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16 December 2020

Aarhus Convention Compliance Committee
Secretary to the Aarhus Convention Compliance Committee
United Nations Economic Commission for Europe
Palais des Nations, 1211 Geneva 10, Switzerland

Cc:

Dr. Maria Carmela Giarratano
Directorate General for Innovation, Personnel and Participation Policies
Ministry of the Environment, Land and Sea
Rome - Italy

Re: (ACCCC / C / 2015/130 (Italy)) Replies of WWF Italia to questions of December 4th, 2020

Dear Ms. Marshall,

Herewith WWF Italy submits its answers to the Committee's questions issued on December 4, 2020.

Questions from the Committee to the communicant and the Party concerned:

Questions to both parties:

1. Is stamp duty (imposta di bollo) still due for documents lodged in the course of judicial proceedings within the scope of article 9 of the Convention?

If that is no longer the case, please provide the legislation which introduced this reform, with an English translation of the relevant provisions.

If stamp duty is still payable, how high is it at first instance and on appeal? How many documents are subject to this duty (i) at first instance; and (ii) on appeal?

Answer

The stamp duty (*imposta di bollo*) is still due in judicial proceeding within the scope of Art. 9 of the Convention, albeit limited to the right to copy official documents of the proceedings and obtain certified copies of judicial decisions. On this point, please see the circular of the Italian Secretariat of Administrative Justice of 3 August 2018 attached (att.1). The amount of the duty depends on the number of pages of the documents a copy thereof is requested. Thus, it is not possible to predetermine their cost in advance as it may vary depending on the actual length and the number of the relevant documents, including judgments. The question, however, has become marginal in recent years, also with regard to costs, because in most cases copies are obtained digitally and hence no duty must be paid.

Questions to the communicant:

2. In its update dated 20 November 2020, the communicant states that, where the action of a claimant in an environmental case has been rejected both at first instance and on appeal, the costs incurred by the claimant at both instances combined can range between €15,000 and €60,000.

Please provide examples of judgments and/ or judicial orders awarding costs against unsuccessful claimants in environmental cases within the scope of article 9 of the Convention to support its claim that costs at both instances combined can be up to €60,000. To enable the Committee to appreciate the costs at the two instances combined, the communicant is requested to provide such documentation at first instance and on appeal in the same cases.

First of all, it must be pointed out that the Italian courts follow the tariffs set out in Ministerial Decree no. 55 of 10 March 2014 (the relevant tariff tables for administrative proceedings are attached hereto under 2 in both its Italian version and English translation).

These tables quantify the remuneration of legal assistance in all domestic jurisdictions, including the administrative one (i.e., TAR and Council of State); the final amount varies depending on the activities carried out during the relevant proceeding (e.g., in case of preliminary investigation before TAR or in case of a request for a precautionary measure before TAR and the Council of State), and on the overall monetary value of the case.

Environmental cases are in most cases considered to be of "indeterminable" or "indeterminable of particular importance" value. In the former case, the monetary values of ranging from 26,000.00 to 260,000.00 applies; in the latter case, the monetary value up to 520,000.00 applies.

The fee then varies from a minimum to a maximum to be ultimately determined at the judicial bodies' discretion, although based on various parameters (i.e., the complexity of the case, the activity performed by attorneys, etc.). For example, in a case of indeterminable value, the fee for the appeal alone ranges from €675.00 to €3,276.00.

When estimating the costs of a case, environmental associations are thus to face both a certain costs outline and an uncertain one:

- The certain proceedings' costs outline relates the cost of the unified contribution/filing fee (*contributo unificato*), which amounts to €650.00 for the appeal and €650.00 for each appeal on additional grounds (*motivi aggiunti*). Importantly, additional appeals are not infrequent in environmental matters, because authorisation of projects with impacts on the environment are often complex and based on several measures issued at different times. In addition to this cost, comes the associations' own legal expenses for attorneys, who in many cases act pro bono or to a much lesser extent than provided for in Ministerial Decree 55 of 2014;

- The uncertain proceedings' costs outline relates to:

(a) the number of parties who will actually join the administrative proceedings among those against whom the action is filed;

(b) the amount of activity that will take place during the whole proceeding;

(c) the amount of compensation for each parties' lawyer that the TAR and the Council of State will determine and that the appellant will be required to pay in the event of losing the case. On the basis

of the table (attachment 2), administrative judicial bodies in Italy are free to determine the remuneration of the lawyer for each of the parties to the proceedings in an amount ranging from €5,301.00 to €37,161.00 in proceedings before the TAR, and from €5,115.00 to €37,332.00 in proceedings before the Council of State. Administrative judges in Italy therefore entertain a very wide discretion in quantifying the lawyer's fee for each party of the proceedings before them.

It is now necessary to examine the practice of the Regional Administrative Courts (TAR) and the Council of State in proceedings relevant under Article 9 of the Convention.

Here are some recent examples. A summary of the most relevant sections of these judgments are also enclosed in their English translation.

TAR Trentino-Alto Adige, 20 October 2020, no. 248 - Plaintiff: Associazione Verdi Ambiente (attachment 3)

Costs outline:

order € 2,000.00 plus ancillary costs and VAT	
for each defendant (3) =	€2000,00
Flat-rate costs (set by law) - 15%	€2300,00
lawyers' social security - 4%	€2392,00
VAT 22%	€2918,24
3 defendants	€8754.72
Unified contribution for the filing of the case	€650.00
Unified contribution for filing on additional grounds (motivi aggiunti)	€650.00

The Association thus incurred costs of € 10,054.00 at first instance. Clearly without taking into account the costs of its own defence.

TAR Liguria 3 September 2020, no. 600 – Plaintiffs: WWF + others (attachment 4)

Costs outline:

order 2.000,00 plus ancillary costs and VAT	
for each defendant (4) =	€2000,00
Flat-rate costs (set by law) - 15%	€2300,00
lawyers' social security - 4%	€2392,00
VAT 22%	€2918,24
4 defendants	€11.673,00
Unified fee for filing	€650,00
Unified fee for filing on additional grounds	€650,00
Unified contribution for additional grounds (2)	€650,00

Total €13,623.00

Council of State, judgment 15 June 2017, no. 8170 – Plaintiff: WWF Italia (attachment 5)

Costs outline:

order €5,000.00, plus ancillary costs and VAT	
for each defendant (6) =	€5,000.00
Flat-rate costs (set by law) - 15%	€5750,00
lawyers' social security - 4%	€5980,00
VAT 22%	€7296,60
Total (6 defendants)	€43,776.00

It should be noted that this judgment was handed down twelve years after the appeal (2005) and nine years after the judgment of the Regional Administrative Court (2008), which had instead awarded the costs, i.e. had not ordered the applicant to pay the costs incurred by the respondents.

TAR Toscana, 12 December 2019, no. 1694 – Plaintiff: Italia Nostra (attachment 6)

Costs outline:

order €3500,00 plus ancillary costs and VAT	
Flat-rate costs (set by law) - 15%	€4025,00
lawyers' social security - 4%	€4186,00
VAT 22%	€5106,00
1 party to the proceedings	€5106,00
Unified contribution for filing	€650,00
Total	5.706,00

Although there was only one defendant, the association incurred costs of € 5706.00 only in the first instance proceeding.

The following conclusions can thus be drawn from the cases displayed above:

- *In practice*, the quantification of legal fees by the TAR and the Council of State is much lower than that provided for in the table according to the Ministerial Decree 10 March 2014, no. 55 (it ranges from € 2000.00 to € 5000.00);
- In administrative proceedings concerning environmental matters, the overall costs become burdensome primarily as a result of the high number of parties involved;
- The cost of a first instance proceeding before administrative courts (TAR) ranges from €5706.00 to €13,623.00, and may well be entirely to be borne by environmental associations in case their claim is rejected according to the costs follow the event rule;

- The proceeding costs before the Italian Council of State can amount, in cases with multiple parties, to €43,776.00, on top of the unified contribution of €950.00. Thus, in case of rejection of both claims before TAR and Council of State, the overall costs to be borne by losing associations might amount to as much as €60,000;

- Furthermore, such costs might result in a higher amount, should The Regional Administrative Courts (TAR) and the Council of State apply the relevant value tables as set in the relevant Ministerial Decree;

- The wide degree of uncertainty in advance as to the overall cost of the proceedings before administrative Courts is therefore a consequence deep-rooted in both the general regime for costs assessment and the Italian administrative Courts' judicial practice;

- The duration of the administrative proceedings, which often exceeds ten years, constitutes an additional hardship for environmental associations while setting aside in their budget the amounts necessary to duly cover the expenses they will incur should their claims be rejected. This results in a major deterrent to for the same associations from filing claims relevant under art. 9 of the Convention before administrative Courts in Italy.

3. Please provide examples of judgments or judicial orders in environmental cases within the scope of article 9 of the Convention in which a punitive surcharge has been imposed on the claimant pursuant to the second sentence of Article 26(1) and/ or under Article 26(2) of Decree 104/2010.

Answer

Although this possibility is envisaged under the relevant legal framework as noted by the Committee in its question, no such judgments are known within the scope of Article 9 of the Convention. However, should this additional charge be indeed imposed, the above reported administrative proceedings' costs could potentially result in much higher amounts.

4. Please provide examples of judgments or judicial orders to substantiate your claim (in the second paragraph 13 of the communication), that access to the legal aid regime by environmental NGOs like WWF Italia is barred "on the basis of a very questionable interpretation given by administrative judges". Please provide examples of such judgments or judicial orders:

(a) Issued prior to January 2018, while article 12 of Decree 460/1997 was still in force;

(b) Issued after January 2018 and since the entry into force of article 79 of Decree 117/2017 (the "Code of the Third Sector").

Answer

The answer to the question can be found in the order of the Supreme Court of Cassation of 5 February 2020 (annex 7), which referred to the Supreme Court in Plenary composition the key question about whether or not NGOs are exempt from the payment of the unified contribution, precisely because of the importance and the current uncertainty of the issue also as a result of inconsistent case law among the same Supreme Court's different Chambers.

The judgment also refers to the effects, which are yet very limited, resulting from the entry into force of the new legislation – Framework Law on the Third Sector. Yet this legislation, which profoundly

reformed the regulatory setup for not-profit entities in Italy, only entered into force in October 2020, and therefore no actual application of this regime is known as of today.

Notably, the Regional Administrative Court (TAR) of Tuscany, in its judgement no. 569 of 2011 (attachment 8), stated quite clearly the reasons that prevent the recognition of legal aid in favour of environmental associations, such as WWF. The Constitutional Court also ruled on this point in its decision no. 128/2016 (attachment 9), giving relevance only to the income limit, considering it constitutionally legitimate to use the same criterion for individuals and NGOs.

Trieste, 16 December 2020

Yours sincerely,

WWF Italy
Alessandro Giadrossi

List of attachments:

- 1) Segretariato Giustizia Amministrativa circular document, 3 August 2018 (Italian and English version);
- 2) Ministerial Decree no. 55 /2014 on costs values in judicial administrative proceedings (Italian and English version);
- 3) TAR Trentino Alto Adige, judgment 20 October 2020, no. 248;
- 4) TAR Liguria, judgment 3 September 2020, no. 600;
- 5) Council of State, judgment 15 June 2017, no. 8170;
- 6) TAR Toscana, judgment 12 December 2019, no. 1694;
- 7) Supreme Court, Order 5 February 2020;
- 8) TAR Toscana, judgment 3 January 2011, no. 569;
- 9) Constitutional Court, judgment no. 128/2016 (ratio decidendi).