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RE **Note on the case ACCC/C/2014/111 Belgium in the framework of a communication to the Compliance Committee of the Aarhus Convention**

On a preliminary basis, we first of all would like to draw the Committee's attention to the fact that, in the Belgian legal system, it is not for the government to comment the content of a decision handed down by a Belgian court. Indeed, the constitutional rules on the independence of judges and on the separation of powers prohibit anything that might be perceived as an interference by the executive in the judiciary.
You will therefore understand that, after briefly reviewing the facts of the case, we shall limit ourselves to setting out the rules established in Belgium concerning the legal costs in the broad sense.

Background

Two non-profit environmental protection associations (ASBL Ardennes Liégeoises and ASBL Terre wallonne) initiated a summary procedure before the court of first instance of Verviers, seeking a declaration that a company (S.A. Carrières & Entreprises Bodarwe & Fils) did not have the single permit required for the operation of a quarry and that this company should be ordered, subject to a penalty payment, to apply to have the situation regularized. The court of first instance dismissed the claim of both associations, which lodged an appeal.
In a ruling dated 29 October 2013, the court of appeal of Liège dismissed the associations' action and ordered them to pay the case preparation allowances in an amount of EUR 1,200 for the proceedings at first instance and in an amount of EUR 2,500 for the appeal.
Both above-mentioned associations denounced this ruling to the Committee on 12 May 2014 because they considered that the sums they were ordered to pay were "*prohibitive in themselves and they infringe Article 9.4 of the Convention*".

II. Belgian law

II.1. Order to pay the costs

Under Belgian law, Article 1017 to 1024 of the Judicial Code are applicable to the costs.
Article 1017 provides that: "any final judgement handed down, even as a matter of course, entails ordering the losing party to pay the costs, unless particular laws provide otherwise and without prejudice to an agreement between the parties as ordered in the judgement, as the case may be.

However, except in cases of a frivolous or vexatious request, the order to pay the costs is always handed down on the authority or body bound to apply the laws and regulations referred to in Articles [579, 6°,] 580, 581 and 582, 1° and 2°, as regards applications filed by or against social security beneficiaries.
"Social security beneficiaries" should mean the social security beneficiaries within the meaning of Article 2, 7°, of the law of 11 April 1995 creating a "Charter" for social security beneficiaries.]
The judge may order that the costs be shared as he/she deemed appropriate, either where each party succeeds on some and fails on other heads, or between spouses, ascendants, siblings or relatives by affinity to the same degree.
[...]
Any interlocutory judgement reserves the costs.] "

Articles 1018 and 1019 of the Judicial Code list the costs. These costs are the following:

- various fees, court and registration fees;
- cost, emolument and salaries of judicial acts;
- cost of the exemplified copy of the judgement;
- costs of all investigation measures (witness fee and expert fee);
- travel and accommodation expenses of magistrates, registrars and parties;
- the case preparation allowance referred to in Article 1022 of the Judicial Code;
- fees, emoluments and costs of the mediator designated in accordance with Article 1734.

In other words, the unsuccessful party shall be ordered to pay the costs, whether the application has been declared unfounded or inadmissible. The obligation to bear the costs derives from the law but nothing prevents parties from finding cost-sharing arrangements. Moreover, the judge may apportion the costs (paragraph 3) when no party can be considered as successful or unsuccessful[1]. The judge may then decide that the parties owe nothing to each other, or order that each party will pay the costs of the other party, or that the parties will bear the costs according to what he/she deemed appropriate[2].
There are also exceptions to the principle set out in Article 1017:

- when the application is filed by or against a social security beneficiary (paragraph 2),
- when particular laws provide for it (bankruptcy law, law on the protection of workers' remuneration, law relating to the urgency procedure for expropriation in the public interest...),
- when Article 1382 of the Civil Code applies (the judge may order a party to pay the costs occasioned by its fault, whereas it is not the unsuccessful party – this is the application of the principle of prohibition of unnecessary costs in order to avoid costs which are vexatious, unnecessary or caused by negligence[3]).
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It should also be noted that the parties can submit a detailed statement of their respective costs during the procedure, including the case preparation allowance referred to in Article 1022 of the Judicial Code. In such a case, the judgement will contain the award of costs. "*The judge may only award the costs which have effectively been mentioned by the parties in a detailed statement*[4]" (the judge is not bound by the amount assessed by the parties).
Furthermore, attention is also drawn to the existence of the legal aid system. Article 664 of the Judicial Code provides that: "*The legal aid consists in exempting, fully or partly, persons who cannot afford the costs in relation to judicial or even extra-judicial proceedings, from paying the [various fees], registration, court and exemplification fees as well as the other costs involved. The legal aid also ensures that interventions of public and ministerial officials are free of charge for the persons concerned, in accordance with the conditions laid down below.*

[1] B. Biémar, « Chapitre 4. L'accès économique à la justice », in *Droit judiciaire Tome 2. Manuel de procédure civile*. Larcier, 2015, p. 227, n°2.124.
[2] C. Defoirdt, « Chapitre 1. La condamnation aux dépens. », in *Droit judiciaire. Commentaire pratique*, Wolters Kluwer, 2007, VIII.1-3, n°025.
[3] A. Fettweis, *Manuel de procédure civile*, 2 ed., Liège, Fac. Dr. Liège, 1987, p. 587.
[4] B. Biémar, *op.cit.*, p. 294, n° 2.129.

It also allows the persons concerned to benefit from the free assistance of a technical advisor during court-appointed experts' judicial assessments." That Article "*relates to the administrative costs associated with proceedings, from the document instituting the proceedings up to the execution of the decision and the interventions of certain court officers*"[5]. The legal aid is granted to legal or natural persons if they are involved in proceedings, if their claim seems fair and if they can prove that their incomes are insufficient.

II. 2. The case preparation allowance (lawyers' costs and fees)

In the costs, Article 1022 of the Judicial Code more particularly concerns the case preparation allowance.

That Article provides that: "*The case preparation allowance is a flat contribution to the lawyers' costs and fees of the successful party.*
After consulting with the Ordre des barreaux francophones et germanophone and with the Orde van Vlaamse Balies, the King shall establish, by decree deliberated in the Council of Ministers, the basic, minimum and maximum amounts of the case preparation allowance, depending in particular on the nature of the case and on the importance of the litigation.
At the request of one of the parties, eventually made by the judge, the latter may either reduce or increase the allowance by a specifically motivated decision, without, however, exceeding the maximum and minimum amounts established by the King. In his/her assessment, the judge shall take the following into account:

- *the unsuccessful party's financial capacity as a factor in reducing the amount of the allowance;*
- *the complexity of the case;*
- *the allowances awarded on a contractual basis to the successful party;*
- *the manifestly unreasonable nature of the situation.*

If the unsuccessful party benefits from the secondary legal assistance, the case preparation allowance is set at the minimum amount established by the King, except in case of manifestly unreasonable situation. The judge shall specifically motivate his/her decision on that point.
When several parties benefit from the case preparation allowance supported by one and the same unsuccessful party, the amount of that allowance shall not exceed twice the maximum amount of the case preparation allowance which can be claimed by the beneficiary entitled to claim the highest allowance. It shall be allocated among the parties by the judge.
No party can be required to pay an allowance for the intervention of another party's lawyer beyond the amount of the case preparation allowance. "

In 2007, the Belgian legislator set up this lawyers' costs and fees recovery system. The main objective of the legislator was to ensure an equal access to justice for all citizens: "*The preparatory work for the challenged law indicates that the legislator took care to ensure legal certainty and to respond to the evolving case law on the recovery of lawyer's costs, as well as to safeguard access to justice for all litigants* [6]". The explanatory memorandum of the proposal for a law on the recovery of lawyers' fees and costs recalled that the right of access to justice necessarily follows from Article 6, §1, of the European Convention on Human Rights[7]. Pursuant to Article 6 of the European Convention on Human Rights, "*the right of access to a judge and the principle of equality of arms also imply the obligation to secure a balance between the parties to the proceedings and to give each party the opportunity to present its case in conditions that do not put it at a clear disadvantage compared to the opposing party(ies)*[8]".
However, as the Constitutional Court stated, "*the potential costs of a judicial proceeding can have an influence both on the decision to bring action and on the decision to defend oneself against a claim or an*

[5] C. Defoirdt, « L'assistance judiciaire. », in *Droit judiciaire. Commentaire pratique*, Wolters Kluwer, 2007, IX.2 – 2, n° 005.
[6] Constitutional Court, 18 December 2008, decision no 182/2008, point B.5.3.
[7] Proposal for a law on the recovery of lawyers' fees and costs, Doc. Parl. Sénat, session 2005-2006, 3-1686/1, p. 8.
[8] ECHR, Dombo v. The Netherlands, 22 September 1993; Öcalan v. Turkey, 12 March 2003; Yvon v. France, 24 April 2003, quoted by the Constitutional Court, 19 April 2006, decision no 57/2006, point B.4.3.

accusation."[9] (…) Finally, "*it is up to the legislator to give a practical scope to the general principles such as access to a court and the equality of arms as well as to determine to what extent the recovery of lawyers' fees and costs should contribute to it*"[10].

Article 1022 of the Judicial Code defines the case preparation allowance as a flat contribution to the lawyers' costs and fees of the successful party. This is not a full defrayal of the lawyers' costs and fees but a flat amount granted to the successful party and paid by the unsuccessful one. The amounts are set out in the Royal Decree of 26 October 2007 fixing the amounts of the case preparation allowance referred to in Article 1022 of the Judicial Code and establishing the date of entry into force of Articles 1 to 13 of the law of 21 April 2007 on the recovery of lawyer's fees and costs (M. B., 9 November 2007). Its Article 8 provides that: "Basic, minimum and maximum amounts are linked to the consumer price index, which corresponds to 105,78 points (base 2004); any increase or decrease of 10 points will result in a 10 percent increase or decrease in the amounts referred to in Articles 2 to 4 of this decree."

As the index of February 2011 was established at 116.33 (M.B., 28 February 2011), the aforesaid amounts are increased by 10 percent as from 1 March 2011.

	Basic amount	**Minimum amount**	**Maximum amount**
Up to EUR 250.00	EUR 165.00	EUR 82.50	EUR 330.00
From EUR 250.01 to EUR 750.00	EUR 220.00	EUR 137.50	EUR 550.00
From EUR 750.01 to EUR 2,500.00	EUR 440.00	EUR 220.00	EUR 1,100.00
From EUR 2,500.01 to EUR 5,000.00	EUR 715.00	EUR 412.50	EUR 1,650.00
From EUR 5,000.01 to EUR 10,000.00	EUR 990.00	EUR 550.00	EUR 2,200.00
From EUR 10,000.01 to EUR 20,000.00	EUR 1,210.00	EUR 687.50	EUR 2,750.00
From EUR 20,000.01 to EUR 40,000.00	EUR 2,200.00	EUR 1,100.00	EUR 4,400.00
From EUR 40,000.01 to EUR 60,000.00	EUR 2,750.00	EUR 1,100.00	EUR 5,500.00
From EUR 60,000.01 to EUR 100,000.00	EUR 3,300.00	EUR 1,100.00	EUR 6,600.00
From EUR 100,000.01 to EUR 250,000.00	EUR 5,500.00	EUR 1,100.00	EUR 11,000.00
From EUR 250,000.01 to EUR 500,000.00	EUR 7,700.00	EUR 1,100.00	EUR 15,400.00
From EUR 500,000.01 to EUR 1,000,000.00	EUR 11,000.00	EUR 1,100.00	EUR 22,000.00
More than EUR 1,000,000.01	EUR 16,500.00	EUR 1,100.00	EUR 33,000.00

	Basic amount	**Minimum amount**	**Maximum amount**
Cases not evaluable in money	EUR 1,320.00	EUR 82.50	EUR 11,000.00

However, this is not a purely flat-rate system: "*In a sensible manner, a mixed system has been established: it has a flat-rate basis but the judge keeps a power of discretion. (…) in accordance with the 'range' from the minimum to the maximum amount, the judge may assess the amount the unsuccessful party will be ordered*

[9] Constitutional Court, 19 April 2006, op. cit., point B.4.6.
[10] Ibidem, point B.4.4.

to pay[11]. ". Indeed, after the bar associations delivered their opinions, the royal decree established the basic, minimum and maximum amounts, depending in particular on the nature of the case and on the importance of the litigation. Practically, the judge refers to the basic amount established by the royal decree unless the parties request him/her to depart from it. In this case, the judge has a discretion power (Article 1022, paragraph 3, of the Judicial Code) taking into account the unsuccessful party's financial capacity as a factor in reducing the amount of the allowance, the complexity of the case, the allowances awarded on a contractual basis to the successful party, the manifestly unreasonable nature of the situation[12].

The first criterion can only be used for an eventual reduction of the basic allowance provided that the lack of resources is sufficiently demonstrated. Moreover, the person asking for this reduction must provide all the elements that may justify his/her claim.
The complexity of the case is a relatively flexible criterion which makes it possible to adapt (upwards or downwards) the allowance to the circumstances of the case submitted to the judge, especially in cases not evaluable in money (multiplicity of proceedings, complexity of the arguments exchanged between parties, etc.).
The third criterion plays a more marginal role and concerns penalty clauses, which may establish substantial default interest.
According to the doctrine, the criterion concerning the manifestly unreasonable nature of the situation is the most difficult one to discern. "Unreasonable" should not be confused with "unfair" and neither should "the situation" with the persons. The application of this criterion enables the trial judge to take into account criteria which are specific to the proceedings before him/her, as well as criteria which are specific to the situation of the parties[13]. For instance, the judge can increase the amount of the allowance in case of abusive behaviour by one of the parties. He/She can also reduce the case preparation allowance in case of a manifestly unreasonable situation given the disproportion between the financial positions of the respective parties[14].

In view of the foregoing, the following elements can be emphasized in the decision of the court of appeal:
1. The court of appeal ordered both non-profit associations to pay the costs claimed by the respondent company in its latest additional summary submissions (dated 14 May 2013), i.e. EUR 1,200 for the proceedings at first instance and EUR 2,500 for the appeal. We would like to draw the Committee's attention to the fact that it did not get the respondent's submissions in this case, whereas it received the appellants' submissions. The Court of Cassation[15] recalled that "*in the judgement, the judge may only award the costs which have effectively been mentioned by the parties in their detailed statements*". It is therefore important to take into account the claims of all the parties concerning the costs in general and not only the claim of one of them.

2. In its assessment of the costs, the court of appeal uses the following arguments:

- "*the originating request of both above-mentioned non-profit associations and their appeal caused both instances, whereas the counterclaim of the respondent company is just the reply to that;*

[11] G. MARY, « La nouvelles réglementation relative à la répétibilité des frais et honoraires d'avocat », *R.G.A.R.*, 2008 , 14336, p.10, pt 4.
[12] J-F. van DROOGHENBROECK and B. DE CONINCK, La loi du 21 avril 2007 sur la répétibilité des frais et honoraires d'avocat, *J.T.*, 2008, p. 44 and 45.
[13] H. Boularbah, « Les frais et les dépens, spécialement l'indemnité de procédure », in Actualités en droit judiciaire, Larcier, CUP, volume 145, 2013, p. 387, n°65.
[14] Cass., 21 January 2010, C.08.0538.N : The Court of Cassation set aside the decision of the court of appeal of Brussels because the latter did not answer to one of the arguments raised by one of the parties and based on the criterion of the manifestly unreasonable nature of the situation. The court of appeal failed to motivate its decision on that point. www.juridat.be
[15] Cass., 5 January 2007, C.05.0483.N/1, www.juridat.be

- *given the extent to which the case has developed in appeal, the amount claimed in appeal is indeed higher than the basic allowance but remains within a reasonable range in comparison with the maximum allowance for litigations not evaluable in money;*
- *both above-mentioned non-profit associations have not adequately established reasons relating to their exact financial position that would allow the court to reduce the case preparation allowances normally calculated according to the statutory scales for such proceedings;*
- *although it may overall seem desirable that non-profit environmental protection associations should not be ordered to pay the costs of their proceedings, this principle, which is praiseworthy in itself, can no longer be retained when such non-profit associations initiate proceedings, the basis of which is highly questionable in several respects, which is the case here*"[16].

In this case, we can thus simply note that the court used several criteria made available to it under Belgian law to adapt the amount of the case preparation allowance: the financial capacity of the parties (not adequately established), the complexity of the case (multiplicity of proceedings due to the applicant) and the manifestly unreasonable nature of the situation (highly questionable basis).

To conclude, we hope that this brief explanatory presentation of the Belgian system will, as far as possible, help the Committee assess the present case.

The Director General,

D. FLORE

[16] Decision of the court of appeal of Liège dated 29 October 2013, p. 6.