The impact of Article 6, § 1, of the European Convention on Human Rights on the proceedings before the Belgian Council of State

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I. Competence of the Council of State

A. Disputes concerning subjective rights

1. In this introduction, a short description will be given of the system of adjudication of administrative law cases in the Belgian legal order. The starting point is to be found in the Articles 144 and 145 of the Constitution.

These Articles deal with disputes concerning so-called "subjective rights". According to the Court of Cassation, a subjective right is the object of a dispute whenever a plaintiff alleges that the defendant refuses to fulfil a precise obligation, which is directly imposed on him by a statute or a regulation. The essential feature is that for the fulfilment of the obligation, the law leaves no room for any discretion. Typical examples of such disputes are those involving a claim for payment of a salary or a pension, or for payment of compensation because of breach of a contract or because of a wrongful act.

Within the category of disputes concerning subjective rights, the only sort of disputes envisaged by the drafters of the original Constitution (1831), a distinction is made between disputes concerning "civil rights" and disputes concerning "political rights". According to Article 144, disputes


\[2\] There are no other subjective rights than civil rights and political rights (see Cass., 21
concerning civil rights belong exclusively to the competence of the ordinary courts. According to Article 145, disputes concerning political rights belong in principle to the competence of the ordinary courts, but are subject to the exceptions provided by statute; the legislator is thus empowered to provide for the adjudication of disputes concerning political rights by administrative courts.

It remains unclear, however, what is a civil right and what is a political right. Whenever a right corresponds to an obligation placed upon a public authority, in the exercise of a function that is significantly related to the prerogatives of a public authority, it is assumed that the right is of a public nature\(^3\). Besides these rights, social security rights have also been held to belong to the category of political rights\(^4\).

Of particular importance for the competence of administrative courts is the constant holding of the Court of Cassation that the right to reparation for a wrongful act is a civil right, even if the tort consists of the violation of a political right\(^5\) or of an unlawful exercise of discretionary power\(^6\). This means that there is a constitutional obstacle to conferring on administrative courts the power to decide on the reparation to be offered by a public authority, in case its unlawful act has caused damage to a citizen.

2. Administrative courts can thus be entrusted with the task of deciding on disputes concerning political rights.

In practice, however, there are relatively few cases in which disputes of this kind still belong to the jurisdiction of administrative courts. In the last decades, the jurisdiction over social security and social welfare matters has been transferred from administrative tribunals to the labor courts; recently,
the jurisdiction over tax matters, to the extent that it belonged to
administrative tribunals, has been transferred to the civil courts.

What remains for administrative courts, are some rather exceptional
matters, such as disputes concerning local elections or concerning pensions
for war victims. In general, for such kind of cases, jurisdiction is given to an
administrative tribunal, composed in whole or in part of members who are
not professional judges; in principle, its decisions can then be challenged
before the Council of State, in a so-called "administrative cassation"
procedure (Article 14, § 2, of the co-ordinated Acts on the Council of
State). In these cases, the Council can only quash the challenged decision
(and send the case back to the administrative tribunal), or dismiss the
appeal. Exceptionally, the Council of State decides itself on the merits of
the case, either as jurisdiction of first and last instance or as appellate
jurisdiction (Article 16 of the co-ordinated Acts on the Council of State, in
particular with respect to local elections).

B. Disputes of an objective nature

3. Most of the jurisdiction of the Council of State - in perhaps 95 to 99%
of the cases - relates to disputes of an entirely different nature than those
discussed until now.

Indeed, the essential task of the Council of State is to decide on pleas of
annulment, for violation of substantial forms or forms prescribed on penalty
of annulment, or for excess or abuse of power, directed against individual
acts or regulations of the different administrative authorities (Article 14, §
1, of the co-ordinated Acts on the Council of State). In 1999, after the
Arbitration Court (constitutional court) had found that gaps in the possibility
to challenge acts of an administrative nature before the Council of State
were incompatible with the Constitution, the Council’s jurisdiction has been
extended to administrative acts of legislative assemblies and of judicial
organs, with respect to matters relating to public procurement and
personnel (ibid.).

In these cases, the challenged act is of a public authority acting in the

7 See further, no. 27.
exercise of a discretionary power. The citizen is thus unable to invoke a subjective right, in the sense described above. For that reason, the disputes involved are often qualified as disputes of an "objective" nature.

With respect to pleas of annulment, the Council of State acts as jurisdiction of first and last instance. Its jurisdiction is limited, however, to the annulment of the challenged act or to the dismissal of the plea\(^8\); it cannot decide, in lieu of the public authority, on the policy aspects involved, and therefore cannot reform the challenged act or replace it by another decision.

To be complete, it should be noted that with respect to certain areas of administrative action, the legislator has granted the decision-making power immediately to an administrative tribunal, because of the independence and the impartiality deemed necessary. This is the case, e.g., for decisions on requests of asylum seekers to obtain the status of refugees, at least once it has been determined that the request is not manifestly ill-founded\(^9\), or for decisions on the question whether or not the sanction of non-reimbursement by the social security system of acts performed by a practitioner of a medical profession should be imposed\(^10\). In those cases, the judicial decision of these tribunals can be challenged before the Council of State by way of a cassation appeal, as mentioned above (supra, no. 2).

4. When the Council of State was created, in 1946, the legislator felt that the competence to annul administrative acts was compatible with the Constitution, since this type of adjudication was considered to fall outside the scope of application of the Articles 144 and 145 of the Constitution. The Council's task was essentially to fill a gap, not to encroach upon the existing jurisdiction of the ordinary courts.

In order to ensure that the jurisdiction of the ordinary courts remains intact, Article 158 of the Constitution gives competence to the Court of

\(^8\) Before examining the plea of annulment, the Council can also suspend the challenged act (Article 17 of the co-ordinated Acts on the Council of State) and order provisional measures (Article 18 of the co-ordinated Acts).

\(^9\) The examination of the merits of the request does then belong to the jurisdiction of the "Permanent Appeals Commission for refugees".

\(^10\) The relevant power, which is similar to a disciplinary power, belongs to an "Appeals Commission with the Office for medical care of the National Institute for insurance against sickness and invalidity".
Cassation to decide on "conflicts of attribution", i.e. conflicts of competence between ordinary and administrative courts. This function is exercised, not through some kind of preliminary proceedings, but through the cassation review of judgments handed down in last instance. For that reason, judgments of the Council of State are subject to a cassation appeal to the Court of Cassation, but only in so far as they decide on the question of competence of the Council of State (Article 33 of the co-ordinated Acts on the Council of State). In the cases where a judgment of the Council of State has been challenged, the Court of Cassation has had mostly to examine whether the real object of the dispute before the Council concerned subjective (civil) rights or (merely) the legality of an administrative act; sometimes the Court had to decide whether the act challenged before the Council emanated from an "administrative authority" or from an organ of a different nature. The Court of Cassation has thus been in a position to effectively watch over the preservation of the jurisdiction of the ordinary courts.

During decades, the Council of State had no explicit legal basis in the Constitution. Rather, apart from its cassation competence with respect to political rights, it operated outside the Constitution. This situation changed in 1993, when an Article, now Article 160, was inserted, which provides that there is a Council of State. The Constitution further mentions that the Council adjudicates, by way of judgment, as an administrative court, in the cases determined by statute. The new Article 160 thus does not substantially change the position of the Council of State, but only gives it a constitutional recognition, as is the case for the ordinary courts and the Court of Arbitration (constitutional court).

II. Applicability of Article 6 of the European Convention on Human Rights

A. Determination of civil rights and obligations

5. Article 6, § 1, of the European Convention on Human Rights (hereafter:

11 Article 160 also provides that the Council of State gives opinions, in the cases determined by statute. This function is carried out by the "legislation" section (see further, no. 40).
ECHR) provides for certain guarantees whenever there is a determination of civil rights and obligations. The applicability depends on two elements: the existence of a dispute over rights or obligations, on the one hand, and the civil nature of these rights or obligations, on the other hand.

Both elements will be examined, in the light of the case law of the Council of State.

1. Dispute over rights or obligations

a. The dispute

6. According to the well-established case law of the European Court of Human Rights, there must be a dispute "("contestation" in the French text) over a "right" (or an "obligation") which can be said, at least on arguable grounds, to be recognised under domestic law. The dispute must be genuine and serious; it may relate not only to the existence of a right, but also to its scope or the manner of its exercise. The outcome of the proceedings must be directly decisive for the right in question\textsuperscript{12}.

7. The question whether or not there is a "dispute" and, if so, whether it is a genuine and a serious one, does not seem to have given rise to any case law of the Council of State.

As to the question whether "rights" are involved, one can refer to two decisions by which the Council held that, in a dispute raised by an appeal against an administrative act, no rights of the administration (defendant) were concerned\textsuperscript{13}. The Council has never been in a position where it had to express itself on the existence of the "rights" relied on by the applicant.

8. As to the link that has to exist between the dispute and the rights in question, a matter that is of particular relevance in annulment cases, there are only few decisions where this issue is explicitly discussed.


\textsuperscript{13} Council of State, 3 July 1992, n.v. Imsay, no. 39.979; Council of State, 2 December 1993, n.v. Imsay, no. 45.119.
Practically all of these decisions deal with the effects of the outcome of the dispute on rights in the professional sphere. It is probably not a coincidence that in the only case thus far concerning a procedure before the Belgian Council of State, which gave rise to a judgment of the European Court of Human Rights (De Moor case), the issue of the determination of a right related also to such a right, more precisely the right to be admitted to the profession of advocate.  

For its part, the Council of State has held that an appeal against the withdrawal of a licence to practice a profession concerned that right itself. A dispute concerning the appointment of a person to a position in an educational institution, and thus the non-appointment of the applicant before the Council of State, was held to concern the right of the applicant to practice the profession of teacher. A dispute concerning the non-reimbursement by the social security system of the medical acts performed by a physician, was considered to be a dispute relating to the right of the physician to practice his medical profession; in holding so, the Council knowingly adopted a broader interpretation of Article 6, § 1, than the European Commission, which had refused to apply Article 6, § 1, in a similar case.

Some decisions deal with measures having a serious impact on the status as a civil servant, such as a removal or an unpaid leave of absence. Here the Council held that, unlike comparable measures taken against members of a liberal profession, the said measures had no effect on the right to practice a profession as such, but only on the right to have a particular employment. This line of decisions, which admittedly is questionable, does not seem to have been continued.

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15 See, with respect to the licence to work as a dock-worker, Council of State, 20 December 1984, Broeckx, no. 24.937; Council of State, 3 July 1986, Broeckx and Van Craen, no. 26.840; Council of State, 28 June 1990, Petkovics, no. 35.295. 
16 Council of State, 13 March 1990, De Ridder, no. 34.348; Council of State, 15 May 1990, De Ridder, no. 34.891. 
18 Council of State, 20 January 1988, Cornet, no. 29.183; Council of State, 7 December 1988, Beugnies, no. 31.567; Council of State, 13 September 1989, Jonas, no. 32.996; Council of State, 18 December 1990, Simar, no. 36.038. 
19 See further, with respect to measures concerning civil servants, nos. 11-13.
In two decisions, an appeal against an administrative decision was held to concern rights the applicant could draw from a licence sought or revoked. So, when the holder of a transportation licence appealed against the decision revoking the licence, the Council held that the dispute concerned the exercise of activities as a businessman and the right of an owner to use his possessions in conformity with the law's requirements. In another case, the distributor of a movie appealed against a decision which refused him the access of minors to the movie; the Council held that the dispute had a direct effect on the right to distribute the movie, which was exercised through contracts entered into with cinema operators.

b. The proceedings

9. In order to determine whether Article 6, § 1, ECHR is applicable to a given stage of the proceedings, it must be established that the outcome of the proceedings in that stage already is, or still is, decisive for the rights in question.

In this respect, the Council of State has held that a decision on interim measures, such as a request for a stay of the execution of an act, does not constitute a determination of (civil) rights and obligations.

Reference should also be made to a decision of the European Commission of Human Rights, holding that Article 6, § 1, was not applicable to an application for review of proceedings already definitively closed by a judgment of the Belgian Council of State.

2. Civil character of the rights and obligations

10. In its judgments, the European Court of Human Rights often recalls that the concept of "civil rights and obligations" is not to be interpreted

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solely by reference to domestic law, and that Article 6, § 1, ECHR applies irrespective of the status of the parties, as of the character of the legislation which governs how the dispute is to be determined and the character of the authority which is invested with jurisdiction in the matter²⁴.

It can thus not be excluded a priori that "rights" that are the object of a dispute before the Council of State, are of a "civil" nature, in the sense of Article 6, § 1, ECHR. The fact that it is constitutionally impossible for the Council of State to adjudicate on "civil rights", in the sense of Article 144 of the Constitution (see above, no. 1), cannot be an obstacle to this finding, given the "autonomous" meaning of the terms of the ECHR.

a. Civil service

11. By far the area, in which the question of the applicability of Article 6 ECHR has been raised most, is that of civil service.

The first time the Council of State had to decide on this question was in the Vercammen case. The Council held, on 26 September 1984, as follows:

"4.5.4. ... Conditio sine qua non for the application of (the Articles 6, § 1, and 13) ECHR is that the applicant did not hold an official post, in other words did not practice a profession that has to be considered as one of a civil servant, so that the case concerns a civil right, in the specific sense of Article 6, § 1, ECHR.

4.5.5. It is not disputed that the applicant, as member of the staff of an inter-municipality association, is in an established legal position. However, it does not follow automatically that the applicant was a civil servant in the real sense of the word.

A distinction has to be made between the activities, functions and employments at the service of the public authority, depending on whether they are or are not to be considered as typical duties of the public authority, on whether they typify or do not typify the specific activity of the public authority, on whether they involve or do not involve participation in the

activities of a public authority in the proper sense (comp. Court of Justice of the European Communities, 17 December 1980).

The applicant was a cleaning woman in a swimming pool; this is not an activity that is to be considered as a typical task of a public authority. The applicant therefore did not practice a profession which is one of a civil servant; this case positively concerns a dispute over a civil right in the sense of the Convention, and therefore Article 6, § 1, ECHR is applicable."25

This "functional" criterion has been applied on other occasions by part of the panels of the Council of State. Article 6, § 1, was thus considered to be applicable in cases concerning the recruitment, the career or the termination of the service of a professor in a State institution of higher education26 and of a handworker at a public water distribution company27. On the basis of the same criterion, Article 6, § 1, was held not to be applicable to disputes concerning a postal worker who handled public funds28, an employee at a public prosecutor’s office29, and a mayor30.

12. During many years, this case law has given evidence of a much broader interpretation of the scope of application of Article 6, § 1, than the one adopted by the organs of the ECHR. Indeed, in a number of cases, including some relating to procedures before the Belgian Council of State, the European Commission held that litigation concerning access to, or dismissal from civil service, fell outside the scope of application of Article 6, § 131, or at least that such litigation fell "in principle" outside the scope of application of the said article32. Meanwhile, the European Court too had

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26 Council of State, 13 March 1990, De Ridder, no. 34.348; Council of State, 15 May 1990, De Ridder, no. 34.891. The Council quoted extensively from the Vercammen judgment, and considered that teaching could not be considered as a typical task of a public authority, since education could also be organized by private initiative.
27 Council of State, 2 October 1990, Baeten, no. 35.619.
28 Council of State, 10 July 1990, Wambacq, no. 35.435.
29 Council of State, 10 May 1993, Van den Langenbergh, no. 42.869.
30 Council of State, 15 March 1994, Verleye, no. 46.516.
adopted the view that disputes relating to the recruitment, the career and the termination of service of civil servants were, at least as a general rule, outside the scope of Article 6, § 1 33.

It is this more restrictive interpretation of the scope of application of Article 6, § 1, which was followed by other panels of the Council of State. Practically all of the cases, in which these panels decided on the applicability of Article 6, were of a disciplinary nature. The Council held, mostly without any further analysis, that disciplinary disputes involving a civil servant did not concern civil rights of obligations34.

13. As one knows, on 8 December 1999, in the Pellegrin case, the European Court abandoned its case law, as it had proven to lead to legal uncertainty and to inequality between persons in state service performing equivalent duties. It explicitly announced that it adopted a new criterion, being a functional one, based on the nature of the employee's duties and responsibilities. At the same time, the Court reversed the principle: disputes between employers and employees, even in the public sphere, now fall as a general rule within the scope of application of Article 6, § 1. According to the new criterion, "the only disputes excluded from the scope of Article 6, § 1, of the Convention are those which are raised by public servants whose duties typify the specific activities of the public service in so far as the latter is acting as the depository of public authority responsible for protecting the general interests of the State or other public authorities"35.

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The *Pellegrin* decision substantially follows the *Vercammen* line of reasoning, inaugurated in 1984. It can be expected that all panels of the Council of State will now adopt the functional criterion.

b. Business and professional activities

14. In some cases, the Council of State has qualified rights relating to business and professional activities as "civil rights".

With respect to the right to practice the profession of dock-worker, the Council observed that, notwithstanding the licence that was required, the persons concerned worked as wage earner, i.e. as private person. The Council further held that the rights related to a transportation licence were of a civil nature, in the sense of Article 6, § 1, ECHR, as the European Court of Human Rights had interpreted this provision in the *Benthem* case. Indeed, the licence related to the exercise of a profession as a businessman, as well as to the right of an owner to use his possessions in conformity with the law’s requirements; it had, moreover, a pecuniary character. For all these reasons, the dispute on the withdrawal of a licence concerned civil rights.

The right to exercise the profession of taxi driver, a profession that did not belong to the civil service, likewise was qualified as a civil right.

The rights of the distributor of a movie were also considered to be civil rights, having regard to the private law contracts by which they were put in practice, as well as to the pecuniary nature of these rights.

Finally, it should be recalled that in the *De Moor* case, which originated from proceedings before the Council of State and which ended at the European Court, the right at issue was the right to be admitted to the profession of advocate. The European Court held that this was a civil right. In a similar vein, the Council of State gave the same qualification to

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the right to practice the medical profession\textsuperscript{42}.

c. Physical planning and environmental protection

15. Disputes relating to building permits, environmental permits, etc., clearly belong to the category of disputes to which Article 6, § 1, ECHR applies.

In the case law of the Council of State, there seems to be only one decision that does explicitly acknowledge that this is indeed the case\textsuperscript{43}.

d. Situation of aliens

16. Practically half of the caseload before the Council of State concerns applications by aliens against measures refusing to grant them the right to enter or to stay in the country, or refusing to grant them the status of refugee\textsuperscript{44}.

In a large number of these cases, a violation of human rights is invoked. Article 6 ECHR is one of the articles that are popular among the applicants. The Council of State, however, has always considered that such disputes do not involve the determination of "civil" rights, and therefore do not fall within the scope of application of Article 6, § 1\textsuperscript{45}.

This case law is in line with the constant holding of the European Commission, according to which procedures to determine whether an alien should be allowed to stay in a country or should be expelled, including political asylum procedures, do not involve the determination of civil rights\textsuperscript{46}.

\textsuperscript{42} Council of State, 29 July 1997, De Saedeleer, no. 67.605.
\textsuperscript{43} Council of State, 12 May 1995, s.p.r.l. Société Couvinoise de Carburants, no. 53.237. The case concerned an appeal against a refusal to grant a building permit. The Council referred to the \textit{Benthem} judgment of the European Court of Human Rights, mentioned above (see footnote 37).
\textsuperscript{44} See further, no. 61.
e. Financial benefits and contributions

17. An area where there still remains uncertainty about the precise limits of the scope of application of Article 6, § 1, ECHR, is that of taxes, on the one hand, and social security and other compensation systems, on the other hand.

The Council of State is only marginally concerned by this issue, since tax and social security matters are practically all excluded from its jurisdiction. It does retain, however, some jurisdiction, as a cassation court, with respect to claims for compensation not falling within the ordinary social security system.

In two instances, the Council had to decide whether these claims involved "civil rights", in the sense of Article 6, § 1, ECHR.

The first case dealt with a claim for compensation for damages suffered by a Belgian citizen, due to the granting of independence to the former Belgian Congo. The Council held that the dispute did not involve civil rights, but rights relating to a financial aid by the State, resulting from a duty of national solidarity.

The other case concerned a claim for revision of an invalidity pension granted to a war-invalid. The Council admitted that the right to a pension had a personal and a pecuniary character and that the amount of the pension was of substantial importance for the applicant, and considered that these were features of private law. It considered, however, that there were also a number of features of public law: the public nature of the applicable law, the financing by the State, and the absence of the idea of liability based on fault; as to the last element, the Council stressed, here too, that the pension in question was based on the idea of national solidarity. After having found that the public-law features were significantly more important that the private-law features, the Council concluded that no civil right was at stake. Without referring to the case-law of the European Court, it is obvious that the Council applied criterions that have also been

47 Council of State, 8 October 1993, Kimpe, no. 44.403.
48 Council of State, 3 June 1997, Godderis, no. 66.512.
used by that Court.

18. The *J.R. v. Belgium* case, which recently has been referred to the European Court by the European Commission, will offer the Court a new occasion to give some guidance in this area.

That case originated from an application concerning the length of proceedings before administrative tribunals dealing with a claim for compensation for the damage suffered as the result of an accident occurred during a recall of the applicant as a reserve officer. Before the Commission, the Belgian government relied on the reasoning developed by the Council of State in the second of the above-mentioned cases.

In its opinion, the European Commission looked at the matter differently. It considered that the claim had a purely pecuniary character, and that the payment of compensation did not depend on the exercise of any discretionary power. It therefore concluded that, notwithstanding the no-fault character of the liability of the State, the right at issue was a civil one.

The Commission thus seemed to follow the case law of the Court.

B. Determination of a criminal charge

19. Until now, there have been no cases before the Council of State where it could reasonably have been argued that the case concerned the determination of a "criminal charge", in the sense of Article 6, § 1, ECHR.

A case which was related to a criminal procedure, concerned an appeal against a decision of the Minister of Justice to extradite a person, so that he could stand trial in another country. The Council held that the Minister...
had not to decide on any charges, so that Article 6 did not apply to the procedure followed before him\textsuperscript{52}.

III. Right to a court

20. According to the European Court of Human Rights, "Article 6, § 1, secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court", of which the right to access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only"\textsuperscript{53}. Another aspect of the right to a court is the right to a "judicial determination of the dispute"\textsuperscript{54}.

Both aspects deserve a closer look, in particular with respect to cases that can be brought before administrative courts.

A. Right of access to a court

1. Possibility to institute proceedings

a. Disputes concerning subjective rights

21. There can be no problem to bring a claim, based on the violation of a subjective right, before a court. As has been explained above, claims concerning civil rights, in the sense of Article 144 of the Constitution, can be brought before the ordinary courts, whereas claims concerning political rights, in the sense of Article 145 of the Constitution, can be brought before the ordinary courts or, if an administrative tribunal has been created for the adjudication of such claims, before that tribunal\textsuperscript{55}.

\textsuperscript{52} Council of State, 10 December 1996, Di Tomasi, no. 63.483.
b. Disputes of an objective nature

22. According to Article 14 of the co-ordinated Acts on the Council of State, in its initial version, a plea of annulment could be brought against individual acts or regulations of "administrative authorities". Remained outside the scope of jurisdiction of the Council: acts of legislative authorities, acts of judicial authorities, and some acts of administrative authorities which the legislator, explicitly or implicitly, had withdrawn from the Council's jurisdiction. It was not always clear whether other possibilities existed to challenge such acts. In any event, these exceptions have given rise to a number of judicial and legislative developments, especially in the last ten years.

23. In this respect, one may start with the situation of acts emanating from judicial authorities or authorities active in the environment of the judiciary.

An important case has been the *De Moor* case, concerning an appeal by a lawyer against a decision of a bar council, which refused to enrol him on the list of pupil advocates. In the past, the Council of State had declared itself incompetent with respect to appeals against decisions of authorities of the bar, having regard to the opinion expressed by the legislator during the drafting of the relevant statutory provisions. This time, the applicant denounced that situation, leaving him in fact without any possibility to challenge the refusal to enrol him, as a violation of Article 6, § 1, of the European Convention. The case was therefore referred to the general assembly of the adjudication section ("section of administration") of the Council of State, which constituted a very exceptional step. In its judgment of 31 October 1991, however, the Council did not reverse its case law. It repeated that the legislator had withdrawn acts of authorities of the bar from its jurisdiction, and added that "the right to have his case heard by an independent and impartial national tribunal, which the applicant (inferred) from Article 6, § 1, ECHR, (did) not mean that the Council of State (had) to

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55 See above, no. 1.
rule on a matter which (fell) outside its jurisdiction.  

The applicant then filed a complaint with the European Commission of Human Rights, which brought the case before the European Court. In its judgment of 23 June 1994, the Court did not examine the case from the point of view of the right of access to a court. However, taking into account the fact that no remedy had been available to the applicant, the Court examined whether the proceedings before the bar council satisfied the requirements of Article 6, § 1. In this respect, the Court found that the bar council had not given the applicant's case a fair hearing (having regard to the defective reasons given in its decision) and, moreover, that no public hearing had been held and that the decision had not been delivered in public. The proceedings before the bar council therefore had been conducted in breach of Article 6, § 1.

Indirectly, the lack of jurisdiction of the Council of State had thus contributed to the finding of a violation of Article 6, § 1. Indeed, since the Council had not examined the merits of the applicant's plea, the proceedings before it had not "corrected" the deficiencies of the proceedings before the bar council.

Even before the judgment of the European Court had been handed down, the legislator had reacted in order, among other things, to fill the gap. By an Act of 19 November 1992, he made it possible for an applicant whose enrolment had been refused, to appeal to the "disciplinary appeals board", a judicial organ composed of ordinary judges and members of the bar.

The Act of 19 November 1992 concerned only individual acts. The question remained whether regulations, adopted by the authorities of the bar, could henceforth be challenged before the Council of State.

The Council had the occasion to express itself on this question, when a plea of annulment was filed with it by the member of a bar, directed against the regulation of a bar council, relating to various aspects of pupillage. This case was again referred to the general assembly of the adjudication section, and the applicant again invoked Article 6 (as well as Article 13) ECHR in

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56 Council of State, 31 October 1991, De Moor, no. 38.014.
58 See, for the further amendments contained in the act, the description given in the De Moor judgment of the European Court, o.c., p. 12, § 31.
favor of the jurisdiction of the Council of State. The Council, however, by judgment of 15 September 1997, did not change its position: it continued to refer to the opinion of the legislator as it appeared from the preparatory work of the relevant provisions, and concluded that it had no jurisdiction. There was no explicit rejection of the argument based on the ECHR\textsuperscript{59}.

This judgment is now the object of an application before the European Court of Human Rights; the case is still in the admissibility stage of the proceedings.

24. While the \textit{De Moor} case was under consideration by the European Court, the question arose whether a registrar of a court could challenge before the Council of State a disciplinary sanction imposed on him by the procureur general at the court of appeal.

The Council considered that it seemed to be without jurisdiction to hear the case, as the act under review did not emanate from an "administrative" authority. Before deciding in that sense, however, it requested a preliminary ruling from the Arbitration Court on the question whether such a situation did not violate some provisions of the Constitution, as well as Article 6 ECHR\textsuperscript{60}.

The Arbitration Court held that, if there was indeed no possibility of any appeal, the law violated the constitutional provisions guaranteeing the rights to equality and non-discrimination. It noted, however, that there seemed to be a possibility of a cassation appeal with the Court of Cassation; if the law were interpreted in a sense that allowed for such an appeal, there would be no violation of higher norms\textsuperscript{61}.

Unfortunately, the case has not received a final determination. In the subsequent proceedings before the Council of State, the Council had to find that the applicant did not intend to pursue his application till the end, and therefore the Council had to close the proceedings without any decision on the question of its jurisdiction\textsuperscript{62}.

\textsuperscript{59} Council of State, 15 September 1997, Misson, no. 68.116.
\textsuperscript{60} Council of State, 6 May 1993, Van Damme, no. 42.818.
\textsuperscript{62} Council of State, 8 October 1996, Van Damme, no. 62.403.
25. Recently, a new issue involving a "gap" in the system of judicial review has been raised.

In a case concerning an appeal by a bailiff against a disciplinary sanction imposed by the council of a chamber of bailiffs, the Council of State held that the rule of law required that the bailiff should be able to have resort to a court. Having regard to the legal texts as they existed at the time of the filing of the plea of annulment\(^63\), the Council came to the conclusion that it was not the intention of the legislator to grant it jurisdiction in this field. It then went on to request a preliminary ruling from the Arbitration Court on the question whether or not the law, interpreted in the sense of denying jurisdiction to the Council of State, was compatible with the constitutional principles of equality and non-discrimination\(^64\).

The case is still pending before the Arbitration Court.

26. Meanwhile, the question of the impossibility to challenge an administrative act of a legislative assembly, such as an act relating to matters of personnel or public procurement, had also been raised.

In a preliminary ruling, in a case relating to a disciplinary sanction imposed on a staff member, the Arbitration Court had held that the absence of a possibility to challenge administrative acts of a parliamentary assembly or its organs, entailed a violation of the constitutional principles of equality and non-discrimination\(^65\).

In reaction to this ruling, some panels of the Council of State underlined that the Arbitration Court had based its ruling on the interpretation of Article 14 of the co-ordinated Acts on the Council of State in a sense that would exclude acts of legislative authorities from the jurisdiction of the Council. This was indeed the interpretation explicitly adopted in the request for a preliminary ruling. The panels in question held, however, that a different interpretation was perhaps possible, and that, moreover, in that other interpretation there would be no discrimination. For these panels of the Council, this was a sufficient reason to retain jurisdiction, at least for

\(^{63}\) Meanwhile, an act had made possible an appeal to a newly created appeals board, comparable to the one existing for the members of the bar.

\(^{64}\) Council of State, 7 June 1999, Wijnen, no. 80.682.

the consideration of requests for urgent interim measures\textsuperscript{66}.

Each of these cases was referred to the general assembly of the adjudication section, for consideration of the jurisdiction issue in connection with the merits. At the moment of its decision, the issue had been solved by the legislator: an Act had amended Article 14 of the co-ordinated Acts, so as to bring also certain acts of legislative assemblies under the Council's jurisdiction. The general assembly limited itself, in its judgment, to take notice of this new law and to apply it in the instant cases, without developing any reasoning based on the Constitution or the ECHR\textsuperscript{67}.

27. The Act in question is an Act of 25 May 1999, which contains a number of amendments of the co-ordinated Acts on the Council of State.

Article 14 of the co-ordinated Acts is replaced by a new text, of which § 1 provides, as has been explained above\textsuperscript{68}, that a plea of annulment can be brought against acts and regulations of the different administrative authorities, as well as against administrative acts of legislative and judicial organs, with respect to matters relating to public procurement and personnel.

This change has been inspired by the judgments of the Arbitration Court in the cases of the registrar of a court and of the staff member of a parliamentary assembly\textsuperscript{69}.

It should be noted, however, that it is uncertain whether the amendment also solves the problems raised in relationship to the decisions of the authorities of the bar and of the bailiffs\textsuperscript{70}. In this respect, Article 6, § 1, ECHR may still play a role as an element to be relied upon for a change, especially in the case law.

2. Effectiveness of the access to the Council of State

\textsuperscript{66} Council of State, 17 December 1997, n.v. Ondernemingen Jan De Nul and n.v. Envisan, no. 70.402; Council of State, 16 March 1998, Van Damme, no. 72.464; Council of State, 24 April 1998, n.v. Ondernemingen Jan De Nul and n.v. Envisan, no. 73.266.

\textsuperscript{67} Council of State, 9 November 1999, n.v. Ondernemingen Jan De Nul and n.v. Envisan, nos. 83.413 and 83.414, and Van Damme, no. 83.415.

\textsuperscript{68} See above, no. 3.

\textsuperscript{69} See above, nos. 24 and 26. See the reference to these cases in Parl.Doc., Senate, 1998-99, no. 1-361/3, p. 2.

\textsuperscript{70} See above, nos. 23 and 25.
28. As the European Court has held, the right of access is not supposed to be a theoretical or illusory right, but a practical and effective one.\footnote{See, e.g., E.Ct.H.R., 9 October 1979, Airey, \textit{Publ.Court}, Series A, vol. 32, pp. 12-13, § 24.}

The Council of State explicitly relied on this holding by the European Court in its \textit{Vercammen} case, already mentioned.\footnote{See above, no. 11.}

In that case, the applicant appealed against her dismissal by an inter-municipality association. However, she had first gone to a labor court, which declared itself without jurisdiction, and only then filed an appeal with the Council of State, long after the expiration of the time limit (60 days). The Council was nevertheless prepared to hear her case. It held that, since there could be a reasonable doubt as to which of the two courts had jurisdiction, a new time for appealing started to run from the day of the notification of the judgment by which the labor court declared itself without jurisdiction.\footnote{Council of State, 26 September 1984, Vercammen, no. 24.689. In the same sense, Council of State, 2 October 1990, Baeten, no. 35.619.}

The Council thus anticipated on the case law to be inaugurated by the European Court some years later. The European Court has indeed held that, for the right of access to be effective, an individual must have a clear and practical opportunity to challenge an act that is an interference with his rights. For that reason, not allowing an individual to bring proceedings, on the basis of procedural rules that are not sufficiently clear, constitutes a denial of the right of access.\footnote{See E.Ct.H.R., 16 December 1992, de Geouffre de la Pradelle, \textit{Publ.Court}, Series A, vol. 253-B, pp. 40-43, §§ 27-35; E.Ct.H.R., 4 December 1995, Bellet, \textit{o.c.}, vol. 333-B, pp. 39-43, §§ 28-38; E.Ct.H.R., 30 October 1998, F.E. v. France, \textit{Rep.}, 1998-VIII, pp.}

29. The effectiveness of the right of access has also been invoked by applicants who, after having received the memorial in reply of the defendant, or a notice by the registry that no such memorial had been filed, failed to file a memorial of rebuttal or an explanatory memorial, within the time limit set by the law. In such case, the law provides that the applicant is presumed to have lost the legal interest in his case, and the Council is obliged to declare the application inadmissible (Article 21, second
paragraph, of the co-ordinated Acts on the Council of State) 75.

At the request of some applicants, the Council of State referred the matter to the Arbitration Court for a preliminary ruling on the question whether this system was compatible with the Constitution. In two of these cases, the issue of the compatibility with Article 6, § 1, ECHR was also raised. The Arbitration Court, however, saw no problem. It held that the system was set up in order to generally accelerate the proceedings before the Council of State, and thus served a legitimate purpose. The effects on the applicant were considered not to be disproportional, given the fact that the application could not be declared inadmissible in case of "force majeure", and given the fact that the requirement did not impose a heavy burden on the applicant. The Court thus concluded that the system could not be regarded as an unlawful impediment to the access to a court, so much the more because the applicants were explicitly warned by the registry about the consequences of a failure to file a memorial 76.

For the Council of State, these rulings are binding, and they thus close the discussion 77. A re-opening of the discussion is not excluded, however, since it appears that at least one of the unfortunate applicants has filed a complaint with the European Court of Human Rights 78.

B. Right to a judicial determination of the dispute

1. Power of decision

30. As the European Court has held, a "power of decision" is inherent in the very notion of "tribunal" within the meaning of the ECHR 79.

This requirement does not set a problem for the Council of State. Its

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75 Arbitration Court, 6 May 1997, no. 27/97, Moniteur belge, 10 June 1997; Arbitration Court, 15 July 1999, no. 94/99, Moniteur belge, 14 December 1999. See further, no. 67.

76 Arbitration Court, 6 May 1997, no. 27/97, Moniteur belge, 10 June 1997; Arbitration Court, 15 July 1999, no. 94/99, Moniteur belge, 14 December 1999.

77 See, for cases where the Council of State refused to request further preliminary rulings from the Arbitration Court: Council of State, 1 September 1999, K.K., no. 82.167; Council of State, 13 September 1999, Baneton, no. 82.235.

78 A complaint has been filed by the applicant in the case in which the Arbitration Court has handed down its decision on 15 July 1999; the Council of State has taken notice of the complaint, but nevertheless has declared the application before it inadmissible (Council of State, 24 November 1999, Monstrey, no. 83.605).

decisions are binding for the parties and, in case of an annulment of an administrative act, even have an effect "erga omnes". Decisions of administrative tribunals are binding too, under reservation of cassation by the Council of State.

31. The right to a judicial determination of the dispute implies that the courts must be able to rule on all questions put before them, without being bound by decisions taken by administrative authorities.\textsuperscript{80}

In principle, no issue is withdrawn from the examination by the Council of State or the administrative tribunals.

It is true that, in a small number of cases, reference has been made by the Council of State to the theory of the "actes de gouvernement", i.e. acts which, by their nature, are so intimately linked to the exercise of political power, that no judge would be able to review them\textsuperscript{81}. The importance of these references, however, should not be exaggerated. The result would probably have been the same, if the Council of State had based its decision, not on the nature of the act, but on the extent to which the public authority, in performing that act, disposed of a power of discretion.

2. Prior intervention of administrative or judicial bodies, and judicial review by the Council of State

32. The European Court has held that, "whilst Article 6, § 1, embodies the "right to a court"..., it nevertheless does not oblige the Contracting States to submit "contestations" (disputes) over "civil rights and obligations" to a procedure conducted at each of its stages before "tribunals" meeting the Article's various requirements. Demands of flexibility and efficiency, which are fully compatible with the protection of human rights, may justify the prior intervention of administrative or professional bodies and, a fortiori, of judicial bodies which do not satisfy


\textsuperscript{81} See, in particular, Council of State, 26 November 1982, Schütz, no. 22.690.
the said requirements in every respect...\(^{82}\).

If the power to adjudicate is effectively conferred upon organs that do not themselves comply with the requirements of Article 6, § 1, then their decisions must be "subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6, § 1 \(^{83}\)."

The Council of State has referred on several occasions to this doctrine\(^{84}\). In order to determine the consequences of it for the procedures before the Council, a distinction has to be made between procedures relating to a plea of annulment and cassation procedures.

a. Procedures relating to a plea of annulment

33. If a judicial review can be sufficient, for the purposes of Article 6, § 1, then the question arises whether the scope of review, generally exercised by the Council of State, meets the requirements of that Article.

In annulment proceedings, the Council is unable to substitute its own decision (on the merits) for that of the administrative authority. It can only quash the act under review. This does not mean, however, that the scope of jurisdiction is insufficient, according to the Council's constant case law\(^{85}\). In holding so, the Council is in line with the case law of the European Court\(^{86}\).

The term "full jurisdiction" indeed is not very adequate with respect to annulment procedures. What is required, is that an appeal is possible, which allows for a challenge of the "lawfulness" of the decision of the

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\(^{84}\) See, e.g., Council of State, 3 July 1986, Broeckx and Van Craen, no. 26.840; Council of State, 1 December 1987, p.v.b.a. Lambregts Transportbedrijf, no. 28.938; Council of State, 5 May 1988, Thys, no. 30.007; Council of State, 20 December 1988, Dewil, no. 31.650; Council of State, 28 June 1989, Ockerman and Notebaert, no. 32.886, and Vandenberghe, no. 32.887.

\(^{85}\) See, e.g., the judgments mentioned in note 84.

Generally speaking, the court must be able to consider all the submissions relied upon by the parties. These submissions may relate to matters of law, as well as to matters of fact. As far as the law is concerned, the court must have the power to examine whether the administrative authority remained within the limits set by the law; in this respect, the court must be able to examine the act under review "in the light, inter alia, of principles of administrative law." As far as the facts are concerned, the court must have jurisdiction to "ascertain" facts, or at least to "rectify factual errors." One possibility is that the court can establish the facts itself, in a trial "de novo". However, Article 6, § 1, does not seem to prohibit that the court relies on facts established by the administrative authority. In the latter hypothesis, it is nevertheless imperative that the procedure before the administrative authority offers some safeguards as to the decision-making process and, moreover, that the court has the power to satisfy itself that the administration relied on evidence capable of supporting a finding of fact, and that the administration's decision is based on an inference from facts which is not one which no administration, acting properly, would have drawn.

The Council of State considers that its scope of review satisfies the requirements of Article 6, § 1. It refers to the fact that it can review the lawfulness of an act, "in all its aspects." With respect to the review of facts, it underlines that it can check whether the act challenged before it has a "factual basis" or, in other words, that it can evaluate the

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93 Council of State, 5 April 1990, Dossche, no. 34.646.
94 See, e.g., Council of State, 20 December 1984, Broeckx, no. 24.937; Council of State, 3 July 1986, Broeckx and Van Craen, no. 26.840; Council of State, 1 December 1987, p.v.b.a. Lambregts Transportbedrijf, no. 28.938; Council of State, 5 May 1988,
exactness, the relevance and the qualification of the facts, without being bound by the ascertainment of the administrative authority. Since many cases in which Article 6, § 1, is invoked concern sanctions, the Council adds that it can examine whether the sanction is proportionate to the fault established.

The Council admits that, in cases involving an administration's discretionary power, the review thus exercised is only a "marginal" one, not a full one. This kind of control is nevertheless considered sufficient, "since the European Court accepts that, where the administration has a wide discretion, a full judicial control is hardly imaginable".

34. A consequence of the sufficiency of the Council's scope of review is that any defect of the procedure before the administrative authority is remedied by the availability of an appeal to the Council of State. It therefore is not necessary to examine whether the proceedings before that administrative authority did or did not meet the requirements of Article 6, § 1.

The Council of State goes even further. Noting that the procedure to be followed before it in any event meets the said requirements, it holds in most cases that it is not even necessary to determine whether or not Article 6, § 1, is applicable. This has resulted in an absence of any

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97 Council of State, 1 December 1987, p.v.b.a. Lambregts Transportbedrijf, no. 28.938; Council of State, 5 May 1988, Thys, no. 30.007; Council of State, 20 December 1988, Dewil, no. 31.650; Council of State, 28 June 1989, Ockerman and Notebaert, no. 32.886, and Vandenberghe, no. 32.887; Council of State, 19 September 1989, Germonpré, no. 33.021; Council of State, 28 February 1994, Verbiese, no. 46.312. The reference to the European Court's case law is, more precisely, to its judgment of 28 May 1985, Ashingdane, in which the Court considered that a legal obligation, which left "a wide discretion" to the public authority, "would, by its very nature, not be amenable to full judicial control by the national courts" (Publ.Court, Series A, vol. 93, p. 25, § 59).
significant development in the interpretation of the scope of application of Article 6, § 1, at least since 1987.

35. Although the judicial review exercised by the Council of State is sufficient, as a matter of principle, there may be circumstances that exceptionally do not allow for such conclusion.

This is at least what the Council has held in the *W.E.A. Records* case. That case concerned an appeal against a decision of an appeals board, denying the access of minors to a movie. The Council held that the procedure followed by the appeals board, in accordance with the applicable regulation, did not allow the Council to exercise a review of the lawfulness of the decision challenged before it. The Council referred, more particularly, to the absence of legal criterions to be followed by the board, to the absence of an obligation for it to give reasons, and to the absence of a hearing of the distributor of the movie by the board. The Council thus concluded that the board itself had to meet the requirements of Article 6, § 1. Since this appeared not to be the case, its decision was quashed.\(^{100}\)

36. The fact that, apart from exceptional cases, the requirements of Article 6, § 1, do not have to be met in proceedings before organs of an administrative nature, does not mean that Article 6, § 1, is not relevant at all.

To the contrary, the case law of the Council of State shows that, even without a written obligation in that sense, administrative authorities involved in quasi-judicial proceedings are required to meet some basic procedural standards, such as the principle of independence and impartiality (to the extent that it is compatible with the nature of the organ in question), the obligation to give the citizen concerned an occasion to present his point of view, and the obligation to take a decision within a reasonable time.\(^{101}\)

It is quite clear that these standards have been largely inspired by the corresponding standards contained in Article 6, § 1. Even the interpretation of these "general principles" often follows the interpretation given to the

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\(^{101}\) See further, with respect to the reasonable time requirement, no. 57.
provisions of Article 6, § 1, in particular by the European Court.

Article 6, § 1, thus has an influence on administrative procedure, even in the stages for which it is not directly relevant. Unfortunately, within the scope of this report, it is not possible to dwell further on these developments.

b. Cassation procedures

37. With respect to the Belgian Court of Cassation, which has no jurisdiction to enter into a review of the facts as established by the lower court, the European Court has held that its jurisdiction was not sufficient, for the purpose of Article 6, § 1\textsuperscript{102}.

The Council of State, for its part, has seen no reason to look at its jurisdiction in cassation proceedings differently than in annulment proceedings. It thus has decided that the scope of review exercised as a cassation court was sufficient, so that the proceedings before the lower administrative tribunal did not necessarily have to meet the requirements of Article 6, § 1, ECHR\textsuperscript{103}.

Whereas this conclusion may seem questionable, from a theoretical point of view, it seems justified in practice. As a cassation court, the Council of State has indeed adopted review standards which are more comparable to those it applies when reviewing acts of administrative authorities, than to those applied by, e.g., the Court of Cassation.

38. It is not certain, however, whether the foregoing is still valid, since Article 14 of the co-ordinated Acts on the Council of State has been replaced by Act of 25 May 1999. The new Article 14, § 2, dealing with the cassation appeals, provides that the Council of State "does not enter into an examination of the case itself". These are exactly the words Article 147 of the Constitution uses with respect to the Court of Cassation. Moreover, during the legislative process, it has been said that the Council of State, as


\textsuperscript{103} Council of State, 8 October 1993, Kimpe, no. 44.403.
a cassation court, should not get involved in matters of fact, and should limit itself to matters of law\textsuperscript{104}.

It remains to be seen whether the amendment will produce a change in the way the Council of State perceives its role in cassation proceedings. If it decides that it can no longer review any matter of fact\textsuperscript{105}, the requirements of Article 6, § 1, ECHR may become applicable in the proceedings before administrative tribunals.

IV. Structural and procedural guarantees

A. Independence and impartiality

1. Independence

39. There is not much to be said about the independence of the Council of State and its members. They enjoy the usual guarantees in this respect. Just like the professional judges of the ordinary courts, the judges at the Council of State are appointed for life.

It is a characteristic of the administrative tribunals that their members are appointed for a specific term only. The Council of State has held that this does not affect their independence or impartiality\textsuperscript{106}.

2. Impartiality

40. In the \textit{Procola} case, the European Court has held that the Judicial Committee of the Luxembourg Council of State did not fulfill the requirements of an impartial tribunal, in a case that was heard by a panel of five members, four of whom had previously taken part in drawing up the

\textsuperscript{105} Since the entry into force of the Act of 25 May 1999, the Council of State has ordered the reopening of proceedings in a case, in order to allow for a discussion of the implications of the Act for the scope of its review, with respect to arguments based on facts (Council of State, 29 September 1999, National Institute for insurance against sickness and invalidity, no. 82.513).
\textsuperscript{106} See, with respect to the "Permanent Appeals Commission for refugees", Council of State, 29 December 1993, A., no. 45.547; Council of State, 1 April 1994, M., no. 46.852.
Council's opinion on the draft of the regulation under review.\(^{107}\)

Such a situation is excluded under Belgian law. Article 29, second paragraph, of the co-ordinated Acts of the Council of State provides that the members of the adjudication section and the auditeurs may not take part in the suspension or annulment proceedings concerning regulations, if they have previously taken part in the drawing up of the opinion of the "legislation section" (being a section organically different from the adjudication section) on the draft of the same regulation.

41. A question that has given rise to a sometimes heated debate is the one of the composition of the panel that has to decide on a plea of annulment of an act, after a decision has been taken on a claim for suspension of the same act. The question is, more precisely, whether the panel for the examination of the merits can be composed, in whole or in part, in the same way as the panel that handled the claim for suspension.

The co-ordinated Acts on the Council of State do not give an explicit answer in one sense or another. In a few decisions, the Council has held that the Acts do not prohibit an identical composition, in whole or in part, of the two kinds of panels.\(^{108}\)

The statutory provisions, however, cannot be decisive. When some parties raised the issue of the compatibility of the co-ordinated Acts, interpreted in the sense as just mentioned, with the Constitution and with Article 6, § 1, ECHR, the matter was referred to the Arbitration Court for a preliminary ruling.

The Arbitration Court underlined that, according to the co-ordinated Acts, there was a single procedure, albeit in two stages (provisional decision on the claim for suspension, and final decision on the plea of annulment). The fact that, in such a system, the law did not exclude that the same persons examined the claim for suspension and the plea of annulment, did not affect their objective impartiality. The Court added that the fear of some of the parties as to the impartiality of the panel, at the stage of the examination of the merits, was all the less justified since the Council of State did not have


\(^{108}\) See, e.g., Council of State, 28 November 1997, Salle-Hacha, no. 69.893; Council of State, 1 February 1999, Vandenhende, no. 78.468.
to decide on subjective rights, but only on allegations challenging the objective lawfulness of an act. The Court held that, assuming that Article 6, § 1, ECHR was applicable to the dispute before the Council of State, this would not lead to another conclusion.\(^{109}\)

Meanwhile, the question has also arisen whether the judge who, after having decided that the arguments invoked by the applicant are not "manifestly" well-founded and thus not capable of being disposed of in summary proceedings, is able to hear the same case after a full exchange of memorials. Here too, the Council of State has held that the mere involvement of the judge in the first stage of the proceedings cannot justify objective fears as to his fitness to decide subsequently on the merits of the case in an impartial way.\(^{110}\)

42. With respect to the objective impartiality of members of administrative tribunals, a few more decisions of the Council of State can be mentioned.

The "Appeals Commission with the Office for medical care of the National Institute for insurance against sickness and invalidity" examines complaints against practitioners of a medical profession, based on (e.g.) an excessive prescription conduct. The commission is composed, in part, of representatives of insurance institutions and of representatives of professional associations of the practitioners concerned. The Council of State has held that such composition is in general not incompatible with the requirement of impartiality, even if some of the said institutions or associations may defend interests that are not those of the practitioners in question.\(^{111}\) The situation is different, however, where one of the members is a representative of the very institution that, by filing a complaint, has been at the origin of the proceedings: in that case there can be legitimate doubts as to the impartiality of that member.\(^{112}\)

With respect to appeals commissions having jurisdiction to decide on claims for compensation pensions, the Council of State took the

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\(^{111}\) Council of State, 13 September 1989, Monseur, no. 32.994; Council of State, 22 November 1995, Loiseau, no. 56.395.

appearences into consideration. It held that the impartiality was not guaranteed where a member had participated in the decision-making, who had investigated the claim and who had then officially taken position in an opinion, which had been communicated to the parties\textsuperscript{113}.

It results from this case law that the Council of State applies the criterions established by the European Court, in particular with respect to the objective aspect of the impartiality.

B. Fairness of the proceedings

1. Proceedings before administrative tribunals in general

43. There is in Belgium no act concerning administrative procedure (before administrative tribunals) in general. Procedures before administrative tribunals are governed by "general principles" concerning a proper administration of justice, of which the principle concerning the right to defence is perhaps the most essential one. These principles are subject, however, to completion and sometimes even derogation by statutory provisions. Such provisions are to be found in the different statutes relating to each tribunal separately.

The Council of State can quash a judgment of an administrative tribunal because of a violation of substantial forms or forms prescribed on penalty of annulment (Article 14, § 2, of the co-ordinated Acts on the Council of State). An examination of the case law of the Council leads to the - surprising - conclusion that only in very few cases the proceedings before an administrative tribunal have been looked at from the point of view of Article 6 ECHR.

One issue that deserves to be mentioned is that of the right of the parties to be represented by a lawyer. In a case concerning disciplinary proceedings against exchange brokers, before the "Appeals Commission of the public stock exchanges", the Council of State held that the personal presence in disciplinary matters was the rule, and that exceptions to that rule had to be authorized by an explicit provision. The Council did not find such a

\textsuperscript{113} Council of State, 13 March 1990, Put, no. 34.336; Council of State, 27 June 1991,
provision, either in the relevant statute or in the ECHR. It therefore concluded that the appeals commission did not violate any procedural rule by sentencing the brokers in their absence and by not allowing their lawyers to represent them.\(^{114}\) In a more recent decision, the Council adopted a different point of view. It held that Article 6, § 3, c, ECHR guaranteed the right for an accused person to be represented by a lawyer, and that this Article thus gave expression to a general principle that, as such, was also applicable in disciplinary proceedings.\(^{115}\) The new position corresponds better with the case law of the European Court with respect to proceedings before criminal courts.\(^{116}\)

44. Given the fact that an examination of the issue of the proceedings before administrative tribunals in Belgium would necessarily lead to a casuistic approach and that, moreover, Article 6, § 1, ECHR does not seem to have played a visible role in this respect, the attention in this report will not be focused on these proceedings. It seems more useful to concentrate on the fairness of proceedings before the Council of State, both in annulment proceedings and in cassation proceedings.

2. Proceedings before the Council of State

a. Right to take part in the proceedings

45. An important aspect of the right to a fair trial is the right to take part in the proceedings.

Before the Council of State, this right is granted not only to the applicant and the defendant (an administration), but to "everyone who has an interest in the outcome of the case". In principle, the registrar of the Council, acting on directives given by the auditeur in charge of the case, notifies the appeal

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\(^{114}\) Council of State, 7 September 1988, Leiser, Beelen and Kirschchen, no. 30.637.

\(^{115}\) Council of State, 27 November 1996, De Herdt, no. 63.300. The case concerned disciplinary proceedings before an administrative organ, not before an administrative tribunal.

to all the persons who have such an interest (e.g. the person whose appointment or licence is challenged); these persons then have thirty days to intervene in the proceedings. Persons who have not been notified by the registry, can at any moment ask permission to intervene, provided that the intervention does not delay the proceedings (see Article 21 bis of the co-ordinated Acts on the Council of State).

Persons who have been admitted to intervene, can file memorials and argue the case at the oral hearing.

b. Adversarial character of the proceedings

46. Another fundamental aspect of the right to a fair trial is that the proceedings have to be adversarial, in the sense that each party must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party\textsuperscript{117}.

This principle is strictly observed. Each party has to file its memorials at the registry, together with all documents it wants to produce. Copies of the memorials are sent to the other parties. The file, containing all pieces of evidence, can be consulted at the registry; in practice, lawyers communicate copies of their documents to each other\textsuperscript{118}.

47. The European Court has held that the right to adversarial proceedings is relevant not only with respect to memorials and evidence produced by the parties, but also with respect to any evidence adduced or observations filed by an independent organ, with a view of influencing the court’s decision. This has been the case, e.g., with the opinion given by the advocate general in proceedings before the Belgian Court of Cassation\textsuperscript{119}.

In the proceedings before the Council of State, a role comparable to the

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\textsuperscript{117} See, e.g., E.Ct.H.R., 16 February 2000, Rowe and Davis, 60, unpublished, and Jasper, § 51, unpublished.

\textsuperscript{118} See the Articles 6, 7 and 14 of the Decree of the Regent of 23 August 1948 containing the regulation of the procedure before the administration section of the Council of State; hereafter: “Regulation on Procedure”.

advocate general is played by the auditeur.

In fact, the auditeur plays an even more important role. He does not only give an oral opinion at the hearing, but before that, also drafts a written report, in which he analyses the arguments of the parties and concludes in one sense or another. This report is sent to the parties, who have the opportunity to comment on it, in principle in writing. In proceedings where the emphasis is on a swift handling of the case, such as suspension proceedings or proceedings in which the auditeur, on the basis of an analysis of the plea of annulment, immediately suggests to hold that the Council of State manifestly has no jurisdiction, or that the appeal is manifestly inadmissible or ill-founded, or that it is manifestly well-founded, the report is still sent to the parties, but at the same time a date for the hearing is fixed, and the only opportunity for the parties to comment on the report is at the hearing, orally.

Where the written report is thus fully subject to contradiction by the parties, this has not always been the case with the oral opinion the auditeur gives at the hearing, after the oral arguments by the parties. Indeed, it has long been the practice that, even before the auditeur had given his opinion, the debates were closed, so that the parties could not comment on the opinion of the auditeur. However, since the moment the European Court has stressed the relevance of the adversarial character of the proceedings with respect to the opinion given by the advocate general at the Court of Cassation, the presiding judges at the Council of State have given the parties the opportunity to take the floor again, after the delivery of the opinion by the auditeur, for a short reaction. A simple change in practice thus has been sufficient for an adaptation of the procedure to the requirements of Article 6, § 1, ECHR.

c. Equality of arms

120 See Articles 14 and 29 of the Regulation on Procedure.
121 See Articles 12 and 13 of the Royal Decree of 5 December 1991 containing the regulation of the summary proceedings before the Council of State.
122 See Articles 93 and 94 of the Regulation on Procedure.
123 See, for a decision justifying that practice, Council of State, 30 June 1987, Lambrechts, no. 28.317.
48. According to the European Court, the principle of equality of arms, requires each party to be given a reasonable opportunity to present its case, under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent\textsuperscript{124}.

Before the Council of State, no distinction is made between the different parties. Generally speaking, they have the same, or at least similar, procedural rights. Public authorities certainly do not enjoy privileges, compared to citizens.

In one case, the Council found that the application of procedural rules led to an unequal treatment. This was the case where, after the auditeur had suggested to declare the application manifestly inadmissible, his report had been sent to the applicant, to the defendants and to two parties who had just before intervened in the case. Whereas the applicant and the defendants were unable to react in writing to the report, the intervening parties were in a position to file a new plea of intervention, in which they could develop their arguments in the light of the position taken by the auditeur. The Council held that the applicant thus was placed in a situation that did not satisfy the principle of equality of arms: in proceedings which were essentially written, the weight of a mere oral argument could not be compared to that of a written document. The Council therefore authorized the applicant to file a written document too\textsuperscript{125}.

d. Evidence

49. In annulment proceedings before the Council of State, the applicant can invoke arguments based on facts. The defendant, for its part, has an obligation to submit the administrative file to the Council\textsuperscript{126}. If, after consultation of the file, the applicant has noticed facts until then unknown, he may base new arguments on these facts, which he can invoke in his memorial of rebuttal or his explanatory memorial.

In cassation proceedings, new facts, i.e. facts not submitted to the administrative tribunal of which the decision is challenged, are in principle


\textsuperscript{125} Council of State, 4 June 1997, s.a. Cinès Wellington, no. 66.564.

\textsuperscript{126} See Article 6 of the Regulation on Procedure.
inadmissible. The extent to which the Council of State can examine arguments based on facts, in this kind of proceedings, seems to be uncertain.

50. If it appears that the administrative file does not contain all the necessary information for the solution of the dispute, the Council of State can order any public authority to produce any kind of document or information. In practice, it is the auditeur who, since he studies the file first, is in the best position to take initiatives with respect to the evidence useful for the case.

Theoretically, the Council of State has the possibility to order specific investigative measures, such as the appointment of an expert or the hearing of a witness. In practice, however, the investigation by the auditeur makes it superfluous to have recourse to such measures.

51. It is only exceptionally that problems occur with respect to the lawfulness of the evidence produced. The Council of State would have to decide on such issues on the basis of general principles of law, since there are no written rules in this respect. Article 6, § 1, ECHR could also come into play.

It can happen that a party refuses to produce evidence it holds, on the ground that it would be unlawful to disclose it. The Council of State would have to consider the merits of the position thus taken, as part of the examination whether the decision under review rests on a sufficient factual basis.

e. Oral hearing

52. Article 22 of the co-ordinated Acts on the Council of State provides

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127 See, e.g., Council of State, 18 December 1992, Devlaminck, no. 41.435.
128 See above, no. 38.
129 Article 23 of the co-ordinated Acts on the Council of State.
130 See Article 12 of the Regulation on Procedure.
131 Article 25 of the co-ordinated Acts on the Council of State.
132 The Council of State has decided, e.g., that a public authority could not invoke the medical secret as a valid reason for not including a medical report in its file. It then went on to decide that it was not able to control the lawfulness of the decision under review.
that the handling of the cases is in writing, but that the Council of State "can" convoke and hear the parties. This provision has been completed by the Articles 14 to 14quater of the Regulation on Procedure, which provide for a fixation of the case for a hearing once the auditeur has filed his report and, except in summary proceedings, the parties have had the occasion to comment on it in writing.

An oral hearing is, in other words, always organized.

Its usefulness, however, is in annulment or cassation proceedings often limited, since the parties have had ample opportunity to develop their point of view in writing. At the hearing, they may limit themselves to a simple reference to their memorials.

In suspension proceedings, the hearing is more important. It gives the applicant for the first time the opportunity to react to the "note" normally filed by the defendant.\(^{133}\)

53. It should be noted that, by an Act of 25 May 1999, Article 21 of the co-ordinated Acts on the Council of State has been amended, so as to make it possible that the Council of State can declare inadmissible an application without organizing an oral hearing. This would be the case when an applicant fails to file a memorial of rebuttal or an explanatory memorial, within the time limit provided by the law; as has been mentioned already, the law provides that in such case the applicant is presumed to have lost his interest in the case.\(^{134}\)

The new Article 21, second paragraph, of the co-ordinated Acts provides that an oral hearing then has to be organized only if one of the parties asks for it.

The said provision has not yet entered into force. This will happen as soon as the Regulation on Procedure has been adapted to it. At that time, it could be possible to introduce similar provisions in the Regulation in order to make oral hearings optional also in other situations where summary

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133 The fact that, in these proceedings, the defendant is unable to file a second note, and the applicant unable to file a memorial of rebuttal, has been considered compatible with the right to a fair hearing, given the nature of the proceedings (Council of State, 19 October 1999, Gheeraert, no. 82.952).

134 See above, no. 29. See also further, no. 67.
proceedings are organised.\textsuperscript{135}

f. Examination by the Council of State of the submissions, arguments and evidence adduced by the parties

54. According to the European Court of Human Rights, a court is "under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision."\textsuperscript{136}

To show that the Council of State complies with this duty, it has to give reasons for its decision.\textsuperscript{137}

If, for some reason or another, a member of the panel that has heard the case, is unable to take part in the deliberation, the proceedings have to be reopened, and a new hearing will have to take place. If the president of the panel, after having heard the case and after having participated in the deliberation, is unable to sign the judgment, he can be replaced for that formality by another judge.

C. Public hearing and public delivery of the judgment

1. Public hearing

55. It is generally accepted that the hearing before a court is public only in so far as this follows from a written rule. For disputes concerning civil rights and obligations, Article 6, § 1, ECHR is such a rule.

Since Article 6, § 1, does not always apply to disputes before administrative tribunals, it often depends on the statutory provisions whether or not the hearing before these tribunals is public.

\textsuperscript{135} See the opinion of the Council of State of 17 December 1998 on the draft which has led to the Act of 25 May 1999, \textit{Parl.Doc.}, H.Rep., 1998-99, no. 1960-1, pp. 23-24. The Council refers to the situations where the applicant, after having received an unfavorable report from the auditeur, has not showed his intention to continue the proceedings (Article 21, sixth paragraph, of the co-ordinated Acts on the Council of State), or where, after having received a judgment dismissing his claim for suspension, he has not either showed his intention to continue the proceedings on the merits (Article 17, § 4ter, of the co-ordinated Acts). See further, no. 67.

As far as the Council of State is concerned, Article 27 of the co-ordinated Acts and Article 26 of the Regulation on Procedure provide that the hearings before the Council are public, unless this would create a danger for the order of for morals, in which case the closing of the doors is ordered by a reasoned decision. The publicity thus is the rule, the closing of the doors the - in practice inexistent - exception.  

2. Public delivery of the judgment

56. What has been said about the public hearing of a case, applies also to the public delivery of the judgment: the publicity must be provided for by an explicit provision.

As far as the Council of State is concerned, Article 28, first paragraph, of the co-ordinated Acts and Article 33 of the Regulation on Procedure provide that each judgment is pronounced publicly.

In practice, publicity is assured by other means. Until 1994, all judgments were published in an official collection of decisions. This publication had been stopped. Article 28, third and fourth paragraphs, of the co-ordinated Acts and the Royal Decree of 7 July 1997 concerning the publication of the judgments of the Council of State now provide for the publication in electronic form. All judgments, except those relating to the status of aliens, are made public through the internet and through CD Rom available by the Council. Parties can, at any moment until the judgment is handed down, request that in the published version of it their identity be deleted.

D. Reasonable time

1. Proceedings before administrative organs

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137 Article 28, first paragraph, of the co-ordinated Acts on the Council of State.
138 The mere fact that morals will be discussed, does not justify the closing of the doors; it is necessary that morals would run a danger by a public discussion of the case (Council of State, 28 June 1996, Keustermans, no. 60.616).
139 For the Council’s website, consult http://www.raadvst-consetat.be. At the present time, the judgments since April 1994 are available.
140 At the present time, the judgments from 1996-97 till 1998-99 are available on a CD Rom.
57. As has been explained above, it is in principle sufficient that the guarantees of Article 6, § 1, ECHR are respected at the stage of the proceedings before a judicial organ with full jurisdiction.\(^\text{141}\)

This is, however, not exactly true with respect to the requirement of a decision within a "reasonable time". Even if only the decision of the court has to be handed down within a reasonable time, the reasonableness of the time will partly depend on the duration of proceedings before administrative organs, if these proceedings have to be exhausted before the case can be brought before the court. When Article 6, § 1, ECHR is applicable, the reasonable time may thus begin to run from the moment preliminary proceedings are started before an administrative appeals organ.\(^\text{142}\)

According to the case law of the Council of State, it is in fact not necessary to determine whether or not Article 6, § 1, is applicable. The Council indeed holds that an administrative authority is in any event required to decide within a reasonable time, as this follows from a general principle of good administration. This is true, in particular, in disciplinary matters, even before an administrative organ of first instance, and in administrative appeals proceedings concerning a licence for the exploitation of a nuisance enterprise.\(^\text{143}\)

58. In many cases, the relevant statute sets an explicit time limit for administrative authorities to decide in disciplinary cases or on appeals.

Proceedings before administrative authorities therefore generally are not a big problem, from the point of view of the reasonable time requirement.

2. Proceedings before administrative tribunals

59. In so far as Article 6, § 1, ECHR is applicable to a dispute submitted to an administrative tribunal, it is undeniable that the tribunal has to respect

\(^{141}\) See above, no. 32.
\(^{143}\) See, e.g., Council of State, 20 February 1990, De B., no. 34.108; Council of State, 13 October 1993, L, no. 44.493; Council of State, 31 May 1994, H., no. 47.683. See also Arbitration Court, 7 December 1999, no. 129/99, Moniteur belge, 15 February 2000.
the reasonable time requirement.

The Council of State has held a few times that this obligation thus had to be met by the Appeals Commission with the Office for medical care of the National Institute for insurance against sickness and invalidity. It held that the proceedings before that commission had lasted unreasonably long in a case where the file had stayed untouched during two years, because of an overloading of the docket, and in a case where the panel could not be composed during one year and a half, because of a delay by the government in the appointment of a new member of the commission.

60. A case involving the duration of proceedings before an administrative tribunal is now pending before the European Court of Human Rights, after the European Commission has given its opinion. The case in question is the *J.R. v. Belgium* case, mentioned above. In that case, the proceedings before a tribunal of first instance were initiated in 1976, and an appeal was brought before an appeals tribunal in 1980. In 1999, the case was still pending, after a large of number of medical examinations had been ordered. In its opinion on the merits of the case, the European Commission did not see any convincing justification for the long delay, and concluded that Article 6, § 1, ECHR was violated.

3. Proceedings before the Council of State

a. Duration of the proceedings, a matter of serious concern

61. The issue of the duration of proceedings before the Council of State is a matter of continuous concern since the 80's, and especially since the 90's.

The situation can best be described on the basis of statistical data.

For the calendar year 1998, the following data have been collected by the

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144 See, e.g., Council of State, 30 June 1994, n.v. Sidaplax, no. 48.386.
146 Council of State, 16 March 1990, Declève, no. 34.370.
147 Council of State, 29 July 1997, De Saedeleer, no. 67.605.
148 See above, no. 18.
registry:

Number of cases entered in 1998: 4,816.

Cases terminated in 1998 (irrespective of their date of entry): 5,342.

Of these 5,342 cases, it was not possible to check through the information system the date of entry of 118 cases. For the 5,224 remaining cases, the average length of the procedure (i.e. from the date of entry till the date of the conclusion) is 976 days, or 2 years, 8 months and 6 days.

Backlog of cases, i.e. cases entered before 1 January 1999 and not terminated on 31 December 1998: 15,266.

It seems useful to put these data in perspective.

Recently, the Council of State has given an overview of the number of cases that have entered and that have been terminated, for the last nine judicial years. That table shows a growing list of pending cases:

<table>
<thead>
<tr>
<th>Situation on</th>
<th>Cases entered</th>
<th>Cases terminated</th>
<th>Pending cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>31 August 1990</td>
<td>41,876</td>
<td>36,136</td>
<td>5,740</td>
</tr>
<tr>
<td>1990-91</td>
<td>1,895</td>
<td>1,780</td>
<td>5,855</td>
</tr>
<tr>
<td>1991-92</td>
<td>3,050</td>
<td>1,915</td>
<td>6,990</td>
</tr>
<tr>
<td>1992-93</td>
<td>5,363</td>
<td>2,378</td>
<td>9,975</td>
</tr>
<tr>
<td>1993-94</td>
<td>6,129</td>
<td>3,330</td>
<td>12,774</td>
</tr>
<tr>
<td>1994-95</td>
<td>5,574</td>
<td>4,816</td>
<td>13,532</td>
</tr>
<tr>
<td>1995-96</td>
<td>5,333</td>
<td>4,207</td>
<td>14,658</td>
</tr>
<tr>
<td>1996-97</td>
<td>4,891</td>
<td>4,653</td>
<td>14,896</td>
</tr>
<tr>
<td>1997-98</td>
<td>4,541</td>
<td>5,610</td>
<td>13,827</td>
</tr>
<tr>
<td>1998-99</td>
<td>6,347</td>
<td>4,880</td>
<td>15,294</td>
</tr>
</tbody>
</table>

No division has been made between first instance cases and last degree cases. Apart from the (few) cassation cases (and some other, very exceptional cases), the Council of State deals with its cases as jurisdiction of first and last instance.


The number of "cases entered" comprises a large number of cases in which both a claim for suspension and a plea of annulment have been filed. In 1998-99 the number of such cases amounted to 44% of the total number of cases entered. One should not forget that these cases have to be examined twice, at least in principle, and thus give rise to two judgments.

Not all cases are terminated by a judgment. In 1998-99, e.g., the 4,880 cases were terminated as follows: by final judgment: 4,113; by junction: 1,587; by striking off the list, with judgment: 501; by striking off the list, without judgment: 108.
It results from this table that, although the number of cases terminated is (almost) constantly increasing, there is nevertheless a growing gap between the number of cases entered and the number of cases terminated.

A striking feature of the caseload of the Council of State is the very important number of appeals brought by aliens, mostly asylum seekers, against decisions concerning entry in or removal from the country and against decisions refusing to recognize that they have the status of refugee. In 1998-99, the "aliens" cases represented 54 % of the total number of cases entered. The movements in the entry of cases are for most part the result of movements in this part of the caseload, whereas the number of "ordinary" cases per year remains relatively stable.

As for the judgments handed down, they do not all close a case ("final" judgments). For 1998-99, e.g., the division of judgments is as follows:

- Final judgments: 4,113
- Judgments in adversarial suspension proceedings: 1,635
- Judgments in ex parte suspension proceedings: 617
- Other judgments: 154

62. It is obvious that long delays can have adverse effects on the parties. To limit the description to legal effects, one should take into account that the passing of time can have an influence on the admissibility of the appeal. It should, e.g., not be excluded that new legislation makes it useless for the applicant to obtain an annulment of the act he has challenged154.

During many years, the Council of State has held that the retirement of an applicant who challenges a decision to promote a competitor, takes away the usefulness to obtain an annulment, and thus makes the application inadmissible. This practice, based on an interpretation of the provision of the co-ordinated Acts on the Council of State dealing with the legally required interest of the applicant, has recently been challenged before the Arbitration Court. The Court has held that the said interpretation has disproportionate effects, in so far as it leads to the inadmissibility of the

154 Consult Council of State, 4 February 1993, Benne, no. 41.887. See also Council of State, 30 March 1995, Benne, no. 52.617.
appeal without an examination of whether an interest still exists in reality and without taking into account the events which have caused the possible delay in the examination of the case.\textsuperscript{155}

63. In a few cases, the issue of the reasonable time in proceedings before the Belgian Council of State has been the object of a complaint before the European Court of Human Rights.

The only case in which the Court has handed down a judgment, is the \textit{De Moor} case, mentioned above.\textsuperscript{156} That case, however, concerned an atypical situation. The case had been on the docket of the Council of State for almost eight years, during four of which no visible activity had taken place, namely between the first oral hearing and the reopening of the oral proceedings. As the government argued before the European Court, "the death of the judge-rapporteur, the departure of another judge and the retirement of the President all contributed to slowing down the proceedings". The European Court held that these events could not justify the delay, and therefore concluded that Article 6, § 1, ECHR had been violated.\textsuperscript{157}

Only one other case seems to have been declared admissible. The \textit{Vanderheggen} case concerned annulment proceedings directed against the licence granted to a pharmacist, authorizing her to open a pharmacy. After five years and eight months, the licence was annulled. Her complaint with the European Commission of Human Rights was declared admissible, notwithstanding the fact that the government pointed at the enormous increase in the number of cases during the relevant period.\textsuperscript{158} Recently, the applicant and the government arrived at a friendly settlement, thus making a further examination of the merits superfluous.\textsuperscript{159}

b. Mechanisms to neutralise some effects of delays


\textsuperscript{156} See above, no. 23.


64. Some general rules of administrative law allow for a partial or perhaps even full neutralization of delays.

In cases where the applicant obtains an annulment of the act he has challenged, the effect of the judgment is that the act is considered never to have existed. Not only the public authority, but also the applicant are placed in the position in which they were, right before the annulled decision was taken.

As the Council of State has held, the annulment entails for the public authority normally the obligation to make good for the illegality that has been committed\textsuperscript{160}. This does not mean, however, that in case of an annulment of the appointment of a competitor of the applicant, the public authority is unconditionally obliged to appoint the applicant\textsuperscript{161}.

Where the public administration appears to be unwilling to draw the necessary conclusions, the applicant can under certain conditions request the Council of State to impose on that authority a civil sanction, fixed at a given amount, at an amount per time unit or at an amount per infringement\textsuperscript{162}. This mechanism is, however, not so popular. One of the reasons is undoubtedly that the proceeds of the sanction do not benefit the applicant himself, but a government fund aimed at the modernization and the organization of the administration of administrative justice.

Perhaps more important for the applicant is the fact that, according to the case law of the Court of Cassation, the annulment by the Council of State necessarily establishes the wrongful character of the relevant act. This means that in a civil case for compensation, the court is bound to consider, except where the public authority can invoke an insurmountable error or any other reason for exoneration of liability, that the public authority has committed a wrongful act. It then remains to be established, of course, that the applicant has suffered damages, and that these damages present a causal link with the wrongful act complained of\textsuperscript{163}.

\textsuperscript{160} Council of State, 10 March 1992, Asselman, no. 38.968.
\textsuperscript{162} Article 36 of the co-ordinated Acts on the Council of State.
65. Whether an applicant, or any other party in the proceedings, would be able to recover damages caused by an unreasonable delay in the proceedings before the Council of State (or before another court), is a question that at the present time can be answered only in a general way, since there do not seem to be any precedents.

In some recent decisions, the Court of Cassation has accepted that the State can be held liable for damages caused by a wrongful act of a judge or another judicial officer, e.g. in cases where the court or tribunal has violated a rule contained in an international treaty\textsuperscript{164}.

This does not seem to exclude the possibility of damages in cases of violation of the reasonable time provision of Article 6, § 1, ECHR.

c. Action taken to remedy the situation

1. Procedure

66. In the course of the years, different measures have been taken to reduce the backlog and, more generally, to avoid excessive delays.

These measures were aimed at the production of an output within a reasonable time, not at a limitation of the input of cases. There is no limitation of the right to bring an appeal against an administrative act, such as would be provided by, e.g., a system of leave for appeal. It is doubtful, given the fact that the Council of State is in annulment procedures a court of first and last instance, whether such a system would be compatible with the rule of law and with the right of access to a court.

67. The main objective of the legislator, over the past years, has been to provide for several mechanisms by which, if certain conditions are met, cases can be disposed of without a discussion of their merits.

A first set of mechanisms is at the current time as follows:

- loss of the applicant's legal interest, in case he does not file a memorial of rebuttal or an explanatory memorial\textsuperscript{165};
- presumption of renunciation by the applicant, in case he does not request the continuation of the proceedings, after having received the report of the auditeur concluding in the sense of the inadmissibility or the ill-foundedness of his appeal\textsuperscript{166};
- annulment of an act that already has been suspended, without further examination of the merits, in case the defendant does not request the continuation of the proceedings, after having received the suspension judgment\textsuperscript{167};
- presumption of renunciation by the applicant, in case he does not request the continuation of the proceedings, after having received the judgment dismissing his claim for suspension\textsuperscript{168}.

All these mechanisms provide for stringent conclusions to be drawn from the fact that, at a given moment, the applicant or the defendant does no longer seem to believe in a successful outcome of his case.

Another set of mechanisms allows for a summary kind of proceedings, in the following situations;
- the auditeur, on the basis of an examination of the mere plea of annulment, considers that the appeal is manifestly inadmissible or manifestly ill-founded\textsuperscript{169};
- the auditeur, on the basis of an examination of the mere plea of annulment, considers that the appeal is manifestly well-founded\textsuperscript{170}.

In the two latter situations, the case is immediately fixed for an oral hearing, thus not following the normal path of exchange of memorials. If the Council of State disagrees with the auditeur, or in other words does not

\textsuperscript{165} Article 21, second paragraph, of the co-ordinated Acts on the Council of State, and Article 14bis of the Regulation on Procedure. See above, no. 29.
\textsuperscript{166} Article 21, sixth paragraph, of the co-ordinated Acts, and Article 14quater of the Regulation on Procedure.
\textsuperscript{167} Article 17, § 4bis, of the co-ordinated Acts, and Article 15bis of the Royal Decree of 5 December 1991 containing the regulation of the summary proceedings before the Council of State.
\textsuperscript{168} Article 17, § 4ter, of the co-ordinated Acts, and Article 15ter of the Royal Decree of 5 December 1991.
\textsuperscript{169} Article 30 (to become Article 30, § 2) of the co-ordinated Acts, and Article 93 of the Regulation on Procedure.
\textsuperscript{170} Article 30 (to become Article 30, § 2) of the co-ordinated Acts, and Article 94 of the Regulation on Procedure.
consider that there is a "manifest" solution, the case is redirected to the normal procedure.

68. The said mechanisms appear to be effective, in the sense that they are often used. This may appear from the following data, relating to the judgments delivered in 1998-99:

- Final judgments, in the ordinary procedure: 1.565
- Art. 14bis Regulation on Procedure: 527
- Art. 14quater Regulation on Procedure: 513
- Art. 15bis Royal Decree of 5 December 1991: 65
- Art. 15ter Royal Decree of 5 December 1991: 921
- Art. 93 Regulation on Procedure: 419
- Art. 94 Regulation on Procedure: 95
- Special procedure (insurances): 8

Total: 4.113

69. Summary proceedings are in principle brought before panels composed of a single judge. The co-ordinated Acts provide that the same is true for all "aliens" cases, i.e. not only for claims for suspension, but also for pleas of annulment.

This specific provision is supplemented by a provision in the Aliens Act, which authorizes the King to fix special rules for the "aliens" cases, relating to time limits and procedure. The Arbitration Court has held that this possibility to derogate from the ordinary rules does not constitute a violation of the principles of equality and non-discrimination, having regard to the specific characteristics, the increase of the number and the urgent nature of the cases brought by aliens.

The King had made use of the powers granted to him. In general, the

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171 For the meaning of the references to the Regulation on Procedure and the Royal Decree of 5 December 1991, see the preceding footnotes.
172 Article 90, § 1, second paragraph, 1E, of the co-ordinated Acts.
173 Article 70 of the Act of 15 December 1980 on the entry to the territory, the residence, the establishment and the removal of aliens. An Act, recently adopted by Parliament, but not yet published in the Moniteur belge, will repeal that Article, but retain a modified version of its contents, to be placed in Article 30, § 2, of the co-ordinated Acts on the Council of State.
regulation on the procedure for aliens provides for a specific system of proceedings in suspension cases, which is even more summary than in ordinary matters. A requirement that is sometimes overlooked by aliens, is the one to be present, in person, at the hearing\textsuperscript{175}.

70. Finally, it should also be mentioned that on some occasions the Council of State has refused to meet a statutory obligation, if this would lead to an excessive delay of the proceedings.

This has been the case with the formal obligation to request a preliminary ruling from the Arbitration Court on the constitutionality of a statute. In a few cases, the Council of State has gone past this obligation, on the ground that it would be incompatible with the reasonable time requirement, if the Council of State would have to postpone the consideration of the case and wait for the ruling of the Arbitration Court, where that ruling would in fact have no relevance for the outcome of the case\textsuperscript{176}.

2. Management of the Council of State

71. In 1996, the legislator has introduced some measures aimed at the improvement of the management of the Council of State, in particular of its adjudication section.

One measure was the creation of the post of administrator. This person, who does not exercise a judicial function, is charged with the administrative management of the Council of State and its infrastructure\textsuperscript{177}.

Another measure was the creation of an obligation for the Council of State to dress up a quadrennial plan, containing measures it intends to take in order to reduce its backlog. During the period of four years covered by the plan, it shall, moreover, submit annually a report on the implementation of


\textsuperscript{175} See Royal Decree of 22 July 1981 containing the regulation of the procedure before the administration section of the Council of State, in case of an appeal against the decisions referred to in the Act of 15 December 1980 on the entry to the territory, the residence, the establishment and the removal of aliens.

\textsuperscript{176} Council of State, 13 March 1990, De Ridder, no. 34.348; Council of State, 15 May 1990, De Ridder, no. 34.891; Council of State, 1 April 1999, a.s.b.l. Comité de quartier Rue de Ruysbroeck-Sablon, no. 79.745.

\textsuperscript{177} Article 102bis of the co-ordinated Acts on the Council of State.
the plan, based on an assessment made by the administrator\textsuperscript{178}. Thus far, there has been one plan, adopted by the general assembly of the Council of State on 15 December 1997. According to a progress report of 15 December 1998, the implementation during the first year was satisfactory; according to a progress report of 10 January 2000, to the contrary, the goals had no longer been attained, especially because of an increase of the number of incoming cases and the difficulties of the registry to process all these cases. Given the considerable increase of the number of cases in the last months, it seems probable that the next progress report too will have to conclude that the quadrennial plan cannot correspond to reality.

IV. Conclusions

72. At first view, the impact of Article 6, § 1, ECHR on the activities of the Council of State is relatively limited. There are, since more than ten years, only a few cases where Article 6, § 1, was held to be applicable, and where its application had a clear effect.

This has not always been the case. In the 80’s, when the European Court of Human Rights was wrestling with the notion of "dispute over civil rights and obligations", the Council of State also contributed to the clarification of the meaning of that notion. With respect to cases concerning the rights of civil servants, it even adopted an approach that, some fifteen years later, would also be adopted by the European Court, after years of rulings in a different sense.

The dynamics seem to have come to an end as soon as the Council of State realized that, as a court controlling the legality of administrative acts, it had a sufficiently wide jurisdiction to qualify, without more, as the "tribunal" mentioned in Article 6, § 1. There was thus no need any more to examine whether Article 6 was applicable: any deficiencies in the procedures before administrative bodies would in any event be "covered" by the proceedings before the Council of State.

73. It is true that the number of allegations of a violation of Article 6, § 1,

\textsuperscript{178} Article 120 of the co-ordinated Acts.
ECHR in the proceedings before the Council of State is relatively low. This may be an indication of the feeling that the organization of the Council and its procedures generally comply with the requirements of a proper administration of justice.

The reasonable time requirement, however, constitutes an obstacle which, it seems, cannot always be taken. Although Article 6, § 1, ECHR does not play a significant role in the discussion on how to improve the handling of cases before the Council of State, it is clear that its shadow is hanging over the tables where the situation is analysed and where measures are invented.

What to think about the measures that have been taken thus far to reduce the backlog?

They certainly contribute to limiting the effects of the increase - if not the explosion - of the number of cases. They do not seem sufficient, however, to reduce the existing backlog.

Perhaps more radical measures are needed. Some years ago, a working group under the chairmanship of Mr. Tapie, First President of the Council of State, submitted a report on the creation of administrative courts of first instance\textsuperscript{179}. Maybe it is time to take up such proposals again, and to examine to what extent they are able to realize a better compliance with Article 6, § 1, ECHR.

\textsuperscript{179} Others have suggested that the Council of State and the other administrative tribunals could best be integrated within the ordinary judiciary.