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

The communicant denounced the judgment of the Liège court of appeal of 29 October 2013 to the Committee on 12 May 2014 as he considered that the sums (1,200 and 2,500 euro) he was ordered to pay were “intrinsically prohibitive and contrary to article 9.4 of the Convention”.

I. Case preparation allowance

In Belgian law, the unsuccessful party has to pay the costs of the proceedings.
The costs of the proceedings include the case preparation allowance. The case preparation allowance is 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.
At the same time, however, it is not a purely flat-rate system either. It is a combined system, which means that it has a flat-rate basis but the judge keeps a power of discretion within the boundaries of set minimum and maximum limits. The judge may assess the amount the unsuccessful party will be ordered to pay. 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. In practice, 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, with a view to reducing the amount of the allowance, the complexity of the case, the allowances awarded on a contractual basis to the successful party and the manifestly unreasonable nature of the situation as factors.

II. Conformity of the Belgian system with the Aarhus Convention
Article 3.**8**. of the Aarhus Convention gives the courts the power to award reasonable costs in judicial proceedings.

“3.8. *Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement.* ***This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings.*** ”

"9.4. *In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be* ***fair, equitable, timely and not prohibitively expensive****. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.* "

The Belgian lawyers' costs and fees recovery system is fully in conformity with the Aarhus Convention as it only gives the courts the power to award reasonable costs in judicial proceedings.
Indeed, the objective of the legislator who created this recovery system was to put an end to the legal insecurity due to the disparate case law in the field of lawyers' costs and fees recovery while ensuring the access to justice. When the legislator introduced the recovery system, he was aware of the fact that he might hinder the access to justice. That is why this recovery system has been framed by:

- minimum and maximum amounts determined by the bar associations, which know the average fees lawyers charge and which are thus able to fix minimum and maximum amounts in a well-informed way. As the advocate general of the Court of Justice of the EU states in his conclusions regarding the case C-57/15 United Video Properties, Inc. v Telenet NV of 5 April 2016 (reimbursement of lawyers' fees in the field of intellectual property rights – directive 2004/48), "*The Royal Decree was adopted specifically in the light of the favourable opinion of the Belgian professional organisations (bar associations) and therefore, in principle, it must be assumed that the maximum figures laid down therein are consonant with the average standards applicable in Belgium. Those organisations are well placed to suggest the standards of '****objective reasonableness****' above which, in Belgium, no one should be required to pay the opposing party's lawyer's fees.* "

- the involvement of a judge, which allows to take the circumstances of the case into account.

This combined system has the benefit of ensuring a degree of predictability regarding the financial risks in the event of losing an action, which not only favours access to justice but also protects a party when the opposing party has incurred costs which are not reasonable or proportionate.
Moreover, in its judgment No 182/2008 of 18 December 2008, the Constitutional Court defends this system: "*It is because of his concern for the access to justice that the legislator has chosen to strictly frame the recoverability, by limiting any increase in the amount of the case preparation allowance and granting discretionary powers to the judge to adjust this amount, within the limits set by the King, in order to take account of specific circumstances, and especially of the financial capacity of the unsuccessful party. The system can thus restrict the effects of recoverability in respect of any losing party with limited financial resources.* ".

III. Judgment of the court of appeal

The court of appeal ordered the communicant to pay the costs claimed by the respondent company in its final additional summary of arguments (dated 14 May 2013), i.e. 1,200 euro for the proceedings at first instance and 2,500 euro for the appeal.
The court of appeal has based its assessment of the costs on several criteria for which the Belgian law provides with a view to adjusting the amount of the case preparation allowance.

1. The first criterion, i.e. the financial capacity of the unsuccessful party, can only be used for a potential 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 court considered that the communicant failed to satisfactorily demonstrate its difficult financial situation.

- "*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 usually calculated according to the statutory scales for such proceedings*"

Indeed, in his summary of appeal arguments (page 41), the communicant only requested a reduction of the case preparation allowance to 75 euro, arguing that "non-profit associations are involved, which take recourse to a remedy that is specifically created for them and should serve the collective environmental interest, and that they should not be penalized for their efforts"... and stating that account should be taken of the financial capacity of the unsuccessful party, however without submitting supporting documents to prove this capacity or at the very least without submitting sufficient supporting documents.
In his letter to the compliance committee of 12 May 2014, the communicant defends himself by stating that the accounts of non-profit associations are public... (submitted to the commercial court). In addition to the fact that the communicant admits that he has not submitted supporting documents, the attention of the committee should be drawn to the fact that the judge judges on the basis of documentary evidence and that the parties have to put forward the facts that support their claims. The judge may not base his decision on facts that are not in the debate or on personal knowledge that the judge has acquired outside the hearing. Moreover, it is not common knowledge that non-profit associations have limited means ...

2. The court took account of the criterion complexity of the case (which may result in a reduction or an increase of the case preparation allowance). In this case, taking account of this criterion resulted in an increase.

- "*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;* ***criterion complexity of the case – arguments exchanged, length of the conclusions ...)***
- *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 assessable in money; complexity of the case*

3. Moreover, in accordance with the case-law of the Court of Justice of the EU (Edwards judgment), the court took account of "*the reasonable chances for the claimant to be successful, the seriousness of what is at stake for him and of what is at stake as regards the protection of the environment, the complexity of the applicable law and procedure and the potentially reckless nature of the appeal in its various stages*". It seems that the cause of action was highly questionable. An appeal that is manifestly bound to be unsuccessful does not serve the general interest. Here are some passages from the decision of the court of appeal of Liège of 29 October 2013:

- "*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*"[1].

- *"The court notes a priori that the duration of the preparation of the case and the particularly long and technical expositions in the parts on the actual existence of a violation already raise questions on the manifest or serious nature of the allegations"*[2]*;*
- *"at this stage, the court can only assume that there is allegedly a manifest violation or a serious threat of violation of a legal or regulatory or other environmental provision"*[3]*;*
- *"after reading the document granting the single permit, it can certainly not be boldly concluded that the permit is insufficiently justified.*

[1] Decision of the court of appeal of Liège dated 29 October 2013, p. 6.
[2] *Ibidem*, p. 3

Moreover, the court cannot see that the assessment of the administrative authority with a view to the issuing of the single permit would in any way constitute an obvious violation or a serious threat of violation of a legal or regulatory or other environmental provision"[4];

- *- "Even though the preceding statement of reasons is already a sufficient justification for the decision in principle that the claim of the appealing non-profit associations is unfounded, the court also points out, as the respondent company also does, that it is traditionally acknowledged that the application of the law of 12 January 1993 requires not only an actual violation of the environmental legislations, but also an actual violation as regards the quality of the environment.*
  On this last point, the court further notes that the alleged violations invoked by the responding parties as regards the quality of the environment were taken into consideration by the authorities that issued the permit to the respondent company and that the permit was issued three years before the two appealing non-profit associations took legal action"[5];

To conclude:

1. The Belgian recovery system is not inconsistent with article 9.4. of the Aarhus Convention as it provides for a flat-rate system, of which the amounts have been determined by the bar associations, with a maximum and a minimum limit. Moreover, the judge can reduce or increase the amount of the case preparation allowance within these limits, taking account of 4 criteria, in particular the financial capacity of the unsuccessful party, with a view to reducing the amount of the allowance.
2. The judgment observed the Belgian legislation and made use of the possibility to adapt the amount in the light of the specific facts of the case. If the communicant had been more diligent, he would most certainly have been able to prove the financial incapacity of his clients and would have been able to obtain a reduction of the amount!
3. Finally, it has to be pointed out that the communicant also had the possibility to file an appeal with the Court of Cassation if he was dissatisfied with the judgment of the court of appeal. The judicial assistance before the Court of Cassation allows to obtain the full reimbursement of the legal expenses, including the costs for the representation by a lawyer before the Court of Cassation, only when such representation is required by the law (which is the case here).

[4] *Ibidem*, p. 5.