not apply to disciplinary cases, but that in rare cases this was not inconceivable.²⁰ In the *Engel and others versus the Netherlands*, case the Court established its famous threefold criterium to decide if the criminal limb was applicable.²¹ The judgment also provides an interesting consideration between the difference between criminal law and disciplinary law. Although the forementioned criterium is later often used to qualify 'administrative sanctions', the *Engel* case was a case regarding disciplinary sanctions. It reveals that the *Engel* criteria are applicable to qualify administrative sanctions and disciplinary ones.

In *Engel and others*, five soldiers were prosecuted for contravening military discipline. With reference to the difference between criminal procedures and disciplinary ones the Court stated:

All the Contracting States make a distinction of long standing, albeit in different forms and degrees, between disciplinary proceedings and criminal proceedings. For the individuals affected, the former usually offer substantial advantages in comparison with the latter, for example as concerns the sentences passed. Disciplinary sentences, in general less severe, do not appear in the person's criminal record and entail more limited consequences. It may nevertheless be otherwise; moreover, criminal proceedings are ordinarily accompanied by fuller guarantees.²²

And to continue

The Convention without any doubt allows the States, in the performance of their function as guardians of the public interest, to maintain or establish a distinction

19 See for example ECtHR *König v. Germany*, 28 June 1978, Series A, n.º 27, § 96; *Lecompte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, Series A-43, § 53; *Albert and Lecompte v. Belgium*, 10 February 1983, § 30.

20 ECtHR *Lecompte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, Series A-43, § 42 with reference to *Engel and others v. The Netherlands*, Series A, n.º 22, §§ 80-85.

21 ECtHR *Engel and others v. The Netherlands*, 8 June 1976, Series A, n.º 22.

22 *Ibid.*, § 80.

between criminal law and disciplinary law, and to draw the dividing line, but only subject to certain conditions. The Convention leaves the States free to designate as a criminal offence an act or omission not constituting the normal exercise of one of the rights that it protects. This is made especially clear by Article 7 (art. 7). Such a choice, which has the effect of rendering applicable Articles 6 and 7 (art. 6, art. 7), in principle escapes supervision by the Court. The converse choice, for its part, is subject to stricter rules. If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 (art. 6, art. 7) would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction, under Article 6 (art. 6) and even without reference to Articles 17 and 18 (art. 17, art. 18), to satisfy itself that the disciplinary does not improperly encroach upon the criminal.²³

As a result, the ECtHR formulates a three-fold criterium: the characterisation under national law, the nature of the offence and the severity of the sanction. Regarding disciplinary matters, the Court noted in general that the designation in national law as only 'disciplinary' is not decisive but rather a starting point. If the offence consists of contravening a legal rule governing the operation of the armed forces, the use of disciplinary law is preferred to the use of criminal law. Finally, a deprivation of liberty belongs more to the criminal law.²⁴ In the case at hand, the offence was aimed at the organisation of service and the penalties were rather light. The Court concluded that the criminal limb was not applicable.²⁵ In this period, the Court generally pointed out that the following did not matter: distinguishing criminal law from disciplinary law or that most of the time disciplinary procedures would not fall under the criminal guarantees.

In the second period, from 1995 to 2022, the first cited case law in the first period came to an end with the case of *Zumtobel vs. Austria* in 1993: the guarantees under the civil limb were not totally the same to those under the criminal limb or at least their intensity was different²⁶. From then on, it became important to decide if the case did not only fall under the civil limb, but also under the criminal limb. This led first to two cases regarding

23 *Ibid.*, § 81.

24 *Ibid.*, § 82.

25 *Ibid.*, § 85.

26 See *Zumtobel v. Austria*, 21 September 1993, 268-A, § 27 and further; Opinion of Judge Martens in *Fischer v. Austria*, 26 April 1995, n.º 312; Daniel de Wolf, *De rol van de rechter bij de waarheidsvinding in de correctionele procedure. Een rechtsvergelijkend onderzoek naar Belgisch, Frans en Nederlands recht*, *op. cit.*, n.º 64 and footnote 637.

non-criminal sanctions, *Welch vs. the UK* and *Jamil vs. France*, where the Court examined, under Article 7 ECHR, in long the existence of a criminal character.²⁷ Applied to disciplinary cases, the conclusion was most often that the criminal nature was absent.²⁸ As to Article 6.1. of the Convention, the cases contained a separate examination if the criminal limb was applicable. In most of the cases of the time, the answer was negative.

In the Court summarized his case law in *Rola vs. Slovenia*:

The Court [...] noted in *Kapetanios and Others v. Greece* (nos. 3453/12 and 2 others, § 87, 30 April 2015) that in cases such as *Vagenas* [...] the disciplinary proceedings had had a certain autonomy vis à vis the criminal proceedings, in particular as regards the manner in which they had been carried out and their purpose. 56. Assessing the question under the criminal limb of Article 6, the Court similarly found in *Müller-Hartburg v. Austria* (no. 47195/06, 19 February 2013) and *Biagioli v. San Marino* ((dec.), no. 8162/13, 13 September 2016) that the offences brought against the applicants – a lawyer, and both a notary public and a lawyer respectively – in the disciplinary proceedings had not been criminal but disciplinary in nature. It observed that the fact that acts which could have led to a disciplinary sanction had also constituted criminal offences (specifically in those particular cases fraudulent conversion and making false declarations in public documents respectively) had not been sufficient to consider a person responsible under disciplinary law as having been “charged” with a crime. As regards the nature of the disciplinary offences in question, the Court further noted that the offences had related solely to professional misconduct and the applicable disciplinary law had not been aimed at the general public but to members of a professional group possessing a special status (see *Müller-Hartburg*, cited above, § 44, and *Biagioli*, decision cited above, § 54). In both cases the purpose of the proceedings had been to protect the public trust in, and the reputation of, the profession (see *Müller-Hartburg*, cited above, § 45, and *Biagioli*, decision cited above, § 55). The Court further observed in *Müller Hartburg* that the disciplinary authorities had been required to have particular regard not only to the degree of culpability but to the damage resulting from

27 *Welch v. the United Kingdom*, 9 February 1995, § 27, Series A, n.º 307 A, and *Jamil v. France*, 8 June 1995, § 30, Series A, n.º 317-B.

28 In these cases, the Court established like in the *Engel* criteria for the applicability of Art. 7 of the Convention which look quite the same as the *Engel* criteria. “*The starting-point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a “criminal offence”. Other factors that may be taken into account as relevant in this connection are the nature and purpose of the measure; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity*” (ECtHR *Del Río Prada v. Spain*, 21 October 2013, §§ 82; see also *Welch v. UK*, 9 February 1995, § 28; *Jamil v. France*, 9 June 1995, § 31; *Kafkaris v. Cyprus*, 12 February 2008, § 142). For later cases, see ECtHR *Rola v. Slovenia*, 4th June 2019, §§ 55-57; see also ECtHR *Gestur Jónsson and Ragnar Halldór Hall v. Iceland*, 22nd of December 2022, with dissenting opinions of the judges Sicilianos, Ravarani and Serghides.

the commission of the offence, in particular to members of the public (cited above, § 45). 57. As regards the nature and degree of severity of the sanction, the Court noted in Biagioli (decision cited above) that although the sanction of disbarment had been severe, its aim had been to restore the confidence of the public by showing that in cases of serious professional misconduct the relevant disciplinary body would prohibit the lawyer or notary concerned from practising. The Court went on to note that, although not crucial to this finding, being disbarred did not necessarily have a permanent effect because a professional who had been disbarred might be reinstated if he or she had been rehabilitated and it were shown that his or her conduct had not been reprehensible (*ibid.*, § 56).²⁹

In *Rola v. Slovenia* it came to the same conclusion under Article 7 of the Convention.³⁰

Nowhere is it more important to search the difference in nature of disciplinary law and criminal law when both procedures are combined. The ECtHR examined this under the *non bis in idem* principle as stated in Article 4 of the 7th Protocol to the Convention in the case of *Sergey Zolotukhin vs. Russia*.³¹ Again a case concerning a military official, who was first convicted for bringing a third person into a military compound and for public disorder to an 'administrative offence' and later for the same facts for a 'criminal offence'. To determine if the provision of the Convention was applicable, the Court had to determine if there was a 'penal procedure'. To do this, the Engel criteria was once again applicable.³² The court noted that the offence was aimed at the general public (not only at members of the armed forces) and the purpose was deterrence.³³ The penalty was a possibly 'administrative' imprisonment of 15 days. The ECtHR concluded that the 'administrative' offence was to be seen as a criminal procedure. The conclusion was that the *ne bis in idem* principle was applicable.

So, in this second period the Court followed the path it took with the Engel case, but now as a principle, and tested systematically if the criminal limb was present. Most of the time the answer was negative. The Court focused on the difference between disciplinary procedure and criminal procedure. This conclusion can be explained by the specificity of the cases but could also be the translation of a certain hostility to make the criminal limb applicable to disciplinary cases.

In the third period, regarding recent cases, from 2022 on, the conclusion regarding the applicability of Article 6.1. of the Convention is more

29 ECtHR *Rola v. Slovenia*, 4 June 2019, §§ 55-57.

30 *Ibid.*, §§ 60-67.

31 ECtHR *Sergey Zolotukhin v. Russia*, 10 February 2009.

32 *Ibid.*, § 52.

33 *Ibid.*, § 55.

nuanced. In some cases, the Court concludes that the criminal limb is applicable. But it's unclear whether the extraordinary situations that were previously reported actually happened in these cases or if there are other factors to take into account.

In the case of *Tuleya vs. Poland*³⁴ the Court found that the criminal limb was applicable because the procedure of uplifting the immunity of the judge was conducted by disciplinary courts, and was only possible in the case of a suspicion of an offence. The offence was aimed at the general public and not only at the judges because of the seriousness of the sanction (up to 2 years of imprisonment) and the possibility of a subsequent criminal procedure after the conclusion of the disciplinary procedure. This is certainly a special case because of the persons and their role in the democratic states (here judges)³⁵, the strong link with the subsequent criminal procedure. The disciplinary procedure marked the start of the criminal procedure.³⁶ The first specificity (prosecuted judges) led in another case, this time against *Albany*, to the conclusion that the criminal limb was not applicable, but that there was a kind of reinforced applicability of Article 6.1. of the ECHR under its civil limb.³⁷ Only the future will tell where the Court is heading to. It seems however that there is a part or even a growing part of the Court that is not convinced anymore by the majority argument that the disciplinary is so different from the criminal procedure.

1.1.3. The Constitutional Court of Belgium

The approach of the Constitutional Court of Belgium is quite different. For a long period of time, it was only possible to ask the Court if the law discriminated persons or categories of persons. Instead of a direct control over the compliance of national laws with the Constitution or European rules, for example, one had to ask the Court if the law when making a comparison of two categories of people violated the rights enshrined in the Constitution or European Treaties. This restriction has been lifted. However, the Court still maintains a tradition of comparing categories.

34 ECtHR *Tuleya v. Poland*, 6 July 2023.

35 This case is certainly influenced by the concerns of the EU regarding a former government of Poland and their measures affecting the rule of law and the independence of judges. It is to no surprise that the ECtHR is referring in its judgement (§ 299) to the judgment of the European Court of Justice of the EU, 5th June 2023 in the case *Commission v. Poland (Independence and private life of judges)* (C-204/21, EU:C:2023:442).

36 This is the definition of a 'criminal charge' given in the key case of the Court in *Deweert v. Belgium*.

37 ECtHR *Thanza v. Albania*, 4 July 2023, §§ 81 and 91; see also ECtHR *Xhoxhaj v. Albania*, 9 February 2021.

It is in this perspective that the Court compared many times the criminal procedure and the disciplinary proceedings. The opinion of the Court led to a standard consideration that can be read in different judgements.

The Court states that (free translation):

There is a difference based on an objective criterion between the state of the persons who are the subject of criminal prosecution and those that are the subject of disciplinary proceedings. The aim of the criminal prosecution is to punish violations of the social order and is exercised in the interests of the whole society; it belongs to the jurisdiction of the criminal courts; it can only relate to facts that are considered a crime by law and, in the event of conviction, it gives rise to the sentences imposed or prescribed by law. The purpose of the disciplinary action is to investigate whether the holder of a public office or of a profession has violated the deontological or disciplinary rules or has prejudiced the honor or dignity of his office or profession; it is exercised in the interest of a profession or a public service; it covers shortcomings that are not necessarily be the subject of a precise definition; it can give rise to sanctions that affect the person concerned in the exercise of his office or profession and pronounced by a body specific to each profession involved, by an administrative authority or by a court.³⁸

The Court notes, without much explanation, that the disciplinary sanctions in a certain law must not be considered a 'criminal charge' under Article 6.1. ECHR.³⁹ In a later case, the Court stated that if disciplinary sanctions were imposed to sportspeople, their subsequent criminal proceedings could be in violation of the *ne bis in idem* principle as foreseen in the ECHR. The judges must in that case see if disciplinary sanctions have a criminal nature.⁴⁰ The Court does not answer this question.

Regarding the need for time limits on prosecutions, the Court stated that based on the different perspectives on criminal law and disciplinary law, the legislator is not obliged to foresee time limits on disciplinary proceedings, even if they exist in criminal procedure. However, the Court underscored that the 'principle' of reasonable time must always be guaranteed.⁴¹

In relation to the right to remain silent and to not cooperate with his own punishment, the Court states that even with the above-mentioned different purpose, in both cases the rights of the defence apply and that the burden of proof lies on the State. It follows that even if it is justified that in

38 Const. Court Belgium, 7 December 1999, n.º 129/1999, B.4; 25 January 2001, n.º 4/2001, B.5.5; compare Const. Court of Belgium 21 May 2015, n.º 63/2015.

39 Const. Court Belgium, 25 January 2001, n.º 4/2001, B.5.3.

40 Const. Court Belgium, 19 October 2017, n.º 121/2017, B.15.

41 Const. Court Belgium, 7 December 1999, n.º 129/1999, B.6-7.

disciplinary matters the person must cooperate loyally and answer precisely on all questions and disclose all documents in his possession, the silence and the passive attitude of the person cannot lead to a disciplinary sanction or an aggravation of it. The law that imposes this violates the mentioned 'ground principles' if the disciplinary proceedings concern the person. It is even not inconceivable that later criminal prosecutions are started with the information achieved in the disciplinary proceedings or following information disclosed at the public hearings of the disciplinary proceedings. This is also problematic.⁴²

We can conclude that although the Constitutional Court makes a clear distinction between disciplinary cases and criminal ones and the disciplinary sanction does not fall within the jurisdiction of the Court under the criminal limb of Article 6.1. ECHR, some principles, and basic rights applicable in criminal procedure are also applicable in the disciplinary proceedings. This brings us to a quite surprising outcome, there is a difference in nature but common principles applicable to both.

1.1.4. Criminal scholars' opinions

Former Attorney-General Jean Dujardin states that there are two tendencies in literature: those who think in terms of 'analogy' and those who see the differences in nature of both laws.⁴³ We cannot provide an exhaustive overview of all opinions but here follows an anthology.

Jean Dujardin himself points out the many differences between both laws and procedures. He sees, for example, that disciplinary law uses such terms as honour, dignity, loyalty, which are more ethical terms. Disciplinary laws are for a particular group of people. There is often no prosecutor, the criminal courts are not involved, etc.

In the same sense, Justice Paul-Emile Trousse wrote: "The development of corporations and associations brings disciplinary law to the criminal law, in the form through definitions of the errors, and by the prior determination of sanctions. But it pursues not a goal of general interest, but a particular one: ensure respect for the duties specific to a profession or an association. It's the goal which conditions the nature of the breaches and the sanctions. Disciplinary law only applies to members".⁴⁴

Professor Jacques Joseph Haus, one of the authors of the Belgian Criminal Code of 1867 had another clear opinion about the nature of disciplinary law.

42 Const. Court Belgium, 25 January 2001, n.° 4/2001, B.5.5.

43 Jean Dujardin, *op. cit.*, p. 5; see also the opinion of former Attorney-General Marc de Swaef before Cass. 29 Januari 2013, P.12.0402.N, nr. 6, footnote 13.

44 Paul-Emile Trousse, "Droit Pénal", in X., *Les Nouvelles*, T. 1-1, Brussel: Larcier, nr. 13.

Haus notes first that the disciplinary faults are for him no criminal offences. The most disciplinary sanctions do not fit in one of the sentences in the Code. However, some of them such as the destitution, the exclusion from a profession, the fine and imprisonment are the same, but they cease on criminal sentences when applied through disciplinary way. The purpose is not to punish, to inflict the deserved pain, but rather to correct so that the person will undertake his duties. In the case of a destitution, the purpose is to keep the honour and the dignity of the service that he belonged to. The right to correct follows from the power the superior has in the interest of the order.⁴⁵ From this distinction follows some important consequences: on the one hand, disciplinary faults do not give reasons to open a criminal prosecution and on the other, disciplinary proceedings do not give reasons to rule the case with a judgement. Further, the criminal code and code of criminal prosecutions do not apply to disciplinary cases and the existence of a decision in a disciplinary case is not a judgement and thus cannot be an obstacle for criminal prosecutions. However, states Haus, the rule in the Constitution concerning the legality of sanctions applies to criminal sentences and disciplinary sanctions. The same is true for the right of grace of the King, which also applies on disciplinary sanctions.

Another opinion is, for example, delivered by French Professor Bernard Bouloc.⁴⁶ He states that there is a clear difference in nature. The disciplinary fault follows the violation of particular rules regarding certain limited groups of people. The infringement is against the interests of the group but is not necessarily expressed in a rule or precisely formulated. The disciplinary sanctions are linked to the exercise of the profession and are imposed by special jurisdictions. However, for B. Bouloc disciplinary sanctions can fall under the criminal limb of Article 6.1. ECHR.

We can conclude that a group of scholars focus on the differences between disciplinary law and criminal law, while other see the differences as well as the similarities. Despite the differences, there is a strong link and resemblance with criminal law⁴⁷, even if there are some specificities. Some guarantees apply to both procedures, but there is no consensus on which ones.

It is difficult to say whether some rules of criminal procedure act as 'general rules of procedure' and are therefore applicable to the disciplinary

45 Jacques Joseph Haus, *Principes généraux du droit pénal belge*, 2 ed., Gent: Hoste, 1874, t. I, n.º 252 and 74.

46 Bernard Bouloc, *Droit pénal général*, Paris: Dalloz, 2011, n.º 98.

47 Some scholars speak about 'distinct but related' systems (see Mathieu van Putten, *Interferentie tussen het tuchtprocesrecht en het civiel en strafprocesrecht m.b.t. het tuchtrecht van vrije beroepen en magistraten*, in Piet Taelman (ed.), *Efficient procederen voor een goede rechtsbedeling*, Gandaius–Postuniversitaire Cyclus Willy Delva, nr. 41, Mechelen: Kluwer, 2016, p. 241 and 245).

proceedings.⁴⁸ However, an important number of scholars believe that regardless of the difference in nature between the procedures, some general rules and principles regarding essential guarantees apply to both procedures. Criminal procedures act as the source. Disciplinary sanctions fall certainly under Article 6 ECHR, and even sometimes under the criminal limb or Article 6.1. of this Convention. This reinforces the idea that it does not matter so much if the laws are different in nature, as for reasons of due process, the essential principles of criminal law and procedure will apply to the disciplinary faults and proceedings. In the next part, we will examine some of these essential guarantees and see how they are received in disciplinary law.

1.2. ESSENTIAL GUARANTEES OF CRIMINAL LAW AND PROCEDURE APPLIED IN PRACTICE

1.2.1. Principle of legality

The principle of legality of criminal law is found in Article 7 of the ECHR, but also in Articles 12 and 14 of the Belgian Constitution. *Nullem crimen, sine lege* and *Nullem poena sine legem*. It is one of the most essential rules in criminal law which is almost universally accepted. Generally, the principle of legality can be further divided into four rules: the rule that offences and sentences can only be provided by the law, the rule that criminal laws must be precise, the rule that the law must establish the offences and sentence prior to the commission of the offence and finally that the law cannot be interpreted by analogy.

In the case law of the Belgian Supreme Court, it is said that the principle of legality cannot be applicable to disciplinary faults.⁴⁹ Further, Article 7 of the ECHR is not applicable to the Supreme Court.⁵⁰ Most often the impossibility to draft all the professional rules that must be followed by the members of a particular service or a profession or a social group, and the impossibility to formulate precise rules are given as reasons for this.⁵¹ Even worse, because the principle of legality does not apply, the Court ruled that there is no (traditional) obligation for the disciplinary courts to qualify the disciplinary fault under the professional rules.

48 See Mathieu van Putten, *op. cit.*, p. 262 et seq.

49 Cass. 26 March 1980, *Arresten Hof van Cassatie* 1979-80, nr. 474; 19 June 1980, *Arresten Hof van Cassatie* 1979-80, nr. 656; 2 June 1983, *Arresten Hof van Cassatie* 1982-83, nr. 546; 19 May 1988, *Arresten Hof van Cassatie* 1988, nr. 583; 2 November 1989, *Arresten Hof van Cassatie* 1989-90, 298; 2 December 1983, *Arresten Hof van Cassatie* 1993, nr. 500.

50 Cass. 14 April 1983, *Arresten Hof van Cassatie* 1983 nr. 441; 14 May 1987, *Arresten Hof van Cassatie* 1987, nr. 538; 2 November 1989, *Arresten Hof van Cassatie* 1989, nr. 135; 3 September 1998, *Arresten Hof van Cassatie* 1998, nr. 381.

51 See Jean Dujardin, *op. cit.*, p. 9.

The Supreme Court should be able to control if the qualified facts by the disciplinary court were a shortcoming to the honour, delicacy, and dignity of the profession.⁵² By extent, in the disciplinary proceedings, it is not mandatory to disclose for which disciplinary fault the person is prosecuted.⁵³ This is an appalling restriction of the right of the defendant,⁵⁴ who has to guess the fault for which he could be convicted.

The above-mentioned arguments are, however, no longer very convincing nowadays, as all services, professions, and groups are using written disciplinary procedures and have large written codes of practice where the professional rules are enumerated. What was true yesterday is not necessarily true today. It is certainly still true that sometimes the rules are vague or that vague terms are used, most often ethical looking rules, just to capture all the possible cases that could arise. However, the case law of the ECtHR does not forbid the use of open or vague terms, as long as this is made clear in case law, for example and that the right and wrong behaviour are foreseeable. For Haus, as mentioned above, the Constitutional principle of legality applies to disciplinary matters.⁵⁵ A recent law of 22 November 2022 regarding notaries has changed the provision and now orders that in the summon the person must be informed of the facts for which he is being prosecuted and the requested punishment. This is not the same as the qualification of the facts, but it is another step forward. Is not now the time to accept the general principle of legality applicable to disciplinary cases?

1.2.2. THE RELATIONSHIP AND THE CONFLUENCE OF CRIMINAL AND DISCIPLINARY PROCEDURES

A difficult point in practice is the confluence of criminal and disciplinary procedures. This gives rise to questions like: should the disciplinary procedure be started directly? Or should one wait to start this after the criminal

52 Cass. 14 October 2022, *Tijdschrift voor Notarissen*. 2023, 189, with annotation Bram van Den Bergh; see also 20 december 2001, D.01.0009.N; Jean Dujardin, "Het recht van verdediging in de rechtspraak van het Hof van Cassatie (1990- 2003)" (Opening Speech before the Supreme Court, 1th of September 2003), Brussels, Supreme Court, 2003, hofvancassatie.be/nl/Pub.html#sec-20c9, p. 53 [consulted on 10 January 2024].

53 See Cass. 23 October 1987, *Arresten Hof van Cassatie* 1987-88, nr. 111; 25 November 1994, *Arresten Hof van Cassatie* 1994, nr. 516; 21 September 2001, D.00.0029.F (see Jean Dujardin, "Het recht van verdediging in de rechtspraak van het Hof van Cassatie (1990- 2003)", *op. cit.*, p. 53); 14 October 2022, D.21.0019.N.

54 See K. Baert and Ph. Leroy, "Een tuchtrechtelijk procesrecht in dienst van het tuchtrecht", *RW* 1977-78, p. 2325; see also the conclusion of Jean Dujardin, "Het recht van verdediging in de rechtspraak van het Hof van Cassatie (1990- 2003)", *op. cit.*, p. 52.

55 See above 2.3.

investigations and maybe when is the trial definitively closed? What influence do the proceedings have on the other proceedings?⁵⁶

Most of the time it is accepted that criminal procedure is independent from disciplinary proceedings. This means that if a disciplinary procedure is started, the prosecutor is fully free to start or not a criminal procedure. Later, we will examine how practice deals with the case when a disciplinary sanction has already been imposed before the criminal action is started and what the influence on the criminal action is (see further *non bis in idem*). However, it is possible that the disciplinary decision does not have an influence on the criminal judge. In the sense that he remains totally free to decide.⁵⁷

More difficult is the question of the impact of a criminal procedure on the disciplinary. Should the disciplinary organs wait to start disciplinary proceedings or to suspend existing disciplinary proceedings? What is the impact of a final decision by a criminal court on the disciplinary? It is certain that the criminal procedure does not suspend the disciplinary proceedings. If the disciplinary proceedings are closed too early, then the essential information of the criminal investigation is missed and maybe the disciplinary decision can become obsolete because of information in the later criminal judgement. If the disciplinary proceedings were started after the criminal prosecutions were finished or came to an end, the disciplinary proceedings could be void because of the violation of the reasonable time delay. It is relatively⁵⁸ certain that there is no rule that the criminal procedure holds the disciplinary proceedings.⁵⁹ The disciplinary judge does not have to wait for the conclusion of the criminal procedure to take a disciplinary decision.⁶⁰ In some cases it is, however, better to wait.⁶¹ But when exactly the disciplinary proceedings should take place in case of the start of a criminal investigation is not known. On the other hand, when a criminal judgement has been delivered, in principle, the disciplinary organs must take it into account.⁶²

56 This question can also be named as "interference"; see in extenso Mathieu van Putten, *op. cit.*, pp. 234-300.

57 *Ibid.*, p. 258.

58 See for the opposite opinion Herman Bekaert "Le criminel tient aussi le disciplinaire en état", *Journal des Tribunaux*, vol. 101, n.° 5213, 1982, p. 473.

59 Jean Dujardin, Rechtspraak in tuchtzaken door de beroepsorden: toetsing van de wettelijkheid door het Hof van Cassatie", *op. cit.*, p. 22; Mathieu van Putten, *op. cit.*, p. 252-253. See also Cass. 21 March 1986, *Arresten Hof van Cassatie* 1985-86, nr. 459; 29 May 1986, *Arresten Hof van Cassatie* 1985-86, nr. 610 and the annotation Pierre Lambert in *Journal des Tribunaux* 1987, 331; 15 October 1987, *Arresten Hof van Cassatie* 1987-88, nr. 93; 10 May 1996, *Arresten Hof van Cassatie* 1996, nr. 167.

60 Cass. 21 March 1986, AC 1985-86, nr. 459; 15 October 1987, AC 1987-88, nr. 93.

61 Const. Court of Belgium, 7 December 1999, nr. 129/99, B.6.

62 See Mathieu van Putten, *op. cit.*, pp. 258-260.

1.2.3. Right to remain silent

The free flow of information can pose problems when this is not problematic in one procedure but could lead to a stay of procedure in the other procedure.⁶³ The Supreme Court had therefore put a hold on the practices that would be too destructive. While the duty of honesty takes precedence over professional secrecy, nevertheless, that secret remains a shared secret.⁶⁴

The exact scope of case law⁶⁵ remains difficult to seize regarding the question of whether the right to remain silent and the right not to be obliged to self-incriminate also apply in disciplinary matters. Regarding the latter, the right to be assisted by a lawyer seems also essential to ensure the right to remain silent. The problem becomes bigger when the information of the disciplinary proceedings in violation with these rights are used or can be used in the criminal procedure⁶⁶ (see the above opinion of the Belgian Const. Court).⁶⁷ Even in disciplinary proceedings without a subsequent criminal procedure, the question is an essential one. In light of the idea that some sanctions imposed on the person are so severe, would it be possible to avoid these guarantees through 'disciplinary' proceedings, while they were applied in a criminal prosecution for the same facts? Or should we make a difference between proceedings where the disciplinary faults are of a different nature to the criminal offence (for example faults strictly on professional rules that place the profession or service in a precarious position)?

1.2.4. Non bis in idem

The traditional opinion of the Supreme Court is that the principle *non bis in idem* does not apply to disciplinary proceedings or criminal prosecutions following respectively a criminal trial or a disciplinary decision.⁶⁸ The

63 *Ibid.*, p. 250.

64 Cass. 12 May 1977, with opinion Attorney-general Delange in *Pasicrisie* 1977, p. 929.

65 First, older case law was very negative about its applicability in disciplinary matters (see Cass. 18 February 1994, D.93.0022.N, *Arresten Hof van Cassatie* 1994, nr. 82; 24 Januari 1997, cited in Denis Holsters, "Knelpunten in evoluerend medisch tuchtrecht", in X., *Het strafrecht bedreven. Liber amicorum Alain De Nauw*, Brugge: Die Keure, 2011, p. 343). More recent case law is more cautious: see Cass. 1 October 2009, AR D.07.0024.N, *Arresten Hof van Cassatie* 2009, nr. 544; 25 November 2011, D.11.0016.F, *Pasicrisie* 2011, nr. 647.

66 Denis Holsters, *op. cit.*, pp. 344-345.

67 See above 2.3.

68 Cass. 6 Februari 1976, *Arresten Hof van Cassatie* 1976, 672; (united chambers) 24 November 2009, *Arresten Hof van Cassatie* 2009, nr. 692, P.09.965.N and *Tijdschrift voor Strafrecht* 2010, 39; 11 January 2012, P.11.1867.F; 29 Januari 2013, P.12.0402.N, concl. first attorney-general M. De Swaef; 6 February 2014, D.12.0018.N; 25 February 2014,

reluctance of the ECtHR is perhaps a reason for this.⁶⁹ After a decision to stay the prosecution (end the prosecution) or even after an acquittal the disciplinary courts would be free to decide otherwise.⁷⁰ The Supreme Court stated however that for the same parties the criminal judgement cannot be neglected or decided to against after it.⁷¹ There is no problem that a disciplinary organ takes action that is needed to ensure the honour and dignity of the profession, when the criminal sentence, as such, is not enough to ensure this. But, as mentioned before⁷² the difference in degree of sanctions (for example, the criminal judge decides a temporary destitution, while the disciplinary decides afterwards for a definitive destitution) or the incompatibility of decisions (a disciplinary conviction after an acquittal by the criminal judge, or the opposite an acquittal by the disciplinary after a conviction by the criminal judge) provide no reason under the 'ne bis in idem' to undertake different procedures on different facts. To go further, can we really say that a destitution by a criminal judge is not the same as a destitution by the disciplinary? Can we continue to say that a decision by the criminal judge can be followed by a disciplinary proceeding regarding the same facts and imposing the same type of sanction but with a different degree?

1.2.5. Other guarantees

After a hostile attitude regarding the applicability of Article 6 of the ECHR and its guarantees on the disciplinary proceedings in the years 1970-1980^[73],

P.13.1409.N, *Rechtspraak Antwerpen Brussel Gent* 2005, 44, annotation P. Hoet, 14 oktober 2015, P.15.0609.F, *Nullum Crimen* 2016, 439, with annotation P. Hoet, "Is de verplichte beoordeling van het strafrechtelijk karakter van een tuchtsanctie voor de toepassing van het ne bis in idem-beginsel een feitenkwestie of toch eerder een rechtskwestie?" and Juan Castiaux, "Ne bis in idem en cas de concours entre une poursuite disciplinaire et une poursuite pénale", *Droit pénal de l'entreprise* 2016, n.º 2, p. 169-179; see also Cass. 11 januari 2012, P.11.1867.F, *Revue de droit pénal*, 2012, p. 693.

69 See Ingrid Opdebeek and Stephanie de Somer, "Het algemeen rechtsbeginsel non bis in idem belet niet de combinatie van een strafrechtelijke sanctie en een klassiek (tuchtstraf)", *Rechtskundig Weekblad*, n.º 18, 2015-16, p. 699-704; Marie-Aude Beernaert, "Le cumul des sanctions disciplinaires et pénales à l'aune du principe non bis in idem", annotation under a judgment of the penal section of the court of first instance of Verviers, 7 december 2009, *Revue de Jurisprudence de Liège, Mons et Bruxelles* 2010, p. 481.

70 Jean Dujardin, "Rechtspraak in tuchtzaken door de beroepsorden: toetsing van de wettelijkheid door het Hof van Cassatie", *op. cit.*, p. 23.

71 See Cass. 15 June 1964, *Pasicrisie* 1964, I, 1106.

72 Daniel de Wolf, "De actuele betekenis van het 'ne bis in idem'-beginsel", in X., *Strafrecht, doel of middel in een veranderende samenleving*, XLIIIste Postuniversitaire cyclus Willy Delva Strafrecht en strafprocesrecht, Mechelen, Kluwer: Die Keure, 2017, p. 170.

73 See Pierre Lambert, "La procédure disciplinaire et la Convention de sauvegarde des droits de l'homme", *op. cit.*, pp. 625-627 and the references in footnotes 8-11.

things have undergone change after the above-mentioned case of Lecompte, Van Leuven and De Meyere in 1983. The Supreme Court reluctantly accepted that depending on the cases, Art. 6.1. is applicable to a civil or criminal limb.⁷⁴ It would go much too far to examine all kinds of guarantees in particular,⁷⁵ but surprisingly seeing the reluctance regarding the applicability of the criminal limb the case law accepted the following guarantees: the publicity of the hearing,⁷⁶ the principle of reasonable time, the independence and impartiality of the disciplinary court,⁷⁷ the obligation to give reasons for a decision.⁷⁸ Therefore, would it be possible to continue to declare that other guarantees of the criminal trial are not applicable?

2. DISCIPLINARY LAW: AN ADMINISTRATIVE LAW PERSPECTIVE⁷⁹

In this part, we will delve into the previously mentioned relationship and the intersection of criminal and disciplinary procedures, examining them through the lens of administrative law, with a specific focus on the jurisprudence of the Belgian Council of State. In the part, part, the repercussions of maintaining silence and adopting a passive stance during disciplinary proceedings were mentioned, along with the ambiguity surrounding whether the right to remain silent and the privilege against self-incrimination was extended to disciplinary matters. These will now be examined through case law from the Belgian Council of State. To accomplish this, we will begin by providing an

74 Cass. 14 April 1983, *Arresten Hof van Cassatie* 1982-83, nr. 441, with opinion of attorney-general J. Velu and 14 May 1987, *Arresten Hof van Cassatie* 1986-87, nr. 538, with opinion of attorney-general J. Velu.

75 See Jean Dujardin, "Rechtspraak in tuchtzaken door de beroepsorden: toetsing van de wettelijkheid door het Hof van Cassatie", *op. cit.*, p. 24 et seq; Mathieu van Putten, *op. cit.*, p. 275 et seq.

76 Cass. 16 February 1995, *Arresten Hof van Cassatie* 1995, nr. 95; 20 October 1997, *Arresten Hof van Cassatie* 1997, nr. 417, D.96.0003.N; 3 June 2008, D.07.0018.F, *Arresten Hof van Cassatie* 2008, nr. 370; Denis Holsters, *op. cit.*, p. 344.

77 See the overview in Jean Dujardin, "Rechtspraak in tuchtzaken door de beroepsorden: toetsing van de wettelijkheid door het Hof van Cassatie", *op. cit.*, and Mathieu van Putten, *op. cit.*, mentioned above. Ad: Cass. 29 March 2019, D.18.0005.N.

78 Cass. 29 March 2018, D.17.0009.N.

79 This part is partially an update of the research mentioned in Frederic Eggermont, "Wordt 'gebaren van krommenas' gedurende de uitoefening van het georganiseerd administratief beroep verheven tot kunstvorm?", in Koen Nevens, Kristof Salomez, Evelien Timbermont and Guido van Limberghen (eds.), *Liber amicorum Wilfried Rauws. Werk opgedragen aan een onvolprezen jurist*, Antwerpen-Gent-Cambridge: Intersentia, 2021, pp. 793-803.

overview of various methods for organizing an administrative appeal against disciplinary decisions. Subsequently, we will scrutinize the Council of State's case law concerning appeals against decisions in the appeals process. Finally, we will explore whether this jurisprudence, initially applied to disciplinary law, extends its influence beyond the confines of this legal domain, thereby possessing a broader impact than solely within disciplinary law.

2.1. ORGANIZED ADMINISTRATIVE APPEAL

2.1.1. Flemish Disciplinary Appeals Commission

When a public official is subjected to a disciplinary sanction, he often has the right to appeal the decision. Before resorting to a court procedure, in most cases, a public official has the option to appeal to an administrative body. For example, the Flemish⁸⁰ Disciplinary Appeals Commission has the authority to adjudicate appeals against disciplinary sanctions imposed on public officials of Flemish local administrations.⁸¹

If the Disciplinary Appeals Commission finds the appeal justified, it annuls the contested decision.⁸² This implies that the Disciplinary Appeals Commission can only assess the legality of the disciplinary decision and is not authorized to reconsider its appropriateness. This has been the case since 1 January 2013.⁸³ Prior to the repeal of Article 141 of the Municipal Decree of 15 July 2005 by the Decree of 29 June 2012, that article provided for a reformatory right for the Disciplinary Appeals Commission. Because the review conducted on appeal is limited to the legality of the decision, if

80 Art. 1 of the Belgian Constitution states that Belgium is a federal State. The Flemish Region has competence in matters related to the composition, organization, authority, and functioning of municipal institutions within that region (Art. 6, § 1, VIII, first subsection, 1°, of the Special Law of 8 August 1980 on institutional reforms, published in the Official Journal of Belgium on 15 August 1980).

81 Art. 212 of the Flemish Decree of 22 December 2017 on local governance establishes the Flemish Disciplinary Appeals Commission. This decree was published in the Official Journal of Belgium on 15 February 2018.

82 Art. 216, fourth subsection, of the Flemish Decree of 22 December 2017 on local governance.

83 The precursor to the Flemish Decree of 22 December 2017 is the Flemish Municipal Decree of 15 July 2005, published in the Official Journal of Belgium on 31 August 2005. The Flemish Decree of 22 December 2017 has repealed the Flemish Municipal Decree of 15 July 2005. Since the modification of the Flemish Municipal Decree of 15 July 2005 by the Flemish Decree of 29 June 2012, published in the Official Journal of Belgium on 8 August 2012, which repealed article 141 of the Flemish Municipal Decree of 15 July 2005, it is no longer stated that the Disciplinary Appeals Commission has a reformatory right.

the decision is annulled, the disciplinary authority must reconsider the case, considering the grounds for the annulment.

The Disciplinary Appeals Commission may also allow the disciplinary authority the opportunity to rectify an illegality in the contested decision within a specified period. In such cases, the Disciplinary Appeals Commission informs the parties about how the appeal will proceed after being informed of the disciplinary authority's decision to rectify the illegality. This information is provided no later than the expiration of the period set for rectifying the illegality.⁸⁴ It should be noted that the Disciplinary Appeals Commission exhibits a reluctance to exercise this authority, as it is keen on avoiding any perception of being overly involved in assisting local governments during a disciplinary procedure.

2.1.2. Internal Appeals Commission

A student of a higher education institution who believes that an unfavorable decision regarding their academic progress – such as an examination disciplinary decision, which is a sanction imposed in response to examination-related offenses⁸⁵ – has been affected by a violation of rights and has access to an internal appeals procedure (within an Internal Appeals Commission), the forms of which are defined in the education and examination regulations.⁸⁶

Contrary to the Disciplinary Appeals Commission, the Internal Appeals Commission may reconsider a decision. Due to the devolutive effect of this organized administrative appeal, the appellate authority, in this case the Internal Appeals Commission (established within every higher education institute in the Flemish Community), acquires decision-making authority over the case itself, similar to the initial decision-maker, such as the Dean of the Faculty. This implies that the Internal Appeals Commission must conduct an own assessment of the case and definitively resolve it, with its decision replacing that of the initial decision-maker, which holds no legal consequences thereafter. Considering the devolutive effect of the administrative appeal, any potential irregularities in the initial proceedings do not render the contested appellate decision null and void. This is because any procedural irregularities in the first instance can generally be cured by the appellate decision.

84 Art. 216, third subsection, of the Flemish Decree of 22 December 2017 on local governance.

85 Art. 1.3, 69°, Codex Hoger Onderwijs, published in the Official Journal of Belgium on 27 February 2014.

86 Art. II.283, first subsection, Flemish Code of Higher Education.

2.1.3. Diverse approaches towards organized administrative appeal

Due to its limited competence, the Disciplinary Appeals Commission can only overturn a decision if it is found to be illegal. In contrast to the Internal Appeals Commission, the Disciplinary Appeals Commission is unable to reassess the merits of the appealed case. It lacks the plenary authority to reconsider the case on its merits. Hence, a procedural irregularity remains beyond remedy by the Disciplinary Appeals Commission. Nonetheless, as previously mentioned, the Commission does possess the authority to afford the disciplinary body an opportunity to correct any legal deficiencies in the challenged decision. It is evident that the organized administrative appeal confers significant advantages upon the appellant. This is primarily due to the comprehensive reassessment conducted by the appeals body, providing a thorough review of the case.

The Decree of 16 June 2023, amending the Decree of 22 December 2017 concerning local government and addressing the termination of the status of statutory personnel,⁸⁷ introduces a notable change. Starting from 1 October 2023, it bars the option of pursuing an administrative appeal against a dismissal decision made by a local government. Consequently, the Disciplinary Appeals Commission is no longer authorized to annul such decisions, even if they are found to be illegal. Notably, the Council of State also loses its jurisdiction to hear annulment appeals against decisions of the Disciplinary Appeals Commission. In the event that an official disagrees with a dismissal decision, his recourse is now to file an appeal at the labor court. However, the labor court can only grant indemnization in cases of illegal dismissal. Unlike the Disciplinary Appeals Commission and the Council of State, which could annul decisions with a reinstatement of officials in their positions as a result, the labor court's authority is limited to financial compensation. This significant modification has raised concerns. Some fear that local officials with decision-making authority may no longer be sufficiently protected against undue pressure, particularly those involved in important decisions such as granting permits. The apprehension is that, since dismissal permanently terminates their position within the local administration—even if the labor court grants indemnization—the new decree may leave them without the possibility of returning to their roles. Therefore, officials might be more hesitant to make decisions contrary to the wishes of the political majority. In response to these concerns, various organizations and individuals have petitioned the Constitutional Court of Belgium to annul the Decree of 16 June 2023. Judgment is anticipated in 2025.

87 Published in the Official Journal of Belgium on 10 July 2023.

2.2. THE ANNULMENT APPEAL TO THE COUNCIL OF STATE OF BELGIUM

2.2.1. Admissibility

Only decisions taken in the final instance are eligible for appeal to the Council of State.⁸⁸ If an organized administrative appeal is available to the concerned party against a decision, it must, in principle, be exhausted before approaching the Council of State.⁸⁹

2.2.2. In the context of a disciplinary procedure, the posture of the appellant during the organized administrative appeal

The obligation to raise objections as promptly as possible, ideally in the administrative phase initially, aligns entirely with the essence of establishing an organized administrative appeals process. If the careful approach when initiating an administrative appeal is no longer imposed, the benefits of the organized administrative process diminish, particularly concerning its remedial function. For this reason, and to enforce the expected posture, the Council of State of Belgium generally did not accept that an applicant, having completed the organized administrative appeal, would, for the first time in the proceedings before the Council of State, complain about certain shortcomings that could have been raised in the administrative procedure.⁹⁰ Due to the filtering function of the organized administrative appeal, the Council of State consistently ruled that a grievance not raised during the organized administrative appeal could not be formulated for the first time before the Council of State.⁹¹ From those who initiate a jurisdictional appeal, it could be reasonably expected that they exhaust all procedurally guaranteed options beforehand to safeguard their rights. The avenue of appeal to an appellate body within the framework of the organized administrative appeal was therefore considered a substantial form in the decision-making process, which had to be utilized to prevent the forfeiture of the right to

88 Council of State of Belgium, judgment 255.364 of 22 December 2022; Council of State of Belgium, judgment 231.488 of 9 June 2015; Council of State of Belgium, judgment 229.686 of 23 December 2014; Council of State of Belgium, judgment 228.558 of 29 September 2014.

89 Council of State of Belgium, judgment 233.265 of 17 December 2015; Council of State of Belgium, judgment 233.230 of 11 December 2015; Council of State of Belgium, judgment 233.136 of 3 December 2015.

90 Joke Goris, "Georganiseerde bestuurlijke beroepen" in *Administratieve rechtsbibliotheek*, Brugge: die Keure, 2012, p. 508.

91 Council of State of Belgium, judgment 224.735 of 19 September 2013; Council of State, judgment 212.714 of 26 April 2011.

file an annulment appeal. However, this had to be nuanced to the extent that arguments were raised in the petition that the petitioner could not have asserted before the appellate body in any case. His appeal was deemed admissible only insofar as he put forward such arguments.⁹² It was not the case that a petitioner could only raise arguments that had already been presented in the context of the organized administrative appeal.

Over time, the Council of State of Belgium has become more flexible regarding the stance an appellant must adopt during the administrative appeal procedure. The Council of State eventually considered that the circumstance that a public servant deliberately or with a significant degree of negligence refrained from defending themselves before the disciplinary authority and thus failed to assert his rights during the administrative procedure, does not suffice to deem the annulment appeal as inadmissible.⁹³ The Council of State has also ruled that no general legal rule dictates that, in the context of annulment appeals, it may only consider grievances or arguments that were already raised by the party concerned during the administrative procedure.⁹⁴ While the principle of due process also applies to the citizen in his relationship with the administration within the framework of the organized administrative appeal,⁹⁵ the balance between proper citizenship and access to justice in this matter appears to tilt towards the latter right.

The Council of State of Belgium now appears to increasingly rely on the principle that a government official subject to a disciplinary procedure has the right to remain silent and not cooperate in the disciplinary process, similar to the rights in criminal proceedings. Invoking the concept of legal waiver is thus much more challenging within the framework of the organized administrative appeal in disciplinary cases, where the concept of proper citizenship seems to play little to no, or at least a subordinate role.

Developments in the jurisprudence of the Council of State of Belgium lead to the conclusion that, in disciplinary cases, an appellant may choose to do nothing at all. If the appellant does not submit a written defense, this stance cannot be attributed to them, as indicated in judgment 240.431 of 16 January 2018. A mere *pro forma* appeal would therefore be sufficient to later legitimately lodge a complaint with the Council of State about the violation of their rights in the initial phase of the administrative appeals procedure, during which remediation by the administration itself was still possible. Even the fact that, in the case leading to judgment 240.431, the appellant had

92 Council of State of Belgium, judgment 243.487 of 24 January 2019.

93 Council of State of Belgium, judgment 241.760 of 12 June 2018; Council of State, judgment 240.431 of 16 January 2018.

94 Council of State of Belgium, judgment 246.101 of 18 November 2019.

95 Joke Goris, *op. cit.*, p. 502.

requested an oral hearing but ultimately did not attend the hearing, could not be imputed to him in a way that would amount to a waiver of his right to invoke a violation of his rights. This approach significantly undermines the remedial function of the organized administrative appeal.

Proponents of the Council of State's position can point to the right to a defense in disciplinary cases, allowing the accused to decide not to cooperate in their prosecution. In judgment 4/2001 of 25 January 2001, the Constitutional Court of Belgium held that in both disciplinary and criminal cases, the right to a defense must be respected as a general legal principle, and the principle that the burden of proof rests on the government must be upheld. The Constitutional Court deemed it unjustifiable to compel someone, in all circumstances – including when they are the subject of a disciplinary procedure – to cooperate dutifully with the disciplinary investigation, answer every question meticulously, and hand over relevant documents. The Constitutional Court asserted that the silence and inaction of the individual in their own case cannot, on its own, lead to a disciplinary sanction or an exacerbation thereof. According to the Council of State, this judgment must therefore be extended to the legality review it conducts; only at the eleventh hour – during the proceedings before the legality judge, which is the Council of State – may someone subject to disciplinary proceedings take action and complain about the injustice done to them.

2.2.3. Attitude of the appellant during the organized administrative appeal in a context other than a disciplinary procedure

The question arises as to whether a diligent appellant may simply remain passive during the administrative appeal procedure and then raise objections only in the proceedings before the legality judge. While the discussed reasoning is constructed around the principle of the right to a defense applicable in disciplinary cases, it was questioned whether this new perspective would also affect other cases unrelated to disciplinary matters.

With judgment 248.244 of 10 September 2020, the perspective held by the Council of State of Belgium in disciplinary procedures was applied to a matter entirely unrelated to it – namely, an appeal against a decision granting a B-orientation certificate to a secondary school student.⁹⁶

In the case leading to judgment 248.244, a student files a petition for urgent suspension of the execution of the decision of the appeals committee of a school, awarding him a B-orientation certificate. The opposing party

96 This implies that to progress to the next school year, a secondary school student must opt for a less challenging trajectory. If the student prefers to stay in their current trajectory, he will need to repeat the entire year.

argues that the grounds are inadmissible to the extent that the student raises objections that he did not assert during the proceedings before the appeals committee.

The Council of State of Belgium considers that no general legal rule dictates that, in the context of annulment appeals or petitions for suspension that are ancillary to them, it may only consider grievances or arguments that were already raised by the party concerned during the administrative procedure. According to the Council of State, the opposing party also does not point to any specific provision in the applicable education regulations that would expressly obligate the petitioner, under penalty of inadmissibility in later proceedings, to present certain grounds during the organized administrative appeal. Nor does the opposing party argue that the student explicitly waived the right to defend against a specific irregularity. If this exception would have been raised, it would be because it accuses the student of deliberately, almost deceitfully, withholding a known legal objection to deceive the administration if the outcome of the administrative phase is not favorable to him. The Council of State reiterates that the forfeiture of the right to present irregularities as grounds to the judge is a severe sanction that can only be applied exceptionally. The burden of proof lies with the party invoking bad faith, namely the administration in this case. Since the opposing party does not provide evidence because it only argues that the student did not present some grievances to the appeals committee, which is no more than a factual observation, there is no evidence of intentional and deceptive omission.

The exception is thus rejected, but here too, the Council of State issues a warning. The failure to assert grievances before the appeals committee does not go entirely without consequences. For example, the student can hardly blame the appeals committee for not responding to an objection if he did not submit this objection to the committee. Furthermore, the student must be aware that the appeals committee, as an active administrative body, subjects his file to a complete examination of both regularity and opportunity. The Council of State, as a legality judge, cannot pronounce on the opportunity of a decision and cannot replace the administration in its legality review. Where an administration has discretion and thus more than one outcome is possible, the Council of State, if asked, can only ensure that the administration, in making its choice, has acted within the bounds of that discretion.

In other words, the evolution in case law regarding the attitude of the petitioner during the organized administrative appeal – ‘gestures of deceit’ cannot be interpreted to the detriment of the petitioner – also impacts case law beyond disciplinary matters. The crucial consideration in judgment 248.244 is that there is no specific provision in the applicable regulations for secondary education that expressly obliges the appellant, under penalty of inadmissibility in later proceedings, to present certain grounds during the

organized administrative appeal. As for study progress decisions made by higher education institutions, the situation is different. These decisions can, as already mentioned, be challenged through an internal appeals process.⁹⁷ Afterwards, a decision of the internal appeals commission may be contested externally at the Flemish Council for Disputes in Study Progress Decisions.⁹⁸ But regarding the procedure for that Council, the Flemish legislator has expressly determined that the student cannot raise new objections in the procedure for the Flemish Council for Disputes in Study Progress Decisions unless their basis has only come to light during or after the completion of the internal appeals procedure, unless the objection relates to the way in which the internal appeal was handled, or unless the objection concerns public order.⁹⁹

However, the question arises of whether the limitation of access to the court, as included in Article II.294, § 2, last subsection, of the Codex Higher Education, is not too broadly defined. The Council of State of Belgium, Section Legislation,¹⁰⁰ in its opinion on the draft Decree amending the Flemish Decree of 4 April 2014 regarding the organization and procedure of certain Flemish administrative courts for the optimization of procedures, stated that generally providing for the possibility that a plea be declared inadmissible when a party has failed to raise the invoked illegality during the administrative procedure, without requiring that the party has been negligent, frivolous, or acted in bad faith, restricts the right to access the court in a manner that is not proportionate to the legal protection of the concerned party. The Section Legislation further emphasizes that it should not be overlooked that a party during the administrative procedure is not necessarily assisted by legal counsel, and therefore, it will not always be self-evident for that party to identify illegalities during that procedure.¹⁰¹ In the draft Decree, for these reasons, the term 'apparently' failing to raise the illegality at the most opportune moment in the administrative phase was used. It is clarified that there must be a clear negligence on the part of the party in question, for example, when this party has consciously, in bad faith, or with a significant degree of recklessness, failed to assert its rights

97 Art. II.283, first subsection, Flemish Code of Higher Education.

98 Art. II.285, second subsection, Flemish Code of Higher Education.

99 Art. II.294, § 2, final subsection, Flemish Code of Higher Education.

100 Unlike in Colombia for example, in Belgium every draft law has to be submitted to the Council of State, Section Legislation, for a legal opinion before adoption by parliament.

101 Explanatory memorandum attached to the draft Decree which resulted in the Flemish Decree amending the Decree of 4 April 2014 regarding the organization and procedure of certain Flemish administrative courts for the optimization of procedures, Documents of the Flemish Parliament, 2020-21, number 699/1, p. 60.

in the administrative procedure.¹⁰² Certainly, the debate would focus on the question of what should be understood by those concepts, with any doubt needing to be interpreted in favor of the appellant.

Achieving the objective that no new objections may be raised before court unless their basis has only come to light during or after the completion of the administrative appeals procedure, unless the objection relates to the way in which the internal appeal was handled, or unless the objection concerns public order, has been made more challenging by a recent ruling from the Constitutional Court of Belgium. Article 6 of the Flemish Decree of 21 May 2021 amending the Decree of 4 April 2014, regarding the organization and procedure of certain Flemish administrative courts, concerning the optimization of procedures, aimed at streamlining and expediting the procedures for two Flemish administrative courts, namely the Council for Permit Disputes¹⁰³ and the Enforcement College.¹⁰⁴ To achieve this, Article 35, third paragraph, of the Flemish Decree of 14 April 2014 specified that a violation of a norm or general legal principle could only result in the annulment of the contested administrative act if the party alleging the violation had not evidently neglected to raise that illegality at the first opportune moment during the administrative procedure (the so-called duty to raise the objection promptly). The duty to raise objections, from the citizens' perspective, imposes an obligation to raise any legal issues during the administrative phase at the most opportune moment, allowing them to later rely on these before the administrative court. According to the Flemish legislator, this obligation

102 Explanatory memorandum attached to the draft Decree which resulted in the Flemish Decree amending the Decree of 4 April 2014 regarding the organization and procedure of certain Flemish administrative courts for the optimization of procedures, Documents of the Flemish Parliament, 2020-21, number 699/1, p. 30. Regarding environmental matters (the Aarhus Convention), judgment C-826/18 of 14 January 2021 of the Court of Justice of the European Union (CJEU) must be taken into account. In this case, the Court ruled that Art. 9, § 2, of the Aarhus Convention should be interpreted to prohibit making the admissibility of a legal action, brought by non-governmental organizations that are part of the 'public concerned' referred to in Art. 2, point 5, of that Convention, dependent on their participation in the preparatory procedure for the contested decision. This condition should not apply when it cannot reasonably be blamed on them for not participating. However, Art. 9, § 3, of the Convention does not prohibit making the admissibility of such an action dependent on the petitioner's participation in the preparatory procedure for the contested decision, unless, given the circumstances of the case, it cannot reasonably be blamed on them for not participating.

103 The Council for Permit Disputes mainly deals with appeals related to urban planning permits or subdivision permits granted or refused in Flanders and environmental permits.

104 The Enforcement College is competent for handling appeals filed against decisions imposing an alternative or exclusive administrative fine, with or without accompanying asset forfeiture.

aims to enable the permitting authority to gather as much information as possible during the administrative procedure, so that it can make informed decisions and address any legal issues. However, in judgment 59/2023 of 11 April 2023, the Constitutional Court of Belgium finds no reasonable justification for this requirement. The duty to raise objections assumes that citizens are capable of immediately identifying all legal issues in often complex and technical files, which would generally mean they must seek legal assistance from a lawyer from the outset of the administrative phase. The Constitutional Court emphasizes that the administration must act lawfully and diligently, and in comparison to the average citizen, the administration often has more knowledge and resources, including legal advice, to oversee the legality of decision-making in environmental matters. The Constitutional Court also questions whether the legislator's goal of expediting the procedure can be achieved, as this condition may lead to potential disputes from the outset of the administrative procedure regarding whether every objection was raised at the opportune moment. Consequently, the Constitutional Court annulled the duty to raise the objection promptly.¹⁰⁵

It is interesting to note that the Council of State of Belgium, specifically in the context of public procurement disputes, has ruled that an applicant must demonstrate the required diligence, care, or proper citizenship when participating in negotiations that they consider to be part of an administrative decision-making process. Failure to meet the expected standards of conduct (such as timely raising a legal objection) may result in the forfeiture of the right to challenge the irregularity of the entire decision-making process.¹⁰⁶ Invoking the doctrine of estoppel is much more challenging within the framework of the organized administrative appeal procedure, where the concept of good citizenship appears to play little to no, or at least a subordinate, role. Additionally, it is not easy to comprehend that someone who did not initiate the organized administrative appeal process will have to bear the consequence of the inadmissibility of the procedure before the Council of State, while in the other scenario, submitting a blank page as an appeal letter and subsequently not attending the oral hearing will not face the same strictness.

The evolution in jurisprudence outlined in this contribution, where the viewpoint of the Council is not (or no longer) limited to disciplinary proceedings, although understandable regarding the stance an appellant must adopt in a disciplinary procedure where it cannot be asked to self-incriminate,

105 See also Michelle Meulebrouck and Lise van Den Eynde, "Grenzen van het bestuursprocesrecht: Grondwettelijk Hof vernietigt de relativiteitseis en de attentieplicht" (annotation under judgment 59/2023 of 11 April 2023), *Rechtskundig Weekblad*, n.º 19, 2024, pp. 744-750.

106 Council of State of Belgium, judgment 246.926 of 30 January 2020.

largely strips the organized administrative appeal procedure of its advantages, including its filtering function and the relief it provides to the judicial system. The organized administrative appeal procedure can thus become an application of the principle of 'art for art's sake', providing no added value for either the administration or the appellant. To avoid this, it is recommended, where possible, to explicitly state in the regulation of the organized administrative appeal procedure that, in the external appeal procedure, new objections cannot be raised, in principle, if the illegality was so obvious that it could and had to be raised during the administrative appeal. This is except in situations explicitly mentioned in the law or regulations, without unduly restricting the right of access to the court. This approach aligns with the original purpose of introducing the organized administrative appeal procedure by the legislator in a broad sense.

3. DISCIPLINARY LAW: PROTECTION OF WHISTLEBLOWERS

In the preceding parts, we have analyzed disciplinary law through the lenses of criminal and administrative law. However, it is imperative that individuals are not subjected to proceedings merely for disclosing or reporting information about illicit activities within a government administration or organization. Disciplinary proceedings should not impede the establishment of a transparent and ethical government or organization. Consequently, this section delves into a mechanism to safeguard those who expose illegal or unethical behavior, specifically exploring whistleblower protection.

More than two decades ago, the United Nations adopted the Convention Against Corruption.¹⁰⁷ This multilateral treaty aims to prevent and combat corruption and still serves as the only legally binding international anti-corruption treaty. The convention introduces a number of preventive measures, such as the promotion of transparency and integrity in the public and private sectors, and rightly recognizes the crucial role of persons who, in good faith and on reasonable grounds, report suspicions of corruption.¹⁰⁸ A total of 190 countries¹⁰⁹ have signed the convention. Interest in whistleblower protection also appears at a more regional level, with the Organization of American States, for example, adopting the Inter-American

107 United Nations. United Nations Convention Against Corruption, Treaty Series, 2349, 2003, p. 41.

108 Art. 33 Convention Against Corruption.

109 Status as of 10 October 2023.

Convention against Corruption back in 1996.¹¹⁰ What both instruments have in common is that they call for systems to protect anyone who, in good faith, reports acts of corruption.

More recently, in 2019, the European Union adopted the so-called Whistleblower Protection Directive,¹¹¹ which establishes a specific framework focused exclusively on (the protection of) persons who report breaches of Union law. The directive sets out minimum standards that all EU countries must implement. Unlike EU regulations, directives must be transposed into national law. It is up to each Member State to decide how and by what means to ensure that the directive is properly implemented. They can also take additional measures, for example by offering more protection than that provided for in the directive.¹¹² The Whistleblower Protection Directive entered into force in December 2019, leaving Member States 2 years to transpose the directive into national law.

In the following, the key principles of the Whistleblower Protection Directive will be outlined. In addition, some critiques will also be made where appropriate. First, the ratio legis of the directive is discussed. Next, its material and personal scopes are addressed before analyzing the various reporting mechanisms. The protective measures are also outlined.

3.1. WHISTLEBLOWER PROTECTION IN THE EUROPEAN UNION

3.1.1. Ratio legis

Recognizing the importance of reporting breaches of law that are harmful to the public interest on the one hand, and the uneven and fragmented protection for whistleblowers in several Member States on the other, the EU could no longer ignore this area.

Over the years, there has been a growing awareness of the key role played by those who report breaches of (Union) law. At the same time, it has become clear that (potential) whistleblowers are often discouraged from reporting their concerns or suspicions due to the fear of reprisals.¹¹³ Several countries have adopted some form of whistleblower protection legislation. However, the protection mechanism is often not comprehensive, as the

110 Organization of American States. Inter-American Convention Against Corruption, S. Treaty Doc. No. 105-39, 35 I.L.M 724, 1996. See Art. III.1 and III.8

111 Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, *Official Journal of the European Union* 26 November 2019, L 305.

112 Art. 288 Treaty on the Functioning of the European Union, *Official Journal of the European Union* 26 October 2012, L 326.

113 Rec. 1 Whistleblower Protection Directive.

legislation only covers a specific sector (e.g. financial services) or a selected range of wrongdoings (e.g. corruption). The need for common minimum standards providing balanced and effective protection for whistleblowers was therefore identified.¹¹⁴

This societal need has also been increasingly recognized by the general public following several scandals (e.g. LuxLeaks, Panama Papers, Dieselgate, etc.). At the initiative of the European Commission, an impact assessment on whistleblower protection was carried out in 2017. The overall beneficial impact of the effective whistleblower's protection on economic growth and cross-border investment in the EU, as well as on the competitiveness of the European Union by reducing corruption and making it a more attractive place to invest, are just some of the aspects highlighted. In the area of public procurement, the annual benefits have been estimated at EUR 5.8-9.6 billion.¹¹⁵ The VAT gap in the Member States without a reinforced system of whistleblower protection was estimated to increase to EUR 217 billion by 2027.¹¹⁶ Effective whistleblowing mechanisms would not only generate economic value, but also create an impact on the well-being of workers and the environment.¹¹⁷

As people in a professional context often are the first to learn of threats or damage to the public interest arising in a work-related setting, they should not be discouraged from reporting wrongdoing or disclosing information in this regard.

In 2018, the European Commission has taken a number of initiatives regarding (the protection of) whistleblowers.

For example, a communication¹¹⁸ on the subject was published and the proposal for the directive¹¹⁹ discussed in this paper was launched. A fact sheet by the Directorate-General for Justice and Consumers shows that

114 Rec. 4-5 Whistleblower Protection Directive.

115 Milieu, *Estimating the economic benefits of whistleblower protection in public procurement*, 2017. <https://publications.europa.eu/en/publication-detail/-/publication/8d5955bd-9378-11e7-b92d-01aa75ed71a1/language-en> [consulted on 10 January 2024].

116 EC. Commission Staff Working Document—Impact Assessment—Accompanying the document Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, SWD/2018/116 final, 2018. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018SC0116> [consulted on 10 January 2024].

117 EC. *Inception impact assessment on Horizontal or further sectorial EU action on whistleblower protection*, 2017. https://ec.europa.eu/smart-regulation/roadmaps/docs/plan_2016_241_whistleblower_protection_en.pdf [consulted on 10 January 2024].

118 EC. Strengthening whistleblower protection at EU level, 23 April 2018.

119 Proposal for a directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, COM, 2018. 218 – 2018/0106 (COD).

many citizens are unaware of whistleblower protection; 49 % did not know where to report corruption, while only 15 % knew about the existing rules on whistleblower protection.¹²⁰

The directive was adopted a year later. The main objective of the Whistleblower Protection Directive is to improve the enforcement of EU law by adopting a set of minimum standards providing a high level of protection for whistleblowers.¹²¹ As will be seen below, it provides for a comprehensive legal framework with easily accessible reporting channels and protective measures.

3.2. SCOPE

3.2.1. Material scope

The directive offers protection to persons who report¹²² infringements falling within the scope of certain EU acts covering 10 areas such as public procurement, financial services, transport safety, consumer protection, environmental protection, etc.¹²³ Breaches affecting the Union's financial interests¹²⁴ and the internal market¹²⁵ are included in the scope of the directive.¹²⁶

'Breaches' can refer to both acts and omissions that "are unlawful and relate to" or "defeat the object or the purpose of" the rules in the EU acts and fall within the material scope of the directive.¹²⁷

This scope should be read and understood in light of the principles of subsidiarity and conferral. The latter principle means that the EU acts only within the limits of the competences conferred upon it by the Member States in the Treaties.¹²⁸ The former, which is closely linked to the principle of proportionality and applies in areas where the EU does not have exclusive

120 Directorate-General for Justice and Consumers, *Whistleblower protection – Fact sheet*, April 2018, https://ec.europa.eu/commission/presscorner/api/files/attachment/855860/Fact-sheet_on_Whistleblower_Protection.pdf [consulted on 10 January 2024].

121 Art. 1 Whistleblower Protection Directive. See also Vigilenca Abazi, "The European Union Whistleblower Directive: A 'Game Changer' for Whistleblowing Protection?", *Industrial Law Journal*, Volume 49/4, 2020, pp. 640-656.

122 Please note that reporting covers both oral and writing communication of information on breaches (Art. 5(3) Whistleblower Protection Directive).

123 Art. 2(1)(a) Whistleblower Protection Directive. The relevant EU acts are included in the Annex (Part I) of the directive.

124 Cf. Art. 325 TFEU.

125 Cf. Art. 26(2) TFEU.

126 Art. 2(1) (b) and (c) Whistleblower Protection Directive.

127 Art. 5(1) Whistleblower Protection Directive.

128 Art. 5 TEU. See also Art. 2-6 TFEU.

competence, aims to ensure that decisions are taken as close to the citizen as possible.¹²⁹ Of course, as already suggested and as explicitly stated in Article 2(2) of the directive, the Member States may extend the protection to other areas. Moreover, the directive does not override the mandatory sector-specific rules on the reporting of breaches.¹³⁰

3.2.2. Personal scope

Any natural person who obtains information in a professional context can blow the whistle.

The directive applies to 'workers', i.e. both employees and civil servants,¹³¹ irrespective of their nationality. Thus, both EU citizens and third-country nationals¹³² fall within the personal scope of the directive. Furthermore, the protection is not limited to those who are performing their employment but extends to job applicants as well as to those whose employment has already ended at the time they report breaches.¹³³ Moreover, the self-employed,¹³⁴ volunteers and (unpaid) trainees can rely on the directive, as can, for example shareholders.¹³⁵ The scope of the directive also includes "persons working under the supervision and direction of contractors, subcontractors and suppliers".¹³⁶ In addition, a wide range of other persons can benefit from the directive's protection, including relatives who may experience (indirect) retaliatory measures due to their connection with the reporting person.¹³⁷

In line with the intention of the EU legislator, protection is granted to a wide range of persons who, by virtue of their professional activities and not merely by virtue of their relationship are in a privileged position to have access to information about breaches which it would be in the public

129 Art. 5(3) TEU and Protocol No. 2 on the application of the principles of subsidiarity and proportionality, *Official Journal of the European Union* 9 May 2008, C 115. See also Art. 10(3) TEU.

130 Art. 3(1) Whistleblower Protection Directive.

131 However, for EU staff separate regulations apply (e.g. Council Regulation (EEC, Euratom, ECSC) No. 259/68). Nevertheless, the Whistleblower Protection Directive applies if they "report breaches that occur in a work-related context outside their employment relationship with the Union institutions, bodies, offices or agencies" (cf. Rec. 23 Whistleblower Protection Directive).

132 Rec. 37 Whistleblower Protection Directive.

133 Art. 4(2) juncto 4(3) Whistleblower Protection Directive.

134 Art. 4(1)(b) Whistleblower Protection Directive.

135 Art. 4(1)(c) Whistleblower Protection Directive.

136 Art. 4(1)(d) Whistleblower Protection Directive.

137 Art. 4(4) Whistleblower Protection Directive.

interest to report, and who may suffer retaliation if they report them.¹³⁸ However, legal entities are not covered by the directive¹³⁹ and therefore, for example, a non-governmental organization cannot claim the protection offered by the directive.

3.2.3. Reporting channels

The directive establishes three distinct types of reporting channels: internal reporting, external reporting, and as a last resort, public disclosure. The following section provides a concise overview of both types.

The directive unequivocally expresses a preference for internal reporting, designating it as a 'general principle'.¹⁴⁰ From a corporate point of view, establishing a robust internal reporting channel is seen as advantageous, aligning with companies' interests to internally analyze and address reported wrongdoing before considering external disclosure or public dissemination. Nevertheless, the directive acknowledges that the whistleblower's right to choose the most appropriate reporting channel.¹⁴¹

According to the directive, internal reporting channels should be set up in both the public and private sectors. However, in the private sector, compliance is required only for legal entities with 50 or more workers.¹⁴² Member States have the discretion to grant similar exemptions in the public sector, especially for municipalities with fewer than 10,000 inhabitants or fewer than 50 workers. These internal reporting channels may be outsourced to a third party. In the public sector, Member States may also allow that internal reporting channels can be shared between municipalities. Additionally,

138 Rec. 37 Whistleblower Protection Directive.

139 This is criticized by some scholars (See Arnaud van Waeyenberge and Zachariah Davies, "The Whistleblower Protection Directive (2019/1937): A Satisfactory but Incomplete System", *European Journal of Risk Regulation*, vol. 12, 2021, p. 236-244. However, one could argue that they can indirectly benefit from the whistleblower protection directive (cf. Art. 4(4)(b) Directive).

140 Art. 7(1) Whistleblower Protection Directive.

141 See also Jan Tadeusz Stappers, "EU Whistleblower Protection Directive: Europe on Whistleblowing", *ERA Forum*, vol. 22, 2021, pp. 87-100.

142 Please note that (i) the nature of the activities and the level of risk for environment and public health may give rise to Member States -following an appropriate risk assessment- to establish internal reporting channels for private sector employers with less than 50 workers, and (ii) the exemption of small and micro enterprises from the obligation to establish internal reporting channels should not apply to private enterprises which are obliged to establish internal reporting channels by virtue of Union acts referred to in Parts I.B and II of the Annex (See Rec. 50 Whistleblower Protection Directive).

private sector employers, up to 249 workers, may share resources for receiving reports and conducting investigations.¹⁴³

The confidentiality of all individuals involved in the report, including the whistleblower and any third parties mentioned, is paramount in the internal reporting mechanism.¹⁴⁴ Unauthorized access by staff members must be prevented, and an acknowledgment of receipt should be sent to the reporting person within 7 days. The directive ensures diligent follow-up through an impartial person or department within a reasonable timeframe, setting a deadline of 3 months from acknowledgement or, in the absence of acknowledgement, the expiry of the seven-day period after the report. Furthermore, clear, and accessible information on external reporting procedures must be available.¹⁴⁵

An external reporting channel should be created as well. Each EU member state is obliged to establish independent and autonomous¹⁴⁶ external reporting channels competent to receive, give feedback and follow up on reports.¹⁴⁷ They must provide certain minimum information online in a separate, easily identifiable, and accessible section on their website. This includes the conditions for qualifying for protection, the contact details for the external reporting channels, etc.¹⁴⁸ Individuals can choose to first report internally and, at a later stage report externally, or can either directly report through the external channel.¹⁴⁹

Public disclosure, in turn, functions as a 'last resort'. A whistleblower opting for public disclosure will only enjoy the protection offered by the directive in a limited number of cases. First, if he followed the internal or external reporting procedure without timely appropriate action being taken. Secondly, if the person concerned had reasonable grounds to believe that, for example, the reported breach may constitute an imminent or manifest danger to the public interest.¹⁵⁰

Maintaining confidentiality is a crucial element of the directive for both internal and external reporting.¹⁵¹ Member States must ensure non-disclosure of the reporting person's identity and any information revealing their identity, except to designated persons handling reports. Exceptions may be

143 Art. 6 Whistleblower Protection Directive.

144 See also *infra* marginal 82.

145 Art. 9 Whistleblower Protection Directive.

146 See Art. 12 Whistleblower Protection Directive.

147 Art. 11 Whistleblower Protection Directive.

148 Art. 13 Whistleblower Protection Directive.

149 Art. 10 Whistleblower Protection Directive.

150 Art. 15 Whistleblower Protection Directive.

151 Art. 16 Whistleblower Protection Directive.

made in case of, for example, judicial proceedings, including safeguarding the rights of defense. In such case, in principle, the reporting person should be informed before their identity is disclosed. This demonstrates that confidentiality is not absolute. Additionally, data protection rules apply to all involved parties.¹⁵² A clear tension arises between the principle of confidentiality and the right of access.¹⁵³ The possibility allows for anonymous reporting, though not as a general obligation. However, even without an obligation to address anonymous reports, whistleblowers may still seek protection under directive.¹⁵⁴

3.3. PROTECTION OFFERED BY THE WHISTLEBLOWER PROTECTION DIRECTIVE

Certain criteria are established to determine the eligibility of the reporting individuals for the protection offered by the directive. In this context, two conditions are crucial: the reasonable belief that the information was true and fell within the scope of the directive, and compliance with the reporting procedure outlined in the directive.¹⁵⁵ Consequently, protection is only offered for those falling within the directive's (material and personal) scope. Concerning the reasonable belief in the truth of the reported breaches, this assessment is made at the time of reporting, taking into account the circumstances and available information. These requirements strike an ideal balance between the safeguarding against malicious, frivolous, or abusive reports and ensuring that protection is retained when reporting inaccurate information due to an honest mistake.¹⁵⁶

The protection provided encompasses the prohibition against any form of retaliation. In total, the directive enumerates 15 examples of what constitutes retaliation. These include, for example, suspension, dismissal, demotion, change in working hours, negative performance assessment, failure to renew a temporary employment contract, etc. Also, the "imposition or administering of any disciplinary measure, reprimand or other penalty, including a financial penalty" is explicitly prohibited. Not only retaliation itself

152 Art. 17 Whistleblower Protection Directive. See also European Data Protection Supervisor (2019), *Guidelines on processing personal information within a whistleblowing procedure*, https://edps.europa.eu/sites/default/files/publication/19-12-17_whistleblowing_guidelines_en.pdf [consulted on 10 January 2024].

153 See also Jan Tadeusz Stappers, *op. cit.*, pp. 87-100.

154 Cf. Art. 6(2) and Rec. 32 Whistleblower Protection Directive. See also Jan Tadeusz Stappers, *op. cit.*, pp. 87-100.

155 Art. 6 Whistleblower Protection Directive.

156 See Rec. 32 Whistleblower Protection Directive.

is prohibited, but also threats or attempts of retaliation.¹⁵⁷ Member States should take measures to ensure that individuals are protected against retaliation, nor can they be held civilly or criminally liable for reporting or the public disclosure. Additionally, there is a provision for a shift in the burden of proof in proceedings relating to a detriment suffered by the reporting persons. Remedies and full compensation should be provided for damage suffered by individuals.¹⁵⁸ Furthermore, Member States must guarantee individuals the right to an effective remedy and a fair trial.¹⁵⁹

Access to support measures should also be mandated. This includes effective assistance in protection against retaliation, free comprehensive and independent information and advice on available procedures and remedies. Support measures may extend to psychological support.¹⁶⁰

Effective, proportionate, and dissuasive penalties should be provided for those who (attempt) to hinder reporting, violate the duty of maintaining confidentiality, engage in retaliatory actions, etc.¹⁶¹ Despite the directive proposal initially including sanctions for malicious or abusive reporting by whistleblowers, this aspect was not included in the Whistleblower Protection Directive. This finding, however, does not preclude the possibility of implementing measures at the national level, such as criminal law offenses for such practices (e.g. slander or defamation).¹⁶²

CONCLUSIONS

The true nature of disciplinary law and proceedings remains elusive. Surprisingly, the applicability of many essential guarantees to the disciplinary process casts further doubt on the purported distinct nature of these proceedings, or at least undermines the usefulness of this distinction for the applicability of such guarantees. Additionally, the non-applicability of certain guarantees, such as the principle of legality, the right to remain silent, and the non bis in idem principle, poses significant issues and requires further examination. The free flow of information presents additional challenges. Lastly, the interference and overlap of procedures raise numerous questions.

The development in the case law of the Council of State of Belgium regarding the petitioner's conduct during structured administrative

157 Art. 19 Whistleblower Protection Directive.

158 Art. 21 Whistleblower Protection Directive.

159 Art. 22 Whistleblower Protection Directive.

160 Art. 20 Whistleblower Protection Directive.

161 Art. 23 Whistleblower Protection Directive.

162 See Art. 3(3) Whistleblower Protection Directive.

appeals—specifically, the principle that ‘gestures of deceit’ should not be construed to the petitioner’s disadvantage—has had a broader impact extending beyond disciplinary cases. This evolution raises the crucial question of whether restricting access to the court is feasible. For instance, could it be argued that if a party has consciously, in bad faith, or with a significant degree of recklessness, neglected to assert its rights in the administrative procedure, there could be limitations?

A recent ruling from the Constitutional Court of Belgium has added complexity to achieving this objective. While the intention behind such a limitation may be understandable, the consequence is a substantial diminution of the organized administrative appeal procedure’s value for both the administration and the appellant. Therefore, it is imperative not to lose sight of the original purpose behind the legislator’s introduction of the organized administrative appeal procedure.

The Whistleblower Protection Directive marks a positive stride by establishing common minimum standards across all EU countries, addressing breaches of EU law within specific policy areas. The limited material scope can be tempered in that EU protection was already granted to e.g. workers when reporting breaches of Union employment law.¹⁶³ Moreover, when comparing the ten Member States that declared they had a ‘comprehensive’ legal framework (covering more than one specific sector, applying to both the public and private sectors, and covering a wide range of wrongdoing)¹⁶⁴ before the directive’s implementation, the directive holds the potential to make significant progress. Its broad personal scope, offering protection to a diverse range of individuals vulnerable to work-related retaliation, enhances its effectiveness. However, it prompts contemplation on whether similar power imbalances exist in other contexts warranting protective measures, such as for consumers.

Whereas in many countries before a hostile environment for whistleblowers was created, the directive is now trying to change this. It creates a level playing field. At the same time due to minimum standards whistleblowers may be encouraged to ‘forum shopping’.¹⁶⁵ Notably, the directive lacks specific guidance on penalties, leaving this decision to the Member

163 See e.g. in the area of occupational health and safety: Art. 11 of Council Directive 89/391/EEC 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, *Official Journal of the European Union* 29 June 1989, L 183.

164 Directorate-General for Justice and Consumers, *Whistleblower protection – Fact sheet*, April 2018, https://ec.europa.eu/commission/presscorner/api/files/attachment/855860/Fact-sheet_on_Whistleblower_Protection.pdf [consulted on 10 January 2024].

165 See also Jan Tadeusz Stappers, *op. cit.*, pp. 87-100.

States. Regardless, penalties should be effective, proportionate, and dissuasive.¹⁶⁶ If necessary, the Court of Justice of the European Union (CJEU) will provide guidance.

Given that the directive was adopted fairly recently, there is currently no CJEU case law on the matter. Future rulings from the CJEU are anticipated drawing upon the ECtHR case law. After all, there is an obvious link between whistleblowing and the right to freedom of expression as enshrined in Article 11 of the Charter of Fundamental Rights of the European Union¹⁶⁷ (*hereafter* CFREU) and Article 10 of the ECHR. Given the clear link between the CFREU and the ECHR, and the intention of the EU to become a member of the ECHR,¹⁶⁸ the Whistleblower Protection Directive will be read together with these provisions, in particular the case law of the ECtHR¹⁶⁹ and the Council of Europe's Recommendation on the Protection of Whistleblowers.¹⁷⁰ Of course, the protection that can be provided by the ECtHR has a different scope compared to the EU approach, given that it has a exclusive ex-post approach while the EU tries to combine both ex-ante and ex post protection.

Questions arise regarding the (minimum) protection offered by the directive and that it is not too far-reaching on certain points. Consider, for instance, the failure to renew a temporary employment contract. This observation, combined with the shift in the burden of proof, leads to the conclusion that the protection an individual enjoys within the EU is interpreted very broadly. Whether this can be linked to the difficulties encountered in transposing the directive into national regulations is not entirely clear. In any case, the implementation in the Member States has been challenging. In February 2023, the European Commission decided to refer 8 Member States to the CJEU for failure to transpose the Whistleblower Protection Directive.

A new anti-corruption directive currently under negotiation,¹⁷¹ is anticipated to further elevate national standards and provide enhanced protec-

166 See Art. 19 and 23 Whistleblower Protection Directive. See also Rec. 41. See on this topic: Arnaud van Waeyenberge and Zachariah Davies, *op. cit.*, pp. 236-244.

167 Official Journal of the European Union 7 June 2016, C 202.

168 Art. 6(2) TEU.

169 See e.g. ECtHR *Guja v. the Moldova*, 12 February 2008; ECtHR *Heinisch v. Germany*, 21 July 2011; ECtHR *Langner v. Germany*, 17 September 2015; ECtHR *Herbai v. Hungary*, 5 November 2019; ECtHR *Halet v. Luxembourg*, 14 February 2023.

170 Committee of Ministers of the Council of Europe, *Recommendation on the protection of whistleblower*, 30 April 2014, CM/Rec(2014)7, <https://rm.coe.int/16807096c7> [consulted on 10 January 2024].

171 Proposal for a Directive of the European Parliament and of the Council on combating corruption, replacing Council Framework Decision 2003/568/JHA and the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and amending Directive (EU) 2017/1371 of the European Parliament and of the Council, COM/2023/234 final.

tion for whistleblowers reporting corruption. This will provide a further opportunity to improve the level playing field at the European level as well as from a national perspective.

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