Disciplinary Sanctions against Judges: Punitive but not Criminal for the Strasbourg Court

Pragmatism or another Twist towards Further Confusion in Applying the Engel Criteria?

Lorena Bachmaier

eucrim
European Law Forum: Prevention • Investigation • Prosecution

Article

ABSTRACT

The European Court of Human Rights (ECtHR) sought to extend the guarantees for criminal procedure enshrined in Art. 6 of the European Convention on Human Rights (ECHR) to administrative offences which are criminal in nature when it established the Engel criteria. It aimed to prevent that the states circumvent criminal procedure safeguards by simply labelling such offences as administrative. However, the ECtHR went back on this initial approach in subsequent judgments, denying that sanctions in disciplinary proceedings against judges fall under the criminal limb of Art. 6 ECHR. Hence, further exploration is required to clear the blurring lines between administrative and criminal sanctions with the aim of establishing which procedural safeguards are applicable.

This article outlines and reflects on the reasons set out in ECtHR case law for no longer considering disciplinary sanctions against judges as "criminal in nature." It is argued that the ECtHR's current approach leaves it unclear which procedural safeguards are applicable in administrative sanctioning proceedings with a punitive nature. What is more, excluding disciplinary proceedings against judges from the guarantees for criminal procedure enshrined in the ECHR lacks a clear legal logic if such sanctions are undoubtedly punitive and could have severe consequences. Moreover, it is stressed that the Court of Justice of the European Union (CJEU) might eventually be called upon to define what should be considered "criminal in nature" when it comes to disciplinary proceedings against judges. Given the relevance of disciplinary proceedings and sanctions for the protection of judicial independence and given the competence established by the Luxembourg Court to decide on this protection, it is of utmost relevance that the approach taken by the Strasbourg Court be revisited.

AUTHOR

Lorena Bachmaier

Full Professor of Law
Universidad Complutense Madrid

CITATION SUGGESTION

L. Bachmaier, "Disciplinary Sanctions against Judges: Punitive but not Criminal for the Strasbourg Court", 2022, Vol. 17(4), eucrim, pp260–265. DOI: https://doi.org/10.30709/eucrim-2022-018

Published in
2022, Vol. 17(4) eucrim pp 260 – 265
ISSN: 1862-6947
https://eucrim.eu

I. Introduction

Criminal and administrative sanctioning systems have been running on parallel tracks in the European continental legal tradition for centuries. In many cases, criminal policy aspects distinguish criminal offences from administrative offences, rather than features or elements of each regulatory system. This is not new.[1] The lines have always been blurred, and the case law of the ECtHR has further obscured the boundaries between the two categories.[2] This difficulty of differentiating between administrative punitive sanctions and criminal sanctions and the overlap between them has been the subject of numerous scholarly studies, which have also highlighted a growing confusion reflected at the level of EU law.[3]

Identifying which administrative offences are to be considered "criminal in nature" is relevant from the point of view of the theory of criminal law, where it has been stressed that there is an unacceptable expansion of criminal law that runs against the principle of *ultima ratio*. Even more importantly, such a clarification would help identify which of the safeguards of the criminal procedure should also apply to the administrative sanctioning proceedings with a punitive nature. The latter also holds true for the *ne bis in idem* principle.[4]

The debate and the case law have mainly revolved around competition law, environmental law, and crime prevention.[5] In turn, disciplinary proceedings – in particular those against judges – represent an area that has often been neglected but where the above-mentioned questions are of great relevance. Although the ECtHR initially considered certain disciplinary proceedings as criminal in nature, it has long abandoned this stance and repeatedly declared that judicial disciplinary proceedings fall within the civil limb of Art. 6 of the ECHR. In this context, the question arises whether disciplinary proceedings and sanctions against judges are purely administrative, "quasi-criminal," or "criminal in nature." Why are disciplinary sanctions against judges, which seem to have a clear punitive character and can entail severe penalties, not considered "criminal" by the Strasbourg Court? Do they have specific features that justify not including them in the concept of "criminal charge"? Are the boundaries between criminal and administrative offences even more blurred in this area?

While it would exceed the scope of this article to review the numerous discussions and case law in connection with the blurred lines between administrative and criminal sanctions and the difficulties of identifying proceedings and sanctions which are "criminal in nature," the aim is to map out the arguments put forward in ECtHR case law on disciplinary sanctions against judges. To that end, I will first describe the safeguards established for disciplinary proceedings against judges. Second, I will briefly call to mind the scope and meaning of the so-called *Engel* criteria, and reflect on the arguments invoked by the Court when framing the disciplinary sanctions against judges within the civil limb of Art. 6 ECHR. I will argue that such an approach does not aid in providing clarity regarding the safeguards of the criminal procedure that are applicable in administrative sanctioning proceedings with a punitive nature. In my conclusions, I will argue that the CJEU might be called upon in the future to define what should be considered as "criminal in nature" in disciplinary proceedings against judges.[6] The issue is not irrelevant as such sanctions are a weak link when it comes to protecting judicial independence – the latter falling within the competence of the Luxembourg Court.

II. Principles for Disciplinary Proceedings against Judges in European Law

Before looking in detail at the CoE legal framework in disciplinary proceedings (including the ECtHR case law on this matter), it makes sense to discuss the legal situation in the EU. To date, the CJEU has yet to conclusively answer the question of whether or not disciplinary sanctions against judges ought to be classified as "criminal" or "quasi-criminal". By its judgment in *Associação Sindical dos Juízes Portugueses v*

Tribunal de Contas,[7] the CJEU linked the disciplinary liability of judges to judicial independence as defined in Art. 19(1) TEU and thus extended the EU's competence to rule on these issues by a broad interpretation of Art. 51(1) of the Charter. This enabled the CJEU to rule on the safeguards of judicial independence in the Member States and resulted in the definition of some guarantees that disciplinary proceedings should include in order to respect said principle of independence. Thus, when it comes to judicial independence and its effective protection, the EU has extended the traditional limits posed by the material criteria which define the spheres of EU and national law. Since that judgment, the CJEU has had the opportunity to rule on the safeguards of judicial independence in the Member States.[8]

The CJEU case law, following some of the standards set out by the ECtHR, defines the guarantees that disciplinary proceedings should include in order to respect the principle of independence:[9]

- A procedure before an independent body that respects the rights of the defence and the right of appeal;
- The precise regulation of disciplinary offences and sanctions.

Yet, what preliminary ruling would the CJEU give on the disciplinary responsibility of a judge? What safeguards would it require to be respected when it comes to disciplinary proceedings against judges? Would it echo the ECtHR and deny the punitive character of such disciplinary sanctions, i.e., the applicability of criminal safeguards? Or would it only limit the concept of "criminal in nature" to cases in which the dismissal of a judge is at stake? Or not even to such cases?

Let us look at the standards on disciplinary proceedings against judges in the framework of the Council of Europe (CoE) and the ECtHR case law interpreting the ECHR guarantees in this field.

With regard to disciplinary liability, COE Recommendation 94(12) on the independence, efficiency and role of the judges already includes principles on the accountability of judges.[10] These principles were updated by CoE Recommendation 2010(12) on the independence, efficiency and responsibilities of judges.[11] CoE Recommendation (2010)12 requires that disciplinary proceedings against judges are conducted by independent bodies or the courts, ensuring full observance of the guarantees of a fair trial. In addition, judges must be granted the right to appeal the decision of the disciplinary body.[12]

Accordingly, the European Charter on the Statute for Judges provides for the possibility of disciplinary proceedings before a competent authority and the imposition of a disciplinary sanction against a judge "following the proposal, the recommendation, or with the agreement of a tribunal or authority composed at least as to one half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties, in which the judge proceeded against must be entitled to representation."[13]

What are the standards provided by the ECHR as interpreted by the ECtHR? This will be outlined in the following three sections – starting with the principles for an independent and impartial tribunal, followed by the right to a fair trial, and finally the right to judicial remedy.

1. Independent and impartial tribunal

The ECtHR does not stipulate that the disciplinary liability against judges be decided by a court. In this regard, the ECtHR has been consistent in its stance that conferring competence to a professional disciplinary body – and not a court – to decide on disciplinary offences and eventually impose the corresponding sanction is not in itself inconsistent with the requirements of Art. 6(1) ECHR. However, when CoE member states opt for this approach, the disciplinary body must either comply with the requirements of Art. 6(1) ECHR (i.e., be an "independent and impartial tribunal established by the law"),[14] or its decisions must be sub-

ject to a "sufficient" judicial review by a body complying with the requirements of independence and impartiality.[15] When assessing the sufficiency of the review, two elements are thus taken into account: the scope of the appeal, but also whether the competent court complies with the requirements of independence, as seen in the case of *Denisov v. Ukraine*.[16] In this case, the applicant – a judge who had been dismissed from his position as president of the Kyiv High Administrative Court of Appeal – complained that the proceedings before the judicial council and the appeal before the High Administrative Court (HAC) concerning his removal had not been compatible with the requirements of independence and impartiality. He also complained that the HAC had not provided a sufficient review of his case, thereby impairing his right of access to a court.[17]

2. Right to a fair trial in disciplinary proceedings

It has been established that disciplinary proceedings against judges must meet the fair trial safeguard requirements as provided under Art. 6(1) ECHR. It is settled ECtHR case law that the disciplinary proceedings in which the right to continue to exercise a profession is at stake are classified as "disputes" over **civil rights** within the first alternative of Art. 6(1) ECHR.[18] This approach has been applied to proceedings before various professional disciplinary bodies; in *Baka v. Hungary*, the Court confirmed its applicability to disciplinary proceedings against judges.[19]

The ECtHR has analysed the violation of fair trial standards against four criteria: lack of impartiality of tribunals, the violation of the principle of equality of arms, secrecy, and excessive length of proceedings.[20] The relevant criteria for satisfying the requirements of Art. 6(1) ECHR concern both the disciplinary proceedings at first instance and the judicial proceedings on appeal. As stated in the Grand Chamber judgment in *Ramos Nunes de Carvalho e Sá v. Portugal* of 2018,[21] this implies that the proceedings before a disciplinary body not only entail procedural safeguards (para. 197) but also measures to adequately establish the facts when an applicant is liable to incur very severe penalties (paras. 198 et seq.).

The disciplinary proceedings in *Ramos Nunes de Carvahlo* concerned a judge who had called another judge a "liar" on the telephone, later persuaded yet another judge to testify in her favour by giving a false statement, and finally asked the judicial inspection service to refrain from instituting proceedings against this last judge for false testimony. In finding whether the proceedings as a whole had been fair, the judges in Strasbourg paid particular attention to the fact that the sanctioned judge had not had the chance to be heard – neither before the disciplinary body nor before the Supreme Court, which was the competent court for the review of the decision of the judicial council. They concluded that there was a violation of Art. 6 ECHR, whereby they did not only take into account the gravity of the sanction,[22] but also the relevance of the witness evidence in determining the facts that led to the disciplinary sanction, and the limited scope of appeal.

3. Judicial remedy

Another requirement consistently upheld by the ECtHR is that the judicial body reviewing the ruling of the disciplinary body must either have full jurisdiction or the scope of the review must be broad enough to revise the findings of the disciplinary body.[23] The ECtHR discussed issues of the scope and the sufficiency of the judicial review in appeal in *Ramos Nunes de Carvalho E Sá v. Portugal*. According to the ECtHR "the review of a decision imposing a disciplinary penalty differs from that of an administrative decision that does not entail such a punitive element" (para. 196), as the sanctions can have serious consequences. All this needs to be taken into account when considering the sufficiency of the review on judicial appeal.[24] The Court concluded in *Ramos Nunes de Carvalho* that a judicial body cannot be said to have full jurisdiction unless it has the power to assess whether the penalty was proportionate to the misconduct (para. 202).[25]

III. *Engel* Criteria and the Case Law of the ECtHR on Classification of Disciplinary Sanctions against Judges

In its second alternative, Art. 6 ECHR sets out specific procedural safeguards for a "criminal charge." These are commonly referred to as the three *Engel* criteria and serve as the yardstick for establishing the applicability of these criminal procedural safeguards under Art. 6 ECHR, i.e., the applicability of the criminal limb:

- The legal classification of the offence under national law;
- The very nature of the offence;
- The degree of severity of the penalty that the person concerned risks incurring.

In applying the criterion of the "criminal nature," both the Strasbourg Court and the Luxembourg Court have previously focused on the aims of a sanction, i.e., whether it has a punitive or a deterrent effect. However, this assessment can be complex[26] as punishment in itself is also seen as a deterrent.[27] The ECtHR has also considered the nature of the penalty in respect of the third criterion.[28] In order to avoid that low administrative fines with a punitive character end up falling under the criminal limb – something the legislators precisely sought to avoid –, the ECtHR established in *Jussila* that a comprehensive assessment of both criteria (nature of the sanction/aim and seriousness of the penalty) should be conducted in cases where the hard core of criminal law was not at stake.[29]

Regarding the classification of the subject matter as disciplinary or criminal offence at the national level, the court was also very clear in its leading case of *Engel and Others v. The Netherlands*:[30]

(…) 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 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.[31]

Thus – as set out in *Engel and Others* –, the ECtHR initially established that disciplinary proceedings fall within the criminal limb as long as the sanction is severe. However, the court has subsequently repeatedly classified disciplinary proceedings against judges as not criminal and thus falling within the civil limb of Art. 6 ECHR (cf. supra). As clarified in the landmark case of *Oleksandr Volkov v. Ukraine*,[32] this approach is even followed if the dismissal of a judge is at stake, and despite the fact that such a dismissal would see a judge permanently barred from the judicial service. Similarly, disciplinary proceedings against a judge in which the suspension from service and the imposition of a substantial fine were at stake did not amount to a "criminal charge," as recognised in *Ramos Nunes de Carvalho*.[33] This is even more striking as the court stressed in this

judgment that such sanctions have a punitive character and that "even if they do not come within the scope of Article 6 of the Convention under its criminal head, disciplinary penalties may nevertheless entail **serious consequences** for the lives and careers of judges".[34]

In light of the *Engel* criteria, and acknowledging both that the nature of disciplinary sanctions against judges is punitive and that certain sanctions are of a serious nature (especially when they entail dismissal), it is not easy to understand why the court decided to deviate from the criteria established in its *Engel* judgment when it comes to disciplinary sanctions against judges. Moreover, it is hard to grasp the reasons behind making an exception to this type of sanction considering the ethical disapproval disciplinary infringements by judges are met with and taking into account that enhancing the safeguards in such proceedings serves to protect judicial independence.

Against this background, we cannot but agree with the words of Judge *Pinto de Albuquerque* in his concurring separate opinion in *Ramos Nunes de Carvalho*:

[…] the subject-matter of these proceedings was intrinsically criminal in nature (defamation, use of false testimony and obstruction of justice). Although no criminal prosecution was brought against the applicant on the basis of the facts investigated in the three sets of disciplinary proceedings, these facts were typical of the "mixed" offences to which the *Engel* judgment referred. These were offences with a high degree of social offensiveness and stigma. The downgrading of these offences by the Grand Chamber, in paragraph 125 of the judgment, as "purely disciplinary" deprives the defendant judge of basic procedural guarantees. This is precisely what the Convention is meant to prevent, especially in the case of the "mixed" offences to which the *Engel* judgment made reference" (para. 23 of the concurring opinion).

The ECtHR has resorted to the requirement that the rule providing for the sanction to qualify as criminal needs to be of a general scope. Since disciplinary sanctions "only" aim at regulating a profession and are applicable only to certain individuals exercising such profession, they are not criminal "in nature." *Caeiro* rightly stressed that this requirement was introduced by the court with the aim of excluding disciplinary sanctions from the application of the criminal procedure safeguards because there are no logic arguments to establish why the scope of application of the *Engel* criteria should not apply to individuals acting in a certain capacity.[35]

In sum, there are no convincing reasons for sanctions, such as a suspension or dismissal from the exercise of the judicial profession, to be found "non-criminal" in nature. This argument of the Court does not only lead to unclarity, and thus opens the door to arbitrariness and inconsistencies, but also ignores the fact that there are many criminal offences with a limited personal scope, applicable only to people distinguished by certain personal or professional features.[36]

IV. Concluding Remarks

As indicated, scholars and legal practitioners have criticised the arguments used by the ECtHR when categorising disciplinary sanctions as non-criminal, in particular severe ones imposed on judges. Such developments, initiated in the *Oztürk* case and reinforced in the *Volkov* case, are not based on any legal categories applicable to the concept of criminal law. Requiring a rule that is of "general scope" for considering a sanction as criminal in nature to the aim of applying the criminal procedural safeguards of Arts. 6 and 7 ECHR does not appear to respond to a legal logic. How broad should the category of persons addressed by the rule be in order to fall within the concept of "criminal charge" under Art. 6 of the Convention? Would the category of "employees in public office" be broad enough?

I do not have the answer to these questions. However, I believe that the issue of a more limited or more extensive scope of application of Art. 6 ECHR does not constitute reasonable grounds for determining the safeguards to be applied to certain administrative sanctioning proceedings that clearly have a punitive character. The nature of disciplinary proceedings against judges is clearly criminal and resorting to the scope of the rule to avoid providing the "top" guarantees of criminal procedure, is not convincing.

The ECtHR's approach in disciplinary proceedings against judges is even more noteworthy as the Court departs from its previous case law, where the punitive nature and the severe penalty were deemed sufficient to trigger the criminal procedural safeguards. However, as seen in *Volkov*, dismissal has not been considered as a sanction serious enough as to warrant the application of the notion of "criminal charge," using the argument that the rules on disciplinary liability of judges do not have a general scope.

Ultimately, it must be stressed that excluding disciplinary proceedings against judges which undoubtedly have severe consequences – not only for the individual sanctioned but also for the whole understanding of the rule of law principles –, is incompatible with the importance of disciplinary proceedings for judicial independence. These disciplinary proceedings should provide for the highest standards of procedural guarantees because there is always the risk that they are arbitrarily used – or even abused – to exert undue pressure upon judges.

In sum, the arguments to exclude disciplinary proceedings against judges from the application of the criminal procedural safeguards under Art. 6 ECHR is not only inadequately justified but needs to be revised in light of the importance of the protection of judicial independence in our democratic societies.

---

1. See generally, D. Ohana, "Regulatory Offences and Administrative Sanctions: Between Criminal and Administrative Law", in: M. D. Dubber and T. Hörnle (eds.), *The Oxford Handbook of Criminal Law*, OUP, Oxford, 1064–1086.↩
2. P. Caeiro), "The influence of the EU on the 'blurring' between administrative and criminal law", in: F. Galli and A. Weyembergh (eds.), *Do labels still matter? Blurring boundaries between administrative and criminal law. The influence of the EU,* 2014, 172-190, at 174-175.↩
3. There is a vast amount of literature on the various aspects of the relationship between administrative and criminal sanctions, which is impossible to cite here. On a more general level, see *inter alia* A. Weyembergh and N. Joncheray, "Punitive administrative sanctions and procedural safeguards. A blurred picture that needs to be addressed", (2016) 7 (2) *New Journal of European Criminal Law,* 190-209;M. Luchtman, "Inter-state cooperation at the interface of administrative and criminal law", in: F. Galli and A. Weyembergh (eds.), *Do labels still matter? Blurring boundaries between administrative and criminal law. The influence of the EU,* 2014, 191-212; O. Jansen (ed.), *Administrative Sanctions in the European Union*, 2013; and more recently, M. Kärner, "Punitive Administrative Sanctions After the Treaty of Lisbon: Does Administrative Really Mean Administrative?", (2021) 11 (2), *EuCLR*, 156-176; and recently, M. Luchtman, K. Ligeti and J.A.E. Vervaele (eds.), *EU enforcement authorities: punitive law enforcement in a composite legal order*, Hart Studies in European Criminal Law 2023.↩
4. On the *ne bis in idem* principle and its application when administrative and criminal decisions were made in the same case, see e.g., S. Mirandola and G. Lasagni, "The European ne bis in idem at the Crossroads of Administrative and Criminal Law", (2019) *eucrim*, 126-135; H. Satzger (2020), "Application Problems Relating to 'Ne bis in idem' as Guaranteed under Art. 50 CFR/Art. 54 CISA and Art. 4 Prot. No. 7 ECHR", (2020) *eucrim*, 213-217.↩
5. Although the CJEU has avoided to establish a clear definition of criminal sanctions and criminal proceedings. See A. Klip , *European Criminal Law. An Integrative Approach,* 3rd ed. 2016, pp. 190–194.↩
6. As for the CJEU case law on administrative punitive sanctions and its categorisation, see: CJEU, 20 June 2018, Case C-524/15, *Luca Menci*; CJEU, 26 February 2013, Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*,; CJEU, 5 June 2012, Case C-489/10, *Lukasz Marcin Bonda*.↩
7. CJEU (GC), 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses v Tribunal de Contas.↩
8. CJEU, 25 July 2018, Case C-216/18 PPU, *Minister for Justice and Equality v LM* (Deficiencies in the system of justice); CJEU, 2 March 2021, Case C-824/18, *AB e.a v. CNPJ* (*Krajowa Rada Sądownictwa*); CJEU, 20 April 2021, Case C-896/19, *Repubblika v. Il-Prim Ministru*; CJEU, 18 May 2021, Case C-83/19, *Asociaţia 'Forumul Judecătorilor Din România'* and Others,; CJEU, 15 July 2021, Case C-791/19, *Commission v. Poland*; CJEU, 6 October 2021, Case C-487/19, *W. Ż*; CJEU, 16 November 2021, Case C-748/19, *WB & XA v. Prokuratura Krajowa* and Others,; CJEU, 16 February 2022, Cases C-156/21, *Hungary v European Parliament and Council of the European Union,* and C- 157/21 *Poland v European Parliament and Council of the European Union*; CJEU, 22 February 2022, Case C-430/21, *RS*.↩
9. CJEU, *Minister for Justice and Equality v LM*, *op. cit*. (n. 8), para. 67.↩
10. Council of Europe Committee of Ministers, Recommendation No. R (94) 12 s on the Independence, Efficiency and Role of Judges, 13 October 1994.↩
11. Council of Europe Committee of Ministers, Recommendation No. R (2010)12 on the Independence, Efficiency and Responsibilities of Judges, 17 November 2010.↩
12. Point 69 of Rec. (2010)12, op cit. (n. 12).↩
13. Para. 5.1 of the European Charter on the statute for judges, Strasbourg, 8-10 July 1998. The Charter is available at: <https://rm.coe.int/16807473ef> accessed 31 January 2023.↩

14. The elements that the ECtHR has taken into account when examining whether the disciplinary body of a judicial council complied with the requirements of independence and impartiality are listed in the landmark case ECtHR, 9 January 2013, *Olexander Volkov v. Ukraine,* Appl. no. 21722/11, paras. 112-115. See also ECtHR, 21 June 2016, *Ramos Nunes de Carvalho E Sá v. Portugal*, Appl. no. 55391/13; ECtHR, 31 October 2017, *Kamenos v. Cyprus*, Appl. no. 147/07, paras. 82-88; ECtHR [GC], 25 September 2018, *Denisov v. Ukraine*, Appl. no. 76639/11, para. 67.↩
15. See e.g., ECtHR, 26 October 2021, *Donev v. Bulgaria,* Appl. no. 72437/11; ECtHR, *Denisov v. Ukraine*, *op. cit.* (n. 14), para. 65; ECtHR, 14 November 2006, *Tsfayo v. the United Kingdom*, Appl. no. 60860/00, para. 42.↩
16. *Op. cit.* (n. 14).↩
17. It is assumed that the reader is familiar with the notion of a "tribunal established by law" and it is not necessary to explain it here in detail. In this context, see for example, ECtHR, 12 March 2019, *Guðmundur Andri Ástráðsson v.* Iceland, Appl. no. 26374/18; ECtHR, 22 July 2021, *Reczkowicz v. Poland,* Appl. no. 43447/19; ECtHR, 6 October 2022, *Juszczyszyn v. Poland,* Appl. no. 35599/20.↩
18. ECtHR, 27 June 1997, *Philis v. Greece (no. 2)*, , § 45, *Reports of Judgments and Decisions* 1997-IV, and ECtHR, 19 April 2007, *Vilho Eskelinen and Others v. Finland* [GC], Appl. no. 63235/00, para. 62.↩
19. ECtHR [GC], 23 June 2016, *Baka v. Hungary*, Appl. no. 20261/12, paras. 104-105. Although this is the reiterated stance of the Court, there was a concurring opinion of Judge Pinto de Albuquerque to the Grand Chamber judgment of 6 November 2018 in *Ramos Nunes de Carvalho e Sá v. Portugal*, Appl. nos. 55391/13, 57728/13 and 74041/13, who dissents with the qualification of the disciplinary sanction system as falling within the civil limb. The arguments put forward in this concurring opinion will be analysed in Section III.↩
20. ECtHR, 5 February 2009, *Olujić v. Croatia*, Appl. no. 22330/05.↩
21. ECtHR [GC], *Ramos Nunes de Carvalho e Sá v. Portugal, op. cit.* (n. 19).↩
22. The judge concerned was sanctioned to 120 days of suspension from judicial duty for calling the other judge "a liar" on the phone; however, this was not the only sanction against her as two other subsequent disciplinary proceedings followed related to the witness evidence.↩
23. ECtHR, 9 March 2021, *Bilgen v. Turkey,* Appl. no. 1571/07.↩
24. In assessing the sufficiency of the judicial review, the ECtHR stated in *Ramos Nunes de Carvalho e Sá v. Portugal*, *op. cit.* (n. 19), para. 199 that it must take into account the following three elements:
    1) The issues covered by the review carried out by the competent domestic court;
    2) The method of review adopted by the domestic court in reviewing the decision adopted by the disciplinary body, while addressing the question of the right to a hearing;
    3) The decision-making powers of the court in question for the purposes of concluding its review of the case before it, and to the reasoning of the decisions adopted.↩
25. However, this conclusion was subject to a separate concurring opinion, which considered that the review carried out by the Supreme Court of Portugal satisfied the requirements of Art. 6(1) ECHR. The separate concurring opinion was in favour of keeping the distinction between "scrutiny and review" and "re-examination" and disapproved of an approach leading to the creation of a "*lex specialis*" on the scope of judicial review for disciplinary proceedings against judges which would require a re-examination of the facts (paras. 21-28 of the Joint partly dissenting opinion of Judges Yudkivska, Vucinic, Pinto de Albuquerque, Turkovic, Dedov, and Hüseynov).↩
26. As pointed out by P. Caeiro, *op. cit.* (n. 2), p. 185, such a distinction cannot be made without a general definition of the purpose of the criminal punishment, and it does not take into account the socio-ethical relevance of the acts and the interests protected by the sanctioning system.↩
27. See, e.g. ECtHR, 23 March 2016, *Blokhin v. Russia*, Appl. no. 47152/06, paras. 179–180.↩
28. See e.g., ECtHR, 21 February 1984, *Öztürk v. Germany*, Appl. no. 8544/79, para. 50; ECtHR, 29 June 2006, *Weber and Saravia v. Germany*, Appl. no. 54934/00, , para. 34.↩
29. ECtHR, 23 November 2006, *Jussila v. Finalnd,* Appl. no.73053/01, para. 43, establishing that tax-surcharges differ from the hard core of the criminal law.↩
30. ECtHR, 8 June 1976, *Engel and Others v. The Netherlands,* Appl. nos. 5100/71 et al. See, M. Arslan, "Principal questions about administrative criminal sanctioning regimes in the European Convention on Human Rights", in: U. Sieber (ed.), *Prevention, Investigation, and Sanctioning of Economic Crime*, (2019) 90 (2) *Rev. International Droit Penal*, 281-298; and in the same volume, L. Bachmaier, "New crime control scenarios and the guarantees in non-criminal sanctions: presumption of innocence, fair trial rights and the protection of property", 299-334.↩
31. Para. 81.↩
32. See ECtHR, *Oleksandr Volkov v. Ukraine, op. cit.* (n. 14), paras. 93-95; ECtHR, *Kamenos v. Cyprus*, *op. cit.* (n. 14), paras. 51-53; and more recently ECtHR, 9 February 2021, *Xhoxhaj v. Albania*, Appl. no. 15227/19.↩
33. See ECtHR [GC], *Ramos Nunes de Carvalho e Sá v. Portugal*, *op. cit.* (n. 19), paras. 124-128.↩
34. *Ibid*, para. 196. The arguments are even more questionable since in the instant case the subsidiary law applicable to the disciplinary proceedings against judges was the Criminal Code of Procedure of Portugal, which reinforces the idea that the sanctions applied in this case have a clear punitive effect.↩
35. P. Caeiro, *op. cit.* (n. 2), p. 187 et seq.↩
36. *Delicta propria*, or *Sonderdelikte*. See the dissenting opinion by judge Pinto de Albuquerque in ECtHR [GC], 15 November 2016, *A and B v. Norway*, Appl. nos. 24130/11 and 29758/11, para.16. In the same regard, P. Caeiro, *op cit.* (n. 2), p. 187; and Judge Pinto de Albuquerque in the concurring opinion in *Ramos Nunes de Carvalho e Sá v. Portugal, op. cit.* (n. 19), para 30.↩

About eucrim

eucrim is the leading journal serving as a European forum for insight and debate on criminal and "criministrative" law. For over 20 years, it has brought together practitioners, academics, and policymakers to exchange ideas and shape the future of European justice. From its inception, eucrim has placed focus on the protection of the EU's financial interests – a key driver of European integration in "criministrative" justice policy.
Editorially reviewed articles published in English, French, or German, are complemented by timely news and analysis of legal and policy developments across Europe.
All content is freely accessible at https://eucrim.eu, with four online and print issues published annually.

Stay informed by emailing to eucrim-subscribe@csl.mpg.de to receive alerts for new releases.
The project is co-financed by the Union Anti-Fraud Programme (UAFP), managed by the European Anti-Fraud Office (OLAF).

Co-funded by
the European Union