Aarhus Convention Compliance Committee
Your Ref.: PRE/ACCC/C/2015/127
Our Ref.: Maquoi, File No. 780

Replies to the Committee's questions received on 6 October 2015

A. Introduction

The communicants wish to clarify that the Communication must be corrected, in so far as it should apply only to non-compliance with article 9, paragraph 4, of the Aarhus Convention.

The Communication concerns only the guarantee of an equitable procedure and the guarantee of a procedure which is not prohibitively expensive, which are two guarantees contained in article 9, paragraph 4, of the Aarhus Convention.

Therefore it was in error that article 9, paragraph 3, of the Aarhus Convention was mentioned in sub-heading 1 on page 3 of the Communication. Indeed, that section is entitled *Infringement of the right to access to justice in environmental matters that is not prohibitively expensive*, and it is of course article 9, paragraph 4, which guarantees that right.

However, the applicants would also like to point out that article 9, paragraph 4, applies to procedures established in the light of article 9, paragraph 3, and that as a consequence – or at least, as an indirect knock-on effect – these matters also concern paragraph 3.

The communicants will try to answer the Committee's questions in the light of the foregoing, amending the wording of their statements so that they also apply to article 9, paragraph 4, of the Convention and no longer only to article 9, paragraph 3, of the Convention.

B. Issue (i): how the communication concerns provisions of national law relating to the environment within the scope of article 9, paragraph 3 [and 9, paragraph 4] of the Convention

1. The Communication concerns issues of the recoverability of lawyers' fees and costs of action before the Belgian Conseil d'Etat (Council of State).

2. The Communication concerns the legislation applicable before the entry into force on 2 April 2014 of the Royal Decree of 28 March 2014 concerning the case preparation allowance covered by Article 30/1 of the Coordinated Laws on the Conseil d'Etat (Council of State) of 12 January 1973 ('the Royal Decree of 28 March 2014').

Article 30/1 of the Coordinated Laws on the Council of State of 12 January 1973 ('the Coordinated Laws') was incorporated into the Coordinated Laws by the Council of State Reform Act 2014 (Law of 20 January 2014 reforming the powers, procedure and organization of the Conseil d'Etat (Council of State)) ('the Reform Act of 20 January 2014'). The text of Article 30/1 is reproduced in section C.2 of this document.

Article 30/1 establishes a system for a case preparation allowance to be awarded to the 'winning' party as a fixed-rate lump sum.

3. The system that preceded the one established by Article 30/1 of the Coordinated Laws, as implemented by the Royal Decree of 28 March 2014, is the system which this Communication sets out to criticize.

In point of fact, before Article 30/1 of the Coordinated Laws came into force, there was no text explicitly providing for recovery of lawyers' fees and of the costs of consulting technical advisers in the context of litigation before the Council of State.

This is the specific subject-matter of the Communication.

4. This legislation – or rather, this absence of legislation – on recovery of expenses demonstrably *concerned the environment* – and therefore fell within the scope of article 9, paragraphs 3 and 4, of the Aarhus Convention – in the sense that it governed an aspect of the Council of State's procedures, which include the opportunity to seek remedies against planning permits, environmental permits and single permits, which are nothing other than forms of consent to make changes to the environment.

Moreover, proceedings before the Council of State can also concern the environment, in the sense that arguments alleging harmful effects on the environment may also be raised.

C. Issue (ii): the extent to which regulation of judicial costs under Coordinated Laws on the Conseil d'Etat (Council of State) is applicable to cases within the scope of article 9, paragraph 3 [and 9, paragraph 4] of the Convention, supporting that answer with relevant statistics and case law

1. As the communicants have already pointed out above (in B.), before Article 30/1 of the Coordinated Laws was introduced by the Reform Act of 20 January 2014 and implemented by the Royal Decree of 28 March 2014, there was no legislation providing for a system of recovery.

Consequently, a judicial solution developed through case-law.[1] This made Article 1382 of the Belgian Civil Code (which is the legal basis of civil liability) applicable in circumstances such as those in this case and enabled an application before the ordinary [i.e. non-administrative] courts for an order for compensation equivalent to the standard case preparation allowance in cases before the ordinary courts[2] – which was €1,320 – against a public authority that had adopted an unlawful measure subsequently annulled by the Council of State, to compensate for harm caused by the adoption of the unlawful measure.

That approach was most certainly prohibitively expensive because (i) it involved a second set of proceedings before the ordinary courts after the initial annulment proceedings before the Council of State, with the disbursement of numerous different expenses which, even though they would be reimbursed in the future (although, we should remember, as a fixed-rate lump sum), had to be paid by the public concerned, and (ii) it did not guarantee as a matter of principle that the adoption of an unlawful measure was equivalent to a wrongful act and so justified compensation for harm caused by that unlawful measure, with the result that some applicants who won their cases before the Council of State might not be compensated for their expenditure on the proceedings.

2. The system for recovery of lawyers' fees in cases before the Council of State is now clearly regulated under fixed-rate provisions, and Article 30/1 of the Coordinated Laws, currently in force, states:

> "*§1. The Administrative Litigation Department may award a case preparation allowance, which is a flat-rate contribution to the lawyers' costs and fees of the successful party.*
>
> *After consulting the Ordre des barreaux francophones et germanophone and the Orde van Vlaamse Balies [the French-, German- and Dutch-speaking bar associations], the King shall establish, by decree deliberated in the Council of Ministers, the standard, minimum and maximum amounts of the case preparation allowance, depending in particular on the nature of the case and the importance of the case.*
>
> *§ 2. The Administrative Litigation Department may, by a decision based on specific reasoning, reduce or increase the payment, without however exceeding the minimum and maximum amounts established by the King. In making its assessment, it is to take into account:*
>
> *1) the unsuccessful party's financial capacity as a factor in reducing the amount of the payment;*
>
> *2) the complexity of the case;*
>
> *3) the manifestly unreasonable nature of the situation.*
>
> *If the unsuccessful party is eligible for second-level legal aid, the case preparation allowance is set at the minimum amount established by the King, unless that is a manifestly*

[1] Judgment No. 118/09 of 16 July 2009 of the Belgian Constitutional Court. (Annex 5 to the Communication)

[2] The arrangements for this compensation before the ordinary courts were determined under Articles 1017 and 1022 of the Code of Civil Procedure and under the Royal Decree of 26 October 2007 fixing the amounts of the case preparation allowances referred to in Article 1022 of the Code of Civil Procedure.

unreasonable situation. In that regard, the Administrative Litigation Department is to base its decision to reduce or increase the allowance on specific reasoning.

Where several parties are entitled to a case preparation allowance awarded against one or more unsuccessful parties, the total amount shall not exceed twice the maximum case preparation allowance that could be claimed by the party entitled to the highest allowance. The Administrative Litigation Department shall apportion the total amount between the parties.

No party can be required to pay compensation for the involvement of another party's lawyer in excess of the amount of the case preparation allowance. Intervening parties cannot be required to pay this allowance, nor are they entitled to it."

And, under the new Article 67 of the Decision of the Regent of 23 August 1948 specifying the procedure for claims before the Administrative Litigation Department of the Council of State:[3]

"*§1. The standard amount of the case preparation allowance is €700, the minimum amount is €140 and the maximum amount is €1,400.*"

3. The case preparation allowance system (whether judicial or statutory in origin) concerns procedures that fall within the scope of the Aarhus Convention each time that they relate to planning permits (which was the situation in the case at issue in the Communication), environmental permits, single permits, development permits or any other permits of an environmental nature or even simply each time that grounds or arguments relating to the environment are raised (which was also the situation in the proceedings in this case).

D. Conclusion

The communicants consider, therefore, that the alleged non-compliance – concerning, first, the prohibitive expense of a specific action before the Council of State and, secondly, an inequitable procedure before the Cour d'appel (Court of Appeal) and the Cour de cassation (Court of Cassation) – infringe article 9, paragraph 4, of the Aarhus Convention and, though only by knock-on effect, article 9, paragraph 3, of the Aarhus Convention.

Moreover, the communicants also draw the Committee's attention to the fact that, in the light of the new legislation, now in force, on recovery under fixed-rate provisions of expenses incurred before the Council of State, instances of non-compliance such as those alleged here can no longer occur.

[3] Re-established by Article 2 of the Royal Decree concerning the case preparation allowance covered by Article 30/1 of the Coordinated Laws.

That is why the subject-matter of their complaint is not a general failure to implement the Aarhus Convention, but only two specific infringements, in connection with the judgment of the Twelfth Chamber of the Court of Appeal of Liège of 8 June 2010 and the judgment of the Court of Cassation of 11 October 2012.

[signed]
Liège, 9 November 2015
For the communicants,
their counsel,
Alain LEBRUN,
Lawyer.