

## **Findings and recommendations with regard to communication ACCC/C/2015/130 concerning compliance by Italy**

**Adopted by the Compliance Committee on 6 July 2021<sup>1</sup>**

### **I. Introduction**

1. On 12 May 2015, WWF Italia submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), claiming the failure of Italy to comply with its obligations under articles 3(8), 9(4) and 9(5) of the Convention with respect to the cost of access to justice.
2. At its forty-ninth meeting (Geneva, 30 June - 3 July 2015), the Committee determined on a preliminary basis that the communication was admissible in accordance with paragraph 20 of the annex to decision I/7 of the Meeting of the Parties to the Convention. On 5 October 2015, the communication was forwarded to the Party concerned pursuant to paragraph 22 of the annex to decision I/7.
3. On 30 September 2016, the Party concerned provided its response to the communication.
4. On 30 January 2018, the Committee wrote to the Party concerned and the communicant requesting both to provide some additional information. On 7 March and 9 April 2018, the communicant and the Party concerned submitted their replies thereto, respectively.
5. On 30 April 2018, the communicant provided comments on the Party's reply dated 9 April 2018 to the Committee's questions.
6. On 12 June 2018, the Party concerned provided documents enclosing legislation relevant to the communication, stating that the English translation would follow.
7. On 3 August 2018, the Committee requested the Party concerned and the communicant to submit a number of legislative provisions and judgments referred to in the parties' submissions which had not been provided to the Committee yet. The Committee also requested an official English translation of certain documents.
8. On 1 October 2018, the Party concerned submitted a number of judgments as requested by the Committee and some official English translations.
9. The Committee held a hearing to discuss the substance of the communication at its sixty-eighth meeting (Geneva, 23-27 November 2020) with the participation of representatives of the communicant and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication.
10. On 4 December 2020, the Committee sent questions to the Party concerned and the communicant for their written reply. On 18 December 2020, the Party concerned and the communicant replied to the Committee's questions.
11. On 20 January 2021, the Committee sent further questions to the Party concerned and the communicant. On 2 February and 4 February 2021, respectively, the communicant and the Party concerned respectively submitted their replies.
12. The Committee completed its draft findings through its electronic decision-making procedure on 14 April 2021. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded on 21 April 2021 for comments to the Party concerned and the communicant. Both were invited to provide comments by 2 June 2021.
13. On 2 June 2021, the communicant submitted its comments on the Committee's draft findings. On 30 June 2021, the Party concerned confirmed that it had no comments on the Committee's draft findings.
14. At its virtual meeting on 1 July 2021, the Committee proceeded to finalize its findings in closed session taking into account the comments received. It then adopted its findings through its electronic decision-making procedure on 6 July 2021 and agreed that they should be published as a formal pre-session document to its

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<sup>1</sup> This text will be produced as an official United Nations document in due course. Meanwhile editorial or minor substantive changes (that is changes that have no impact on the findings and conclusions) may take place.

seventy-second meeting (Geneva, 18-20 October 2021). It requested the secretariat to send the findings to the Party concerned and the communicant.

## II. Summary of facts, evidence and issues<sup>2</sup>

### A. Legal framework

#### Court fees

15. According to article 13(6) (bis) of the Presidential Decree no. 115/2002, the fee (*contributo unificato*) to be paid to file a claim before an administrative court ranges from €650 to €2,000 depending on the matter at stake.<sup>3</sup> Pursuant to article 13(1) (bis) the amount of the tax due at first instance is “increased by half” in second instance proceedings so that, if the amount paid for filing the case before a first instance court was €650, €975, will be due at second instance. An additional fee at the same level is due for each new argument brought to the original claim in accordance with article 13(6) (bis.1) of the Presidential Decree no. 115/2002.<sup>4</sup>

16. In any case, article 13(6) (bis) (a) provides for an exemption from the duty to pay the tax in case of appeal against the refusal of access to environmental information.<sup>5</sup>

17. Pursuant to article 27(bis), table B of the Presidential Decree no. 642/1972, documents, petitions, contracts, as well as copies, even if declared as true, extracts, certifications, declarations and attestations made or requested by non-profit organizations are exempt from stamp tax (*imposta di bollo*).<sup>6</sup>

#### Legal aid

18. According to article 76 of the Presidential Decree no. 115/2002, legal aid can be granted to those whose taxable personal income according to their most recent tax declaration does not exceed €11,493.82.<sup>7</sup>

19. Article 119 of the Presidential Decree no. 115/2002 provides that non-profit organizations which do not pursue profit objectives and do not engage in economic activity are entitled to legal aid on the same terms as individuals (i.e. their annual income does not exceed €11,493.82).<sup>8</sup>

#### Costs to be borne by the unsuccessful party

20. Legislative Decree no. 104/2010 extended the application of articles 91, 92 and 96 of the Code of Civil Procedure governing litigation fees to judicial administrative procedures, with the effect that a judge orders the unsuccessful party to bear the opposing party’s litigation costs in the amount determined by the judge.<sup>9</sup>

21. Article 91(1) of the Code of Civil Procedure provides that:

“In his or her final judgment, the judge shall order the losing party to reimburse the costs borne by the other party and determine their amount together with the lawyer’s fees. However, where the successful party has without good reason refused a settlement proposal for an amount higher than that awarded with the final judgment, the judge may order the party that refused the proposal to bear all the legal costs incurred by the other party after the settlement proposal was made, subject to the provisions of the second paragraph of Article 92 ...”

22. Article 92 of the Code of Civil Procedure in turn provides that:

(1) When ruling pursuant to the previous article, the judge may exclude the recovery of the costs borne by the successful party if he or she deems them excessive or superfluous. Moreover, the judge may order the recovery of costs, even if these are not recoverable, which a party has incurred in, due to the other party’s breach of the duty laid down in article 88.

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<sup>2</sup>This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

<sup>3</sup>Communication, para. 11, and relevant legislation from the Party concerned, 12 June 2018, annex 2.

<sup>4</sup>Communication, para. 11, and Party’s reply to Committee’s questions, 9 April 2018, p.6.

<sup>5</sup>Party’s reply to the Committee’s questions, 9 April 2018, p. 9, and communicant’s reply to questions 5 March 2018, p. 4.

<sup>6</sup>Party’s reply to the Committee’s questions, 9 April 2018, p. 8.

<sup>7</sup>Relevant legislation from the Party concerned, 12 June 2018, annex 2.

<sup>8</sup>Communication, paras. 13 and 18, and relevant legislation from the Party concerned, 12 June 2018, annex 2.

<sup>9</sup>Communication, para. 23.

- (2) If both parties are unsuccessful, if the question raised is entirely novel or if a change in the case law has occurred with regard to the decisive issues in the case, the judge may apportion all or part of the expenses between the parties.

23. Article 92(2) of the Code of Civil Procedure has subsequently been partially struck down. In a judgment of 19 April 2018, the Constitutional Court held that article 92(2) was unconstitutional insofar as it limits the cases in which the judge may apportion the litigation costs between two parties.<sup>10</sup> The Court stated that article 92(2) is inconsistent with the principle of reasonableness and equality under article 3(1) of the Constitution, as well as the right to a fair trial pursuant to article 111(1) of the Constitution, and the right to judicial protection under article 24(1) of the Constitution. Furthermore, the Court found that a party's concern that it will be ordered to pay litigation costs even in unexpected and unpredictable situations can constitute an unjustified deterrent to rely on its rights.<sup>11</sup> The courts must therefore be empowered to apportion the costs in grave and exceptional circumstances analogous to those set out in article 92(2). However, the Court specified that it is for the legislator to address the effects of the regime of costs applying to the losing party, should it wish to do so;<sup>12</sup> but no such legislation has been adopted.

24. Article 88 of the Code of Civil Procedure requires parties and their counsel to act fairly and with probity in court.

25. Article 96 of the Code of Civil Procedure provides:

“If it is proven that the unsuccessful party acted improperly or pursued the proceedings in bad faith or with gross negligence, the judge shall, upon the other party's request, award compensation for the damage which it has incurred, in addition to the litigation costs.

...

In any event, when the judge decides on the expenses pursuant to article 91 [of the Code of Civil Procedure], he may, even *ex officio*, order the losing party to pay the successful party a sum determined on an equitable basis.”

26. Article 26(1) of Legislative Decree no. 104/2010 states that, when deciding on costs of the proceedings pursuant inter alia to articles 91, 92 and 96 of the Code of Civil Procedure and if the unsuccessful party has advanced manifestly unfounded arguments, a judge may, also acting *ex officio*, order that party to pay to the opposite party a sum of money determined on an equitable basis which may not be in any case greater than twice the amount of litigation fees which have been awarded.<sup>13</sup> Article 26(2) of the Legislative Decree provides: “The judge shall order *ex officio* the unsuccessful party to pay a fine of not less than twice and not more than five times the initial filing fee that has to be paid in order to file a claim, when the unsuccessful party has acted or pursued the proceedings vexatiously.”

27. When ruling on costs, courts should apply the tariff tables set out in Ministerial Decree no. 55/2014.<sup>14</sup> These tables quantify the remuneration of legal assistance in all domestic jurisdictions, including the Regional Administrative Courts (*Tribunale Amministrativo Regionale* or TAR) and the Council of State. The final amount varies depending on the activities carried out during the relevant proceedings (e.g., in case of a 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.<sup>15</sup>

28. Environmental cases are usually considered to be of “indeterminable” or “indeterminable of particular importance” value.<sup>16</sup> Pursuant to article 5 of Ministerial Decree no. 55/2014, in the former case, the tariffs applicable to monetary values ranging from €26,000 to 260,000 apply; in the latter case, the tariffs applicable for monetary value up to €520,000 apply. The fee then varies from a minimum to a maximum to be ultimately determined at the courts' discretion within the parameters set (e.g. the complexity of the case, the activity performed by advocates, etc.). The fee is to be paid by the unsuccessful party to each successful party. In the case of an unsuccessful claimant, the fee will be payable to each *parte resistente* (normally the public authorities taking the decision but, depending on the case, also other public authorities acting as parties in the

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<sup>10</sup> Communicant's comments on the Party's reply to questions, 30 April 2018, p. 2, and annex 3, p. 18.

<sup>11</sup> Communicant's comments on the Party's reply to questions, 30 April 2018, p. 2, and annex 3, p. 19.

<sup>12</sup> Communicant's comments on the Party's reply to questions, 30 April 2018, p. 2, and annex 3, p. 23232.

<sup>13</sup> Communication, para. 23, and relevant legislation from the Party concerned, 12 June 2018, annex 1.

<sup>14</sup> Communicant's reply to Committee's questions, 18 December 2020, annex 2.

<sup>15</sup> Communicant's reply to Committee's questions, 18 December 2020, p. 2.

<sup>16</sup> Communicant's reply to Committee's questions, 20 January 2021, p. 1.

proceedings) and *controinteressato* (the developer or other party with opposing interests), collectively referred to as “defendants” below.<sup>17</sup>

### Specific rules governing NGOs

29. Legislative Decree 460/1997 sets out specific rules regarding “non-profit organizations”. Article 10 defines non-profit organizations as “associations, committees, foundations, cooperative societies and other entities of a private nature, with or without “legal personality”, whose statutes or constitutive acts...expressly provide for...the performance of activities” in various areas, including the “protection and enhancement of nature and the environment”.

30. Article 12 of Legislative Decree 460/1997 provides for tax incentives for non-profit organizations. Pursuant to article 12(1), a non-profit organization’s institutional activities “in pursuance of purposes of social solidarity” do not constitute a commercial activity and article 12(2) provides that “revenues deriving from the exercise of directly related activities do not contribute to the generation of taxable income”.

### Legislative developments since the communication was filed

31. On 3 August 2018, Legislative Decree no. 117/2017 (“Code of the Third Sector”) entered into force with the aim to reform the non-profit sector, known in the Party concerned as the “third sector”.<sup>18</sup>

## B. Facts

### The filing fee

32. On 20 September 2013, the Court of Cassation refused to exempt WWF Italia from the payment of the filing fee (*contributo unificato*) on the basis that the term “acts” in Presidential Decree no. 642/1972, article 27 bis, table B (see para. 18 above) refers only to administrative acts and does not include judicial acts.<sup>19</sup> On 6 July 2017, the Regional Tax Court of Lazio followed suit,<sup>20</sup> as did the Regional Tax Court of Campania on 23 January 2018.<sup>21</sup>

33. In contrast, on 11 October 2016, the Regional Tax Court of Liguria upheld an appeal brought by another environmental non-profit organization which sought an exemption from the filing fee for all acts of a procedural nature.<sup>22</sup> The Court held:

“Considering the Aarhus Convention, ratified by the Italian Republic with the Law no. 108/2001, ... the only legitimate interpretation of article 10 of Presidential Decree no. 115/2002, which complies with the aforementioned European standards and constitutionally oriented, is that the combined provisions of the aforementioned Law and art. 27 bis, tab. B of the Presidential Decree no. 642/1972, should be interpreted to mean that an environmental NGO recognized by the Ministry of the Environment, acting in court for the defence of collective diffuse interests in environmental matters, is exempt from tax (*contributo unificato*). Accordingly, even the application before a court is included in the meaning of the word ‘acts’ in the article 27 bis, tab B. Only such an interpretation makes it possible for environmental NGOs to benefit from a tax regime (*contributo unificato*) which takes into account their special status, laid down at international level and guaranteed in the Italian legal system by constitutional rules.”<sup>23</sup>

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<sup>17</sup> Communicant’s reply to Committee’s questions, 18 December 2020, pp. 2 and 3.

<sup>18</sup> Party’s reply to Committee’s request for selected legislation and judgments, 1 October 2018, p. 1.

<sup>19</sup> Party’s reply to the Committee’s questions 9 April 2018, p. 9, and Party’s reply to Committee’s request for selected legislation and judgments, 1 October 2018, annex 1.

<sup>20</sup> Party’s reply to the Committee’s questions 9 April 2018, p. 9.

<sup>21</sup> Party’s reply to the Committee’s questions 9 April 2018, p. 8, and reply to Committee’s request for selected legislation and judgments, 1 October 2018, annex 3.

<sup>22</sup> Party’s reply to the Committee’s questions 9 April 2018, p. 7, and reply to Committee’s request for selected legislation and judgments, 1 October 2018, annex 2.

<sup>23</sup> Party’s reply to Committee’s questions 9 April 2018, pp. 7 - 8.

34. Similar decisions were made in 2015 by the Regional Tax Court of Lazio (decision no. 4352) and in 2016 by the Regional Tax Court of Lombardy (decision no. 987).<sup>24</sup>

35. On 5 February 2020, the Fifth Civil Section of the Supreme Court of Cassation referred to the Plenary formation of the of the same Court the question as to whether NGOs are exempt from the filing fee, precisely because of the importance and the divergences in the case law between different Chambers of the Court.<sup>25</sup> The case is currently pending.

#### **Refusal to grant legal aid to WWF Italia**

36. On 3 January 2011, the Regional Administrative Court of Tuscany rejected WWF Italia's application for legal aid on the ground that, based on an "objective" interpretation of the rules on legal aid, the applicant needed to prove that its income did not exceed the limits in article 76 of Decree no. 115/2002.<sup>26</sup> It thereby rejected the so-called "subjective" approach, which would have been satisfied by the mere fact that the applicant was a non-profit organization. The Court held that the purpose of legal aid was not to "encourage" parties with "specific interests, even if they were of a collective and general nature," but rather to ensure that parties which lack sufficient are able to defend their interests effectively the courts.<sup>27</sup>

37. On 13 October 2016, the Regional Administrative Court of Calabria rejected WWF Italia's application for legal aid.<sup>28</sup> The Court based its reasoning on article 76 of the Presidential Decree no. 115/2002, which states that only those with a taxable income not exceeding €11,493.82 are eligible for legal aid (see para. 17 above). It held that article 119 of that Decree does not imply that non-profit organizations are entitled per se to legal aid, as it should be interpreted in accordance with other relevant provisions and in particular article 76 of Presidential Decree no. 115/2002.

38. On 2 December 2016, the Regional Administrative Court of Marche rejected WWF Italia's application for legal aid on the basis that the conditions laid down in article 119 of the Presidential Decree no. 115/2002 were not met.<sup>29</sup>

#### **The costs in WWF's litigation**

39. In 2006, WWF Italia brought a lawsuit against four resolutions of the City Council of Grosseto concerning the approval of a recovery plan of a former summer camp for the establishment of a habitable settlement in the area.<sup>30</sup> The action was dismissed and in 2009 WWF Italia was ordered to pay €2,000 to each of the two parties to the proceedings (i.e. €4,000 in total).<sup>31</sup>

40. In 2011, the Administrative Court rejected WWF Italia's lawsuit challenging a project for the construction of a new tourist port in Scoglietti and ordered it to pay legal costs of €4,000 to each of the other parties to the proceedings (i.e. €16,000 in total).<sup>32</sup> WWF Italia's appeal against that judgment was rejected and WWF Italia was ordered to pay additional €2,000 to each of the three parties to the proceedings (i.e. a further €6,000 in total).<sup>33</sup>

41. In 2011, WWF Italia and other environmental organizations challenged a decision of Tuscany's regional government authorizing a wind farm project. In 2013, the action was dismissed and WWF Italia was ordered to pay €3,000 to each of the other parties to the proceedings (i.e. €18,000 in total).<sup>34</sup>

42. On 14 August 2017, the Council of State rejected WWF Italia's appeal on the decision of the first instance court in a case concerning an EIA procedure regarding the MOSE (Modulo Sperimentale Elettromeccanico) project in the location of the port of Malamocco and Chioggia. The court ordered WWF Italia to pay €5,000 to each of the six parties to the proceedings, including VAT and other charges (i.e. €43,776 in total).<sup>35</sup>

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<sup>24</sup> Party's reply to the Committee's questions 9 April 2018, pp. 7-8.

<sup>25</sup> Communicant's reply to questions, 16 December 2020, p. 5, and annex 7.

<sup>26</sup> Communicant's reply to Committee's questions, 18 December 2020, p. 6 and annex 8, p. 3.

<sup>27</sup> Communicant's reply to Committee's questions, 18 December 2020, p. 6 and annex 8, p. 3.

<sup>28</sup> Communicant's reply to Committee's questions, 2 February 2021, p. 2 and annex 4.

<sup>29</sup> Communicant's comments on the Party's reply to questions, 30 April 2018, p. 3, and annex 4, p. 2 and Communicant's reply to Committee's questions, 2 February 2021, p. 2 and annex 3

<sup>30</sup> Communication, para. 27.

<sup>31</sup> Communication, para. 27, and annex 4.

<sup>32</sup> Communication, para. 25, and annex 1.

<sup>33</sup> Communication, para. 25, and annex 2.

<sup>34</sup> Communication, para. 26, and annex 3.

<sup>35</sup> Communicant's comments on the Party's reply to questions, 30.04.2018, annex 2 and communicant's reply to Committee's questions, 18 December 2020, annex 5.

43. On 3 September 2020, the Regional Administrative Court of Liguria rejected an appeal by WWF Italia and others challenging the EIA procedure regarding a bituminous conglomerate located at Cava Island in the municipality of Zuccarello. The court ordered the claimants to pay €2,000 to each of the four parties to the proceedings including VAT and other charges (i.e. €13,623 in total).<sup>36</sup>

#### **Costs in environmental cases brought by other environmental NGOs**

44. On 14 March 2018, the Council of State delivered decision no. 1619, ordering Verdi Ambiente e Società an environmental NGO, to pay €4,000 to each of the three parties to the proceedings (i.e. €12,000 in total), plus the CNPA (i.e. contribution to the lawyers' pension fund) and VAT.<sup>37</sup>

45. On 12 December 2019, the Regional Administrative Court of Tuscany ordered Italia Nostra, an environmental NGO, to pay one of the defendants, the Municipality of Florence, the litigation costs of €3,500 plus additional fees including VAT, filing fee, and other costs (i.e. €5,706 in total).<sup>38</sup>

46. On 20 October 2020, the Regional Administrative Court of Trentino Alto Adige ordered the environmental NGO Verdi Ambiente e Società to pay €2,000 to each of the three defendants including the filing fee and the cost for adding additional arguments to the original claim (i.e. €10,054 in total).<sup>39</sup>

#### **Attempts to change the legislation governing costs**

47. In 2006, WWF Italia's former president sent a letter to the Minister of the Environment, Land Protection and Sea asking for a change to the rules governing judicial costs borne by non-profit organizations and asking the Ministry to address the denial of legal aid to such organizations.<sup>40</sup> In 2007, the issue of judicial costs for non-governmental organizations was raised in Parliament, but no changes were made.<sup>41</sup>

48. In 2015, a proposal to exempt non-profit organizations from the payment of the filing fee (*contributo unificato*) was submitted to parliament.<sup>42</sup> The proposal was aimed in particular to modify article 119 of the Presidential Decree no. 115/2002, so that the legal aid regime would apply to non-profit organizations or associations whose incomes do not arise from "profits of commercial activities".<sup>43</sup> The proposal was not accepted.<sup>44</sup>

### **C. Domestic remedies and admissibility**

49. The communicant submits that it has brought the prohibitively expensive nature of access to justice in environmental matters to the attention of the Italian government without success (see paras. 47-48 above)<sup>45</sup> and to the European Commission in 2014.<sup>46</sup>

50. The Party concerned does not contest the admissibility of the communication.

### **D. Substantive issues**

51. In its communication, the communicant claims that the Party concerned is in breach of articles 9(4) and (5) and article 3(8) of the Convention with respect to the costs of access to justice.<sup>47</sup> In particular, the communicant raises three issues:<sup>48</sup> prohibitive and expensive fees for filing and amending environmental claims, excessive and penalizing litigation costs to be borne by the unsuccessful party and the lack of legal aid for environmental NGOs with annual taxable income exceeding €11,493.82.

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<sup>36</sup> Communicant's reply to Committee's questions, 18 December 2020, p. 4 and annex 4.

<sup>37</sup> Communicant's comments on the Party's reply to questions, 30 April 2018, p. 1, and annex 1, p. 13.

<sup>38</sup> Communicant's reply to Committee's questions, 18 December 2020, annex 6.

<sup>39</sup> Communicant's reply to Committee's questions, 18 December 2020, annex 3.

<sup>40</sup> Communication, para. 19, and annex 5.

<sup>41</sup> Communication, para. 20.

<sup>42</sup> Communication, para. 21.

<sup>43</sup> Communication, para. 21, and annex 6.

<sup>44</sup> Communication, para. 22.

<sup>45</sup> Communication, p. 7.

<sup>46</sup> Communication, p. 7.

<sup>47</sup> Communication, para. 6.

<sup>48</sup> Communication, paras. 10 and 30.

*Prohibitive fees for filing and amending environmental claims – article 9(4)*

52. The communicant alleges that the Party concerned fails to comply with article 9(4) of the Convention in view of the fee for filing a claim before the administrative courts (*contributo unificato*, see para. 15 above).<sup>49</sup> It also claims that the same fee is due when further arguments are added to the original claim and that this occurs frequently in cases in which numerous administrative acts are issued progressively over time.<sup>50</sup>

53. The Party concerned submits that a possible solution could be to decrease the amount of the filing fee. However, according to the Party concerned, this initiative must be carefully examined in consultation with the Ministries of Justice and Economy, evaluating the economic impact that the measure would entail.<sup>51</sup> In addition, the Party concerned emphasizes that article 13(6) (bis) (a) of the Presidential Decree no. 115/2002 provides for an exemption from the duty to pay the filing fee in access to cases concerning environmental information (see para. 7 above).<sup>52</sup>

*Excessive and penalizing litigation costs awarded to the successful party – article 3(8)*

54. The communicant alleges that the Party concerned fails to comply with article 3(8) of the Convention, since this provision allows national courts to award only reasonable costs in judicial proceedings, whereas article 26 of Legislative Decree no. 104/2010 and article 91 of the Court of Civil Procedure confer excessive discretion on the administrative court judge to apportion costs to the unsuccessful party.

55. With respect to the tariff tables set out in Ministerial Decree no. 55/2014 (see paras. 28 and 29 above), the communicant submits that administrative courts 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.<sup>53</sup>

56. The communicant submits that, in practice, the quantum of litigation fees imposed by the TAR and the Council of State in administrative court proceedings within the scope of article 9 of the Convention is much lower than that provided for in the tables in Ministerial Decree no. 55/2014 and rather ranges from €2,000.00 to €5,000.00 per defendant. It claims that in administrative proceedings concerning environmental matters, the overall costs are thus burdensome primarily as a result of the high number of parties involved.<sup>54</sup> It submits that, even at this lower level, these amounts may have a deterrent effect on entities wishing to bring environmental claims in the administrative courts.<sup>55</sup> It points out that a court could still moreover decide in a particular case to apply the higher tariffs set in the Ministerial Decree.<sup>56</sup>

57. The Party concerned submits that the rationale of its legal framework is to reduce the financial burden on the justice system and to sanction those whose acts or defences in a trial serve no purpose and consume the resources of the judicial administration.<sup>57</sup>

58. The Party concerned argues that eliminating the expenses of a negative outcome does not seem reasonable from a constitutional point of view, as the party unjustly brought to trial should be entitled to reimbursement of costs to stand victoriously in court.<sup>58</sup>

*Limitations on legal aid for individuals and non-profit organizations – article 9(5)*

59. The communicant claims that the Party concerned fails to comply with the obligation in article 9(5) of the Convention to establish appropriate mechanisms to remove or reduce financial and other barriers to access to justice.<sup>59</sup>

60. Specifically, the communicant submits that NGOs are entitled to legal aid pursuant to article 119 of Presidential Decree no. 115/2002 on the same basis as individuals (see para. 19 above). However, the

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<sup>49</sup> Communication, para. 11.

<sup>50</sup> Communication, para. 11.

<sup>52</sup> Party's reply to the Committee's questions, 9 April 2018, p. 9.

<sup>53</sup> Communicant's reply to Committee's questions, 18 December 2020, pp. 2-3.

<sup>54</sup> Communicant's reply to Committee's questions, 18 December 2020, pp. 4-5.

<sup>55</sup> Communication, para. 23.

<sup>56</sup> Communicant's reply to Committee's questions, 18 December 2020, p. 5.

<sup>57</sup> Party's reply to the Committee's questions, 9 April 2018, p. 4.

<sup>58</sup> Party's response to communication, p. 1.

<sup>59</sup> Communication, p. 8.

communicant submits that in practice, they are barred from receiving legal aid because their annual income usually exceeds the threshold of €11,493.82 laid down in article 76 of that Decree (see para. 18 above).<sup>60</sup>

61. The communicant furthermore claims that, in calculating an NGO's annual taxable income, the non-profit character of the organization should be taken into account.<sup>61</sup> It also submits that regard should be had to the fact that the organization's revenues do not arise from commercial activities but from individual or corporate donations or annual subscriptions.<sup>62</sup> In addition, the communicant argues that properties owned by NGOs do not generate annuities or rental incomes and are stated as book values for real estate tax purposes.<sup>63</sup> The communicant claims that its own activities are qualified as non-commercial activities within the meaning of article 10(8) and article 12 of Legislative Decree no. 460/1997.<sup>64</sup> Moreover, no revenues or profits are distributed to the members of the organization, since any income must be reinvested in the communicant's institutional activities.<sup>65</sup>

62. Finally, the communicant submits that the Italian legislator has not distinguished between economic entities and non-profit organizations and that national courts have also disregarded the fact that the communicant has recently incurred losses.<sup>66</sup>

63. The Party concerned claims that raising the income ceiling below which legal aid is available could impose a considerable burden on the State budget, which is expected to find additional resources to meet the increase in expenses in the delicate field of access to justice.<sup>67</sup>

64. The Party concerned states that differentiating between non-profit associations and other parties does not seem feasible, given that in its view access to justice must be guaranteed to all without distinction.<sup>68</sup>

65. As to the rationale for setting the same level of maximum annual income for individuals and NGOs under Presidential Decree no. 115/2002, the Party concerned submits that entities and associations have greater financial power to face the expenses of justice, since they consist of a plurality of subjects and manage, in many cases, activities from which they derive a considerable income.<sup>69</sup> The Party concerned claims that it can be seen from the publication of environmental organizations' budgets that the assets of the largest and most influential organizations amount to substantial sums. Consequently, the Party concerned submits that those entities are able to bear the costs of the proceedings.<sup>70</sup>

*Effect of legislative developments since the communication was submitted*

66. The communicant submits that the adoption of the Code of the Third Sector in 2018 (see para. 31 above) has not changed the regime of access to environmental justice for NGOs, including the lack of clarity regarding the right of NGOs to be exempted from the payment of the filing fee, nor has the Party concerned clarified how the new law will impact the costs of access to justice.<sup>71</sup>

67. The Party concerned claims that the Code of the Third Sector lays down specific measures for the promotion and support of non-profit entities, as well as financial resources and a particular tax system for these entities.

### **III. Consideration and evaluation by the Committee**

68. Italy ratified the Convention on 13 June 2001. The Convention entered into force for Italy on 30 October 2001, the date of the Convention's general entry into force.

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<sup>60</sup> Communication, para. 13.

<sup>61</sup> Communication, para. 13.

<sup>62</sup> Communication, para. 14.

<sup>63</sup> Communication, para. 14.

<sup>64</sup> Communication, para. 15.

<sup>65</sup> Communication, para. 15 and 17.

<sup>66</sup> Communication, para. 18.

<sup>67</sup> Party's response to communication, p. 1.

<sup>68</sup> Party's response to communication, p. 1.

<sup>69</sup> Party's reply to the Committee's questions, 9 April 2018, p. 4.

<sup>70</sup> Party's reply to the Committee's questions, 9 April 2018, p. 4.

<sup>71</sup> Communicant's comments on the Party's reply to questions, 30 April 2018, p. 3, p. 1.



## **Admissibility**

69. The Party concerned has not contested the admissibility of the communication. Bearing in mind that this case concerns the legal framework regarding the cost of access to justice in the Party concerned, the Committee finds the communication to be admissible.

## **Scope of consideration**

70. The Committee notes that, during the hearing to discuss the substance of the communication held at the Committee's sixty-eighth meeting, the communicant withdrew its allegation regarding article 3(8) of the Convention. Accordingly, the Committee will not examine this claim.

## **Article 9(4) – “prohibitively expensive”**

71. The communicant claims that the costs of access to justice in environmental matters in the Party concerned are prohibitively expensive within the meaning of article 9(4) of the Convention by reason of (i) the court filing fee and (ii) the costs awarded against unsuccessful claimants.

### *Filing fees under Decree 115/2002*

72. It is common ground between the parties that the court filing fee at first instance is €650 and at second instance, €975.<sup>72</sup> An additional fee at the same level is due for each new argument added to the initial claim.<sup>73</sup>

73. It is also common ground that there is no filing fee for review procedures in access to environmental information cases under article 9(1) of the Convention.<sup>74</sup>

### Filing fee for review procedures under article 9(2) and (3)

74. In its findings on communication ACCC/C/2011/57 (Denmark), the Committee held that a fee of DKK 3,000 (approximately €400) for NGOs to make an appeal to the National Environmental Appeals Board breached the requirement in article 9(4) that procedures for access to justice not be prohibitively expensive.<sup>75</sup>

75. There is nothing to suggest that the economic situation in Italy would justify a higher filing fee for access to justice procedures than in Denmark. Thus, a filing fee at a level that the Committee had previously found to be prohibitively expensive for Denmark would certainly be prohibitively expensive if applied at that level in Italy.

76. However, in the present case, the filing fees in the Party concerned at both first and second instance (€650 and €975 respectively) are significantly higher than the fee examined by the Committee in its findings on communication ACCC/C/2011/57 (Denmark).

77. Accordingly, the Committee considers that the filing fees at first and second instance for review procedures within the scope of article 9(2) and (3) render each of those procedures prohibitively expensive within the meaning of article 9(4) of the Convention.

78. Based on the foregoing, the Committee finds that, by charging a filing fee of €650 at first instance and €950 at second instance for review procedures within the scope of article 9(2) and (3), the Party concerned has failed to comply with the requirement of article 9(4) of the Convention that each such procedure not be prohibitively expensive.

### Fees for amending the original claim under article 9(2) and (3)

79. When considering whether the filing fees for amending the original claim at first and second instance are prohibitively expensive, the Committee takes into account the typical character of environmental claims within the scope of article 9(2) and (3) of the Convention. In this regard, timeframes for filing such claims are often short. Moreover, unless the filing of claims has suspensive effect, work on the challenged activity may continue after the claim has been lodged, resulting in further matters that the claimant may wish to add to the

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<sup>72</sup> Communication, para. 11, and relevant legislation from the Party concerned, 12 June 2018, annex 2.

<sup>73</sup> Communication, para. 11, and Party's reply to Committee's questions, 9 April 2018, p.6.

<sup>74</sup> Communicant's reply to Committee's questions, 7 March 2018 and Party reply to Committee's questions 9 March 2018, p.1.

<sup>75</sup> ECE/MP.PP/C.1/2012/7, para 52.

initial claim. Finally, important information about the actual or potential environmental impacts may only come to light after the original claim has been filed. These characteristics mean that, through no fault of the claimant, claims within the scope of article 9(2) and (3) may need to be amended during the course of the procedure. Bearing this in mind, the Committee can see no justification for charging the full filing fee again for the addition of further arguments in cases within the scope of article 9(2) and (3) of the Convention. Rather, in the view of the Committee, doing so is both unfair and may have a deterrent effect on environmental claimants presenting relevant aspects of their claim that, through no fault of their own, could not have been presented at an earlier stage.

80. Consequently, the Committee finds that by charging a fee of €650 at first instance and €950 at second instance to amend a claim within the scope of article 9(2) and (3), the Party concerned has failed to comply with the requirement of article 9(4) of the Convention that such procedures be fair and not prohibitively expensive.

*Costs orders against unsuccessful claimants*

81. The communicant alleges that litigation costs awarded by national judges in environmental cases fail to comply with the requirement in article 9(4) of the Convention that review procedures under article 9 of the Convention not be prohibitively expensive in two main respects:

(a) The costs awarded against unsuccessful claimants under article 91(1) of the Code of Civil Procedure;

(b) Punitive costs pursuant to article 26(1) final sentence and article 26(2) of Legislative Decree no. 104/2010.

82. With respect to determining what is “prohibitively expensive” under article 9(4), the Committee recalls that in its findings on communication ACCC/C/2008/33 (United Kingdom) it held that “when assessing the costs related to procedures for access to justice in the light of the standard set by article 9, paragraph 4, of the Convention, the Committee considers the cost system as a whole and in a systemic manner.”<sup>76</sup> It further concluded that “the ‘costs follow the event rule’ ... is not inherently objectionable under the Convention, although the compatibility of this rule with the Convention depends on the outcome in each specific case and the existence of a clear rule that prevents prohibitively expensive procedures.”<sup>77</sup> The Committee went on to find that, “by failing to ensure that the costs for all court procedures subject to article 9 are not prohibitively expensive, and in particular by the absence of any clear legally binding directions from the legislature or judiciary to this effect, the Party concerned fails to comply with article 9, paragraph 4, of the Convention.”<sup>78</sup>

83. In its findings on communication ACCC/C/2014/111 (Belgium), the Committee held that “the public interest nature of the environmental claims should be given sufficient consideration by the courts with respect to the apportioning of costs”.<sup>79</sup> With respect to procedures covered by article 9(3) the Committee stressed that “the expected costs of the proceedings ... should not effectively bar all or almost all environmental organizations from challenging acts or omissions that contravene national law relating to the environment.”<sup>80</sup> In that case, the Committee found that the costs of €3,700 which the communicants were ordered to pay to the other side, together with their own lawyer’s fees, imposed a considerable financial burden on the communicants.<sup>81</sup>

84. In its findings on communication ACCC/C/2012/77 (United Kingdom), the Committee found that “the amount of £8,000 that the communicant [an environmental NGO] was ordered to pay the defendant makes the procedures prohibitively expensive, even if the court, in revising the original amount (£11,813) took into account the fact that the communicant was acting in the public interest”. The Committee therefore concluded that the Party concerned had failed to comply with article 9(4) of the Convention.<sup>82</sup>

85. In the report to the Meeting of the Parties on compliance by United Kingdom with its obligations under the Convention with respect to decision IV/9i the Committee, in examining the levels of the cost caps for

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<sup>76</sup> ECE/MP.PP/C.1/2010/6/Add.3, para 128.

<sup>77</sup> ECE/MP.PP/C.1/2010/6/Add.3, para 129.

<sup>78</sup> ECE/MP.PP/C.1/2010/6/Add.3, para 141.

<sup>79</sup> ECE/MP.PP/C.1/2017/20, para 75.

<sup>80</sup> ECE/MP.PP/C.1/2017/20, para 76.

<sup>81</sup> ECE/MP.PP/C.1/2017/20, para 77.

<sup>82</sup> ECE/MP.PP/C.1/2015/3, paras 74 and 81.

“Aarhus claims” introduced by the Party concerned emphasised that it was not convinced “that the sum of £5,000 for individuals and £10,000 for organizations will not be prohibitively expensive for many individuals and organizations”.<sup>83</sup>

Costs orders under article 91(1) of the Code of Civil Procedure

86. The Committee understands that, when ruling on costs, the Regional Administrative Courts and the Council of State are expected to apply the tariff tables in Ministerial Decree no. 55/2014 and that the tables’ tariffs for monetary values from €26,000 to €520,000 are used in cases of “indeterminate value”, such as environmental cases (see paras. 27 - 28 above).

87. The Committee notes that, according to these tables, the litigation fees to be paid by an unsuccessful claimant following a single instance proceeding before a Regional Administrative Court may range from a minimum of €5,301 to a maximum of €37,161.<sup>84</sup> Before the Council of State, the litigation fees payable may range from €5,115 to €37,332.<sup>85</sup> These fees are, moreover, payable per defendant (whether acting as *parte resistente* or *controinteressato*). In a case involving multiple defendants, the litigation fees payable could thus be several times higher.

88. Recalling the findings and report summarized in paragraphs 83-85 above, the Committee considers that, if applied in cases within the scope of article 9 of the Convention, the tariffs set out in Ministerial Decree 55/2014 would clearly be prohibitively expensive, even those towards the lower end of each range.

89. However, based on the information before it, the Committee understands that the quantum of litigation fees awarded by the Regional Administrative Courts and the Council of State in environmental cases are in practice lower than those in the Ministerial Decree and instead range from €2,000 to €5,000 per defendant. Other costs, such as the court filing fee, VAT and CPNA may then be added on top of this sum.

90. The communicant has provided a number of examples of costs orders made against unsuccessful claimants in environmental cases under article 91(1) of the Code of Civil Procedure (see paras. 47 to 54 above). These cases demonstrate that even when the lowest level of litigation fee (€2,000) is awarded to each defendant, the total litigation fees payable may be prohibitively expensive.

91. For example, in its judgment of 20 October 2020, the Regional Administrative Court of Trentino Alto Adige ordered the environmental NGO Verdi Ambiente e Società to pay €6,000 in litigation fees (€2,000 each to three defendants). Together with the filing fee and the fee for amending the claim, the total costs payable was €10,054 for a single instance.<sup>86</sup>

92. If a court imposes a litigation fee per defendant at the upper end of the range, the total litigation fees can be very high indeed. For example, in its judgment of 14 August 2017, the Council of State ordered WWF Italia to pay €30,000 in litigation fees alone (€5,000 to each of the six defendants). After adding VAT and other charges, the total costs payable was €43,776.<sup>87</sup>

93. The Committee cannot see why, in a case involving multiple public authorities as defendant (*parte resistente*), each public authority should be awarded the same quantum of litigation fees. In the view of the Committee, the defence in an administrative proceeding would generally be led by one, perhaps two, public authorities, with the other public authorities serving very much a supporting role. Even in a case where all public authorities participate equally, they should be able to pool their resources to reduce their legal costs to some extent.

94. Moreover, in all but two of the nine judgments before the Committee in this case, the developer chose of its own accord to join the proceeding in order to protect its own interests (*controinteressato*). On this point, the Committee recalls its findings on communication ACCC/C/2013/98 (Lithuania), in which it held:

Ordering members of the public to pay substantial costs to third parties that choose of their own accord to intervene could allow third parties to effectively prevent the public from mounting court challenges to permits, thus making the procedure unfair.<sup>88</sup>

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<sup>83</sup> ECE/MP.PP/2014/23, para 47.

<sup>84</sup> Communicant’s reply to Committee’s questions, 18 December 2020, annex 2(a).

<sup>85</sup> Communicant’s reply to Committee’s questions, 18 December 2020, annex 2(b).

<sup>86</sup> Communicant’s reply to Committee’s questions, 18 December 2020, annex 3.

<sup>87</sup> Communicant’s comments on the Party’s reply to questions, 30.04.2018, annex 2 and communicant’s reply to Committee’s questions, 18 December 2020, annex 5.

<sup>88</sup> Para. 145.

95. The Committee considers the above statement very much in point for the present case. The Convention does not prevent the award of reasonable costs to a public authority which has taken the contested decision and successfully defended the claimant's challenge. On the other hand, it is unfair within the meaning of article 9(4) of the Convention to require claimants in cases within the scope of article 9(2) and (3) to pay the costs of public authorities, developers or other entities who choose to join the proceeding of their own accord.

96. In fact, the practice of awarding each defendant (whether *parte resistente* or *controinteressato*) the full sum of litigation fees creates an incentive for additional parties to join the proceeding, knowing that the majority of the legal costs will be carried by the first-named defendants and cognisant that their involvement will add considerably to the claimant's potential financial exposure. In this way, the current practice of awarding each defendant the same quantum of litigation fees is unfair and may have a significant deterrent effect on claimants seeking access to justice under the Convention.

97. The case law before the Committee demonstrates that, even when courts award litigation fees at the lowest end of the range, in cases with multiple defendants the resulting orders for legal costs may be prohibitively expensive. The Committee moreover notes that the legal framework of the Party concerned provides for the award of litigation fees at a considerably higher level than that awarded by the courts in environmental cases in practice.

98. Based on the foregoing, the Committee finds that, by failing to ensure that costs orders against unsuccessful claimants in review procedures under article 9(2) and (3) of the Convention are fair and not prohibitively expensive, the Party concerned has failed to comply with article 9(4) of the Convention.

Punitive costs under article 26(1), final sentence, and article 26(2) of Legislative Decree no. 104/2010

99. Article 26(1), final sentence, of Legislative Decree no. 104/2010 provides that, if the unsuccessful party has advanced manifestly unfounded arguments, a judge may order that party to pay to the opposite party a sum not exceeding twice the amount of the awarded litigation fees.<sup>89</sup> Pursuant to article 26(2) of the same Legislative Decree, the judge is required to order the unsuccessful party to pay a fine of between twice and five times the initial filing fee, when the unsuccessful party has acted or pursued the proceedings vexatiously.

100. The Committee understands that "litigation fees" in article 26(1), final sentence, refers to the costs imposed on the unsuccessful party under article 91(1) of the Code of Civil Procedure (see paras. 86 - 98 above).

101. Both parties acknowledge that they are unaware of any examples in which the punitive costs envisaged in article 26(1), final sentence, and article 26(2) of Legislative Decree no. 104/2010 have been imposed against claimants in environmental cases.

102. Nevertheless, it is common ground between the parties that these provisions are applicable in review procedures within the scope of article 9 of the Convention. Consequently, the possibility cannot be ruled out that a court might indeed decide to apply these provisions against an environmental claimant in the future.

103. In itself, the possibility to impose punitive costs on claimants who persist with manifestly unfounded arguments or who act or pursue claims vexatiously may not be objectionable, nor may be the fact that the amount of the punitive cost in such cases is to be calculated as a percentage or multiple of the filing or litigation fees. However, since the Committee has already found in paragraphs 7778 and 980 above that the filing and litigation fees are themselves prohibitively expensive, the same must by definition apply to the punitive costs, given that they are calculated as multiples of those fees.

104. The Committee notes that when assessing whether the punitive costs provided for under the national legal framework are prohibitively expensive under the Convention, it does not matter whether, in fact, such costs have been applied in practice by the courts. The mere possibility that these costs *could* be imposed on claimants in environmental case may in itself have a deterrent effect and unfairly discourage members of the public from seeking access to justice with respect to environmental matters.

105. Based on the foregoing, the Committee finds that, by maintaining a legal framework that permits the courts to award punitive costs of up to two times the litigation fee and up to five times the court filing fee, the

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<sup>89</sup> Communication, para. 23, and relevant legislation from the Party concerned, 12 June 2018, annex 1.

Party concerned fails to comply with the requirement in article 9(4) that review procedures under article 9(2) and (3) of the Convention be fair and not prohibitively expensive.

### **Article 9(5) – appropriate assistance mechanisms**

#### *In general*

106. Article 9(5) requires Parties to consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice. To comply with this provision, it does not suffice for Parties merely to declare that they are considering or intend to consider introducing such mechanisms. Concrete and visible steps to consider such mechanisms must be taken.

107. The Committee points out that this is a continuing obligation: even if a Party has reviewed its costs system in the past, that does not relieve it from the requirement to revisit the matter as needed.

108. On at least two occasions during the course of the Committee's procedure in this case, the Party concerned has indicated its intention to consider reviewing financial barriers to access to justice in environmental matters in consultation with the other Ministries concerned, and proposed more recently to establish an inter-ministerial working group for this purpose.<sup>90</sup> While welcoming these statements, the Committee notes that the first of these statements was made more than four years ago.<sup>91</sup> The Party concerned then made a nearly identical statement during the hearing on the substance of the communication at the Committee's sixty-eighth meeting.

109. Based on the information before the Committee, despite these statements of intent, the Party concerned has failed to take any concrete or visible steps of the kind mentioned in paragraph 106 above.

110. In the light of the above, the Committee finds that, by failing to consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice, the Party concerned has failed to comply with article 9(5) of the Convention.

#### *Income threshold for eligibility for legal aid*

111. The communicant alleges that the Party concerned fails to comply with article 9(5) of the Convention since its courts include income derived from non-commercial activities when determining whether an environmental NGO's annual income exceeds the €11,493.82 threshold to be eligible for legal aid.

112. The Committee considers that the exclusion of income from non-commercial activities when calculating an environmental NGO's eligibility for legal aid may be a useful assistance mechanism to remove or reduce financial barriers on access to justice. However, while article 9(5) of the Convention requires Parties to consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice, it does not prescribe the exact form that those assistance mechanisms must take. Accordingly, having found in paragraph 110 above that the Party concerned has failed to consider the establishment of appropriate assistance mechanisms to remove or reduce financial or other barriers to access to justice as required by article 9(5) of the Convention in general, the Committee does not consider it necessary to make a separate finding on whether the income threshold for environmental NGOs to be eligible for legal aid is presently too high.

### **Article 3(1) - clarity and consistency of the legal framework for costs of access to justice**

#### *Costs orders against unsuccessful claimants under article 91(1) of the Code of Civil Procedure*

113. Article 3(1) of the Convention requires each Party, inter alia, to establish and maintain a clear, transparent and consistent legal framework to implement the provisions of the Convention, including article 9

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<sup>90</sup> Party's response to communication, 30 September 2016; Party's statement at the hearing at the Committee's 68th meeting, 24 November 2020; Letter from the Party, 20 November 2020; Party's reply to Committee's questions, 18 December 2020.

<sup>91</sup> Party's response to communication, 30 September 2016.

on access to justice. In its findings on communication ACCC/C/2008/33 (United Kingdom), the Committee held:

Having concluded that the Party concerned fails to comply with article 9, paragraph 4, with respect to costs [...] by essentially relying on the discretion of the judiciary, the Committee also concludes that the Party concerned fails to comply with article 3, paragraph 1, by not having taken the necessary legislative, regulatory and other measures to establish a clear, transparent and consistent framework to implement the provisions of the Convention.<sup>92</sup>

114. In the present case, the communicant alleges that administrative judges are granted wide discretion when applying the loser pay's principle in accordance with article 91(1) of the Code of Civil Procedure.<sup>93</sup> As a result, NGOs are not able to predict the costs that will be ordered by the judge at the end of the proceeding.

115. When ruling on costs, the courts generally impose lower tariffs (between €2,000 and €5,000 per defendant) than those set out in Ministerial Decree no. 55/2014, as described in paragraphs 27 and 28 above. The communicant alleges, however, that a court could still decide to apply the tariffs set in the Ministerial Decree and in that case, there is a considerable difference between the minimum and maximum amounts of costs in the relevant categories of those tables.

116. Moreover, the communicant submits that the Constitutional Court's decision of 2018 to broaden the category of cases in which the judges may apportion the costs rather than apply the loser pays principle has further exacerbated the lack of clarity and consistency. It claims that, given the high number of administrative judges in Italy, it is not possible to predict how the judges will apply the Constitutional Court's decision when apportioning costs.<sup>94</sup>

117. Parties are not expected to ensure that prospective litigants can predict their costs down to the last euro if their action fails: by definition, litigation involves a number of imponderables. Needless to say, the Committee attaches the utmost importance to principles of fairness and equity, in keeping with the requirements of article 9(4) of the Convention.

118. Having said that, in the Committee's view, the wide discretion conferred on the courts when deciding litigation costs leads to a lack of certainty and clarity regarding the costs which claimants will face when exercising their right to access to justice in environmental matters. While Ministerial Decree no. 55/2014 establishes tariffs to guide judges when determining the other sides' costs, each category of tariffs has a considerable range within it. Moreover, for the purposes of that Decree, environmental claims may be considered as either of "indeterminable" or "indeterminable of particular importance" value, with markedly different tariffs between the lower end of the former and upper end of the latter.<sup>95</sup>

119. Furthermore, the Italian legislature has failed to specify the grave and exceptional circumstances analogous to those set out in article 92(2) of the Code of Civil Procedure, under which courts should be empowered to apportion costs.

120. The practice of ordering the unsuccessful claimant to pay the same level of costs to each defendant further exacerbates this uncertainty. The examples provided by the communicant include cases with up to six defendants. Claimants may not be able to predict beforehand the number of parties which will become co-defendants, meaning that the total costs may be several times higher than what the claimant might have considered possible when first filing its claim.

121. The Committee finds that, by not having in place a clear and transparent framework for determining costs orders against unsuccessful claimants in review procedures under article 9(2) and (3) of the Convention, the Party concerned fails to comply with article 3(1) of the Convention.

#### *Exemption of environmental NGOs from court filing fee*

122. The communicant alleges that there is uncertainty as to the application of the exemption from the filing fee provided for in article 10 of Presidential Decree no. 115/2002 in conjunction with article 27 bis, table B, of

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<sup>92</sup> ECE/MP.PP/C.1/2010/6/Add.3, para. 140.

<sup>93</sup> Communication, para. 28.

<sup>94</sup> Communicant's reply to Committee's questions, 30 April 2018, p. 2.

<sup>95</sup> Communicant's reply to Committee's questions, 18 December 2020, annexes 2 and 3.

Presidential Decree 642/1972.<sup>96</sup> As is evident from the judgments cited in paragraphs 40 to 43 above some courts have granted this exemption to environmental NGOs, while others have not.

123. The Committee welcomes this exemption and considers that, if consistently applied by the courts in practice, it may be a model for other Parties to the Convention to emulate.

124. However, based on the caselaw before the Committee it seems that the above provisions are not consistently applied by the courts. The Committee notes that, in recognition of this lack of consistency, the Supreme Court of Cassation in its judgment dated 5 February 2020 has referred the matter to the plenary composition of the Supreme Court of Cassation for a determination. That case is however still pending and the lack of clarity as to whether environmental NGOs are exempt from the filing fee accordingly at present continues.

125. In the light of the above, the Committee finds that, by failing to ensure that, in review procedures subject to article 9(2) and (3) of the Convention, the courts adopt a consistent interpretation of the legislation exempting environmental NGOs from the payment of court filing fees, the Party concerned fails to comply with the obligation in article 3(1) of the Convention to establish and maintain a clear, transparent and consistent framework to implement the Convention.

## IV. Conclusions and recommendations

126. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

### A. Main findings with regard to non-compliance

127. The Committee finds that:

(a) By charging a filing fee of €650 at first instance and €950 at second instance for review procedures within the scope of article 9(2) and (3), the Party concerned has failed to comply with the requirement of article 9(4) of the Convention that such procedures not be prohibitively expensive;

(b) By charging a fee of €650 at first instance and €950 at second instance to amend a claim within the scope of article 9(2) and (3), the Party concerned has failed to comply with the requirement of article 9(4) of the Convention that such procedures be fair and not prohibitively expensive;

(c) By failing to ensure that costs orders against unsuccessful claimants in review procedures under article 9(2) and (3) of the Convention are fair and not prohibitively expensive, the Party concerned has failed to comply with article 9(4) of the Convention;

(d) By maintaining a legal framework that permits the courts to award punitive costs of up to two times the litigation fee and up to five times the court filing fee, the Party concerned fails to comply with the requirement in article 9(4) that review procedures under article 9(2) and (3) of the Convention are fair and not prohibitively expensive;

(e) By failing to consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice, the Party concerned has failed to comply with article 9(5) of the Convention;

(f) By not having in place a clear and transparent framework for determining costs orders against unsuccessful claimants in review procedures under article 9(2) and (3) of the Convention, the Party concerned fails to comply with article 3(1) of the Convention;

(g) By failing to ensure that, in review procedures subject to article 9(2) and (3) of the Convention, the courts adopt a consistent interpretation of the legislation exempting environmental NGOs from the payment of court filing fees, the Party concerned fails to comply with the obligation in article 3(1) of the Convention to establish and maintain a clear, transparent and consistent framework to implement the Convention.

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<sup>96</sup> Communicant's reply to questions 30 April 2018, p. 3.

## **B. Recommendations**

128. The Committee, pursuant to paragraph 35 of the annex to decision I/7 of the Meeting of the Parties, and noting the agreement of the Party concerned that the Committee take the measures requested in paragraph 36 (b) of the annex to decision I/7, recommends that the Party concerned undertake the necessary legislative, regulatory, administrative or other measures, such as establishing appropriate assistance mechanisms, to ensure that:

(a) Court filing fees at first instance and again at second instance for review procedures within the scope of article 9(2) and (3) of the Convention are not prohibitively expensive;

(b) Any fee to amend a claim at first and/or second instance in a review procedure within the scope of article 9(2) and (3) of the Convention is not prohibitively expensive;

(c) Any cost orders against unsuccessful claimants in review procedures under article 9(2) and (3) of the Convention are not prohibitively expensive;

(d) Any costs that may be imposed for “manifestly unfounded”, “frivolous” or “vexatious” claims within the scope of article 9(2) and (3) of the Convention are not prohibitively expensive;

(e) The legal framework for determining costs orders against unsuccessful claimants in review procedures under article 9(2) and (3) of the Convention is clear, transparent and consistent;

(f) The legislation exempting environmental NGOs from the payment of court filing fees in review procedures under article 9(2) and (3) of the Convention is applied in a clear, transparent and consistent manner.

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