

Findings and recommendations with regard to communication ACCC/C/2014/111 concerning compliance by Belgium

Adopted by the Compliance Committee on 18 June 2017¹

I. Introduction

1. On 12 May 2014, Ardennes liégeoises ASBL and Terre wallonne ASBL, two non-profit associations (the communicants), 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) alleging the failure of Belgium to comply with its obligations under article 9, paragraphs 3 and 4 of the Convention.
2. Specifically, the communicants allege that the Party concerned failed to ensure that access to judicial procedures to challenge an act or omission by a private person which contravened provisions of national law relating to the environment under article 9, paragraph 3 of the Convention was not prohibitively expensive as required by article 9, paragraph 4, of the Convention.
3. At its forty-fifth meeting (Maastricht, 29 June – 2 July 2014), the Committee decided to defer its preliminary determination of admissibility in order to seek further clarification from the communicants and invited the communicants to re-submit the communication using the Committee's standard format for communications.
4. On 8 September 2014, the communicants resubmitted the communication and provided their reply to the Committee's questions.
5. At its forty-sixth meeting (Geneva, 22-25 September 2014), the Committee decided to defer its preliminary determination of admissibility for a second time in order to seek further clarification from the communicants.
6. On 12 December 2014, the communicants provided their reply to the Committee's questions.
7. At its forty-seventh meeting (Geneva, 16-19 December 2014), the Committee determined on a preliminary basis that the communication was admissible in accordance with paragraph 20 of the annex to decision I/7.
8. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 5 June 2015 for its response.
9. The Party concerned provided its response to the communication on 4 November 2015.
10. The Committee held a hearing to discuss the substance of the communication at its fifty-third meeting (Geneva, 21-24 June 2016), with the participation of representatives of the communicants and Party concerned.
11. By letter of 28 September 2016, the communicants provided the Committee with further information with regard to the communication. On 8 December 2016, the Party concerned also provided some further information.

¹ 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.

12. On 9 December 2016, the Committee sent questions to both parties. The communicants and the Party concerned each provided their replies to the Committee's questions on 13 January 2017.

13. On 20 January 2017, the Party concerned provided comments on the communicants' reply to the Committee's questions.

14. The Committee prepared its draft findings in closed session and completed them through its electronic decision-making procedure on 25 May 2017. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and the communicants on 26 May 2017. Both were invited to provide comments by 13 June 2017.

15. The communicants provided comments on 12 June 2017. On 13 June 2017, the Party concerned indicated that it had no comments.

16. At its virtual meeting on 14 June 2017, the Committee considered the communicants comments on the draft findings in closed session. After taking into account the comments received, the Committee amended its considerations in one respect but agreed that no other changes to its findings were necessary.

17. The Committee then adopted its findings through its electronic decision-making procedure on 18 June 2017 and agreed that they should be published as a formal pre-session document to its fifty-eighth meeting (Budva, Montenegro, 10-13 September 2017). It requested the secretariat to send the findings to the Party concerned and the communicants.

II. Summary of facts, evidence and issues²

A. Legal framework

Costs and case preparation allowance

18. Articles 1017 to 1024 of the Party concerned's Judicial Code set out its legal framework with respect to costs before the ordinary courts (i.e. those other than administrative courts and the Constitutional Court). Article 1017 provides that:

“any final judgement handed down, even as a matter of course, entails ordering the losing party to pay the costs, unless particular laws provide otherwise and without prejudice to an agreement between the parties as ordered in the judgement, as the case may be.

However, except in cases of a frivolous or vexatious request, the order to pay the costs is always handed down on the authority or body bound to apply the laws and regulations referred to in Articles [579, 6°,] 580, 581 and 582, 1° and 2°, as regards applications filed by or against social security beneficiaries. "Social security beneficiaries" should mean the social security beneficiaries within the meaning of Article 2, 7°, of the law of 11 April 1995 creating a "Charter" for social security beneficiaries.

The judge may order that the costs be shared as he/she deemed appropriate, either where each party succeeds on some and fails on other heads, or between spouses, ascendants, siblings or relatives by affinity to the same degree.

[...]

Any interlocutory judgement reserves the costs.”

19. Articles 1018 and 1019 of the Judicial Code list the potential costs, namely: various fees, court and registration fees; cost, emolument and salaries of judicial acts; cost of the exemplified copy of the judgement; costs of all investigation measures (witness fee and

²This 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.

expert fee); travel and accommodation expenses of magistrates, registrars and parties; the case preparation allowance referred to in article 1022 of the Judicial Code; fees, emoluments and costs of the mediator designated in accordance with article 1734.

20. Article 1022 of the Judicial Code addresses the case preparation allowance, namely:

“The case preparation allowance is a flat contribution to the lawyers’ costs and fees of the successful party.

After consulting with the *Ordre des barreaux francophones et germanophone* and with the *Orde van Vlaamse Balies*, the King shall establish, by decree deliberated in the Council of Ministers, the basic, minimum and maximum amounts of the case preparation allowance, depending in particular on the nature of the case and on the importance of the litigation.

At the request of one of the parties, eventually made by the judge, the latter may either reduce or increase the allowance by a specifically motivated decision, without, however, exceeding the maximum and minimum amounts established by the King. In his/her assessment, the judge shall take the following into account: the unsuccessful party’s financial capacity as a factor in reducing the amount of the allowance; the complexity of the case; the allowances awarded on a contractual basis to the successful party; the manifestly unreasonable nature of the situation.

If the unsuccessful party benefits from the secondary legal assistance, the case preparation allowance is set at the minimum amount established by the King, except in case of manifestly unreasonable situation. The judge shall specifically motivate his/her decision on that point.

When several parties benefit from the case preparation allowance supported by one and the same unsuccessful party, the amount of that allowance shall not exceed twice the maximum amount of the case preparation allowance which can be claimed by the beneficiary entitled to claim the highest allowance. It shall be allocated among the parties by the judge.

No party can be required to pay an allowance for the intervention of another party’s lawyer beyond the amount of the case preparation allowance.”

21. A Royal Decree of 26 October 2007 fixes the amounts of the case preparation allowance referred to in Article 1022 of the Judicial Code.³ Article 8 of the Royal Decree provides that: “Basic, minimum and maximum amounts are linked to the consumer price index, which corresponds to 105,78 points (base 2004); any increase or decrease of 10 points will result in a 10 percent increase or decrease in the amounts referred to in Articles 2 to 4 of this decree.”⁴ At the time of the events at issue in this communication, for cases not evaluable in money, including judicial review of administrative acts and omissions, the basic amount of the case preparation allowance was €1,320, with the minimum being €82.50 and the maximum €11,000.⁵

Legal representation before the Supreme Court

22. Article 478 of the Judicial Code states that “in civil cases before the Supreme Court, the right to practice and submit pleadings is reserved for lawyers who have the title of lawyer at the Supreme Court. The foregoing provision does not apply to parties claiming damages in criminal cases.”

³ Party concerned’s response to the re-submitted communication, p. 4.

⁴ The table with basic, minimum and maximum amounts as of February 2011 is included on page 4 of the Party concerned’s response to the re-submitted communication.

⁵ At page 3 of its reply to the Committee’s questions dated 13 January 2017, the Party concerned states that as of 1 June 2016, these amounts have been increased to a basic amount of € 1,440, a minimum of € 90 and maximum of € 12,000.

Legal aid system

23. Article 664 of the Judicial Code addresses judicial assistance for administrative costs associated with proceedings, for instance fees for instituting the proceedings, expert fees etc. up to the enforcement costs of the judgment.⁶ Legal aid can be granted to legal or natural persons if their claim appears fair and they can prove their income is insufficient.⁷

24. In addition, the Party concerned's system provides for second-line legal assistance in article 667 of the Judicial Code.⁸ Second-line legal assistance is distinct from judicial assistance, and involves the assistance of a lawyer, free of charge or partially free of charge. It can be requested in accordance with articles 508/7 to 508/25 of the Judicial Code.⁹ At the time the proceedings at issue in this case were brought, second line legal assistance was not, a priori, open to legal persons.¹⁰

Publicity of the accounts of non-profit organizations

25. Article 26 novies, §1, of the Law of 27 June 1921 states that:

“A file is to be kept at the Registry of the [Commercial Court] for each Belgian non-profit association (referred to in this chapter as ‘association’) that has its registered address in the district.

This file is to contain:

[...]

5) the association's annual accounts, drawn up in accordance with Article 17.”

B. Facts

26. On 20 June 2007, *Carrières et entreprises Bodarwé & Fils SA* (*Bodarwé & Fils*), a company operating a quarry, applied for an environmental permit to extend its quarry by 17.5 hectares. On 25 January 2008, an environmental permit was granted to the company. The decision to grant the permit was notified to the company on 29 January 2008.¹¹

27. The communicants considered that *Bodarwé & Fils* did not have a valid environmental permit, since the notification of consent by the permitting authorities was made after the expiry of the required time-limit. The communicants understood this to mean that consent had been tacitly refused and on this basis, filed an application for interim relief before the *Verviers Court of First Instance*.¹² The communicants' proceedings sought to obtain a ruling that *Bodarwé & Fils* did not have a valid environmental permit as required for the operation concerned and that the company be ordered, subject to a penalty payment, to apply to have the situation regularized. On 17 November 2011, the *Court of First Instance* held that the communicant's application was inadmissible due to lack of standing.¹³

28. On 27 December 2011, the communicants appealed to the *Court of Appeal of Liège* against the decision of the *Court of First Instance*. In its judgement of 29 October 2013, the *Twelfth Chamber of the Court of Appeal of Liège* dismissed the communicants' action as

⁶ Party concerned's response to re-submitted communication, p. 3 referring to C. Defoirdt, “L'assistance judiciaire.” in *Droit judiciaire. Commentaire pratique* (Wolters Kluwer, 2007, IX.2 – 2, n° 005).

⁷ Party concerned's response to re-submitted communication, p.3.

⁸ Party concerned's reply to the Committee's questions, 13 January 2017, p. 3.

⁹ Party concerned's reply to Committee's questions, 13 January 2017, p. 3.

¹⁰ Communicant's comments on draft findings, 13 June 2017. See also comments on draft findings by an observer (Professor Luc Lavrysen), 31 May 2017, and annex 2 thereto. The observer states that on 17 November 2016, the Constitutional Court of the Party concerned held that the exclusion of secondary legal assistance for legal persons charged under the Penal Code violates the Constitution.

¹¹ Re-submitted communication, p. 2.

¹² Re-submitted communication, p. 2.

¹³ Re-submitted communication, p. 2.

unfounded and ordered them to pay case preparation allowances of €1,200 for the proceedings at first instance and €2,500 for the appeal.¹⁴ According to the communicants, their total costs related to the case amounted to around €10,000.¹⁵

29. The average personal annual income in Belgium in 2012 was €16,651 – equivalent to €1,387.58 per month.¹⁶ The most recent available figures are from 2014 and show that average personal annual income increased slightly to €17,684 – equivalent to €1,474 per month.¹⁷

C. Domestic remedies

30. The communicants state that it would have been possible to appeal against the Court of Appeal's judgement to the Court of Cassation on a point of law, but not on a point of fact, and that the question of whether or not proceedings are prohibitively expensive is a fact within the jurisdiction of the ordinary courts, from which no appeal therefore lies.¹⁸

31. The communicants also submitted that given the expense associated with such proceedings, they chose not to risk increasing the burden of their bills for lawyers' fees, which they did not know how they would pay, when there was no certainty that the award of €3,700 costs against them would be revised by the court. They added that according to article 478 of the Judicial Code they would be obliged to consult a lawyer at the Supreme Court, whose fees would be at least €2,000.¹⁹

32. The Party concerned did not contest the admissibility of the present communication but submits that the communicants could have applied to the Court of Cassation and obtained judicial assistance, which would have allowed them to obtain the full reimbursement of their legal expenses before the Court of Cassation, including the cost of legal representation.²⁰

D. Substantive issues

33. The communicants submit that the costs order by the Court of Appeal of Liège in its judgment of 29 October 2013 made the procedure to challenge the validity of the environmental permit for Bodarwe & Fils' quarry development prohibitively expensive under article 9, paragraph 4 of the Convention.

34. The Party concerned denies the communicants' allegation and contends that its legal framework on costs of judicial procedures ensures that access to justice under article 9 of the Convention is not prohibitively expensive.

Legal framework regarding costs and case preparation allowance

35. Both parties agree that the allocation of the costs is regulated by articles 1017 to 1024 of the Judicial Code.²¹

36. The Party concerned emphasizes that the cost system is not a purely flat-rate system, but rather a mixed-base system: it has a flat-rate basis but the judge keeps a power of discretion. The judge will impose the basic amount established by the Royal Decree of 26 October 2007 unless the parties request the court to depart from it in accordance with article

¹⁴ Re-submitted communication, p. 3.

¹⁵ Communicants' oral statement at the hearing during the Committee's fifty-third meeting.

¹⁶ Communicants' response to Committee's questions, dated 12 December 2014, p. 4.

¹⁷ Party concerned's reply to questions of the Committee, dated 13 January 2017, p. 4.

¹⁸ Communicants' response to Committee's questions, dated 12 December 2014, p.1.

¹⁹ Communicants' response to Committee's questions, dated 12 December 2014, p.1.

²⁰ Party concerned's opening statement for the hearing at the Committee's fifty-third meeting, dated 23 June 2016, p. 4.

²¹ Communicants' reply to the Committee's questions, dated 12 December 2014, p. 2 and Party concerned's reply to the Committee's questions, dated 13 January 2017, p. 2.

1022, paragraph 3 of the Judicial Code. If so, the judge may assess the amount the unsuccessful party will be ordered to pay within the “range” from the minimum to the maximum amount.²² In exercising his discretion, the judge takes into account the criteria set out in article 1022, paragraph 3, namely: (i) the unsuccessful party’s financial capacity as a factor in reducing the amount of the allowance, (ii) the complexity of the case, (iii) the allowances awarded on a contractual basis to the successful party and (iv) the manifestly unreasonable nature of the situation.²³

37. The Party concerned states that criterion (i), the unsuccessful party’s financial capacity, can only be used as a basis to reduce the basic allowance if lack of resources is sufficiently demonstrated. The Party concerned emphasises that persons seeking this reduction must provide all the elements that may justify their claim.²⁴ It states that this obligation derives from article 870 of the Judicial Code, which requires all parties to prove the allegations they make,²⁵ and cites a number of cases of the Supreme Court to show that the courts require clear evidence.²⁶ The Party concerned submits that the judge cannot “guess” what the financial capacities of the applicants are but decides on the basis of documentary evidence. It observes that it is therefore important for the party to produce documents that prove in the most objective way its financial capacity. It states that the official annual accounts submitted to the commercial court are appropriate evidence to that end, while, for instance, mere copies of an account balance may be insufficient.²⁷

38. With regard to criterion (ii), the complexity of the case, the Party concerned states that this is a relatively flexible criterion which makes it possible to adapt the allowance to the circumstances of the case submitted to the judge (multiplicity of proceedings, complexity of the arguments exchanged between parties, etc.), especially in cases not evaluable in money.²⁸

39. According to the Party concerned, criterion (iii) regarding allowances awarded on a contractual basis plays a more marginal role and concerns penalty clauses, which may establish substantial default interest.²⁹

40. With regard to criterion (iv) concerning the manifestly unreasonable nature of the situation, the Party concerned states that it is the most difficult one to discern. It submits that “unreasonable” should not be confused with “unfair” and neither should “the situation” be confused with the persons. It claims that the application of this criterion enables the trial judge to take into account criteria which are specific to the proceedings, as well as criteria which are specific to the situation of the parties.³⁰ The Party concerned states that the judge can, for instance, increase the amount of the case preparation allowance in case of abusive behaviour by one of the parties or reduce it in case of a manifestly unreasonable situation

²² Response to the re-submitted communication, p. 4-5 referring to G. Mary, “La nouvelles réglementation relative à la répétibilité des frais et honoraires d’avocat” (R.G.A.R., 2008, 14336) p.10, part 4.

²³ Response to the re-submitted communication, p. 5 referring to J-F. van Drooghenbroeck and B. DE Coninck, “La loi du 21 avril 2007 sur la répétibilité des frais et honoraires d’avocat” (J.T., 2008) p. 44 and 45.

²⁴ Response to the re-submitted communication, p. 5.

²⁵ Party concerned’s reply to the Committee’s questions, dated 13 January 2017, p. 2.

²⁶ Party concerned’s reply to the Committee’s questions, dated 13 January 2017, p. 3 referring to Cass., 19 décembre 1963, Pas., 1964, I, p. 416; Cass., 3 mars 1978, Pas., 1978, I, p. 759; Cass. 22 décembre 1986, Pas., 1987, I, p. 501 and Cass., 16 juin 2003, J.L.M.B., 2005, p. 202, Pas. 2003, I, p. 1189.

²⁷ Party concerned’s reply to the Committee’s questions, dated 13 January 2017, p. 3.

²⁸ Response to the re-submitted communication, p. 5

²⁹ Response to the re-submitted communication, p. 5.

³⁰ Response to the re-submitted communication, p. 5 referring to H. Boularbah, “Les frais et les dépens, spécialement l’indemnité de procédure” in *Actualités en droit judiciaire* (Larcier, CUP, volume 145, 2013) p. 387, n°65.

due to the disproportion between the financial positions of the parties.³¹ It notes that there are no specific rules concerning environmental cases, in this respect.³²

The Court of Appeal of Liège's judgment of 29 October 2013

41. The communicants state that they acknowledge and accept the merits of the judgment of the Court of Appeal of Liège of 29 October 2013 – meaning the legality of Bodarwé & Fils' environmental permit – because the communicants' calculation, which led to the conclusion that the notification had been made after the expiry of the required time-limit, was eventually found to contain an error.³³ The communicants state that their communication rather relates to the costs order made in the Court's judgment which they submit is a specific infringement by the courts of the Party concerned of the right of access to justice guaranteed by article 9, paragraphs 3 and 4, of the Convention, in particular the requirement that the costs of the procedure should not be prohibitively expensive.³⁴

42. The communicants allege that the crux of the alleged infringement of article 9, paragraphs 3 and 4, is that the communicants have been together ordered to pay a case preparation allowance of €3,700 rather than the minimum allowance of €75, which renders the possibility of obtaining an effective remedy (including any possibility of appeal) to all intents and purposes illusory for most non-profit associations, since these organizations generally do not have sufficient funds to pay this kind of cost several times a year. They submit that ordering an environmental protection association to pay such a large case preparation allowance means that such associations will not seek a remedy unless they are certain of winning their action. Environmental protection associations would thus not be able to contribute to the creation of case-law on issues that give rise to doubt.³⁵

43. The communicants state that the cost of €3,700 was paid by their lawyer, who advanced these expenses on their behalf. They submit that the first communicant was and is incapable of paying even half of this case preparation allowance and the second communicant could not make more than one such high payment without going bankrupt. The communicants provide their audited and approved accounts and claim that these accounts indicate that they have no significant financial resources.³⁶ The communicants refer to their submissions to the Court of Appeal of Liège, in which they inter alia stated that they should not be penalized for their efforts for the collective environmental good and that, in accordance with article 1022 of the Judicial Code, the Court should take account of the unsuccessful party's financial capacity as a factor in reducing the amount of the case preparation allowance, including by comparing it to the respondent's substantial financial capacity, and of the manifestly unreasonable nature of the situation that would result from imposing the basic case preparation allowance.³⁷

44. The communicants state that, in their submissions to the Court, they had argued that the Court should also take into account that the respondent had not demonstrated a cooperative attitude towards the proceedings either during preliminary negotiations or at first instance and had merely sent five lines of explanation as to why it claimed that the calculation of the time-limits in the Summary Report on the Administrative Appeal was wrong. The communicants assert that, if there had been a mistake, the reason was simple

³¹ Response to the re-submitted communication, p. 5 referring to Cass., 21 January 2010, C.08.0538.N

³² Response to the re-submitted communication, p. 5.

³³ Re-submitted communication, p. 3

³⁴ Re-submitted communication, p. 6

³⁵ Re-submitted communication, p. 5.

³⁶ Communicants' reply to Committee's questions, dated 8 September 2014, p. 1 and annexes 4, 5 and 12.

³⁷ Re-submitted communication, p. 3.

and could have been addressed without requiring lengthy litigation.³⁸ They claim that the Court of Appeal did not address this aspect of their submissions in its judgment.³⁹

45. The communicants argue that, in light of the foregoing, it is impossible to understand the reasoning put forward in the judgment, which stated that the action had been introduced by the communicants “without reasonable basis”. The communicants argue that the basis of the application was reasonable, and the length of the proceedings was due solely to the respondent, who waited until the end of the trial to explain its calculation of the time limits, thus leaving the communicants unable to correct their calculation error, which was based on misleading information from the public authorities.⁴⁰

46. The communicants submit that in declaring the application inadmissible and not, therefore, ruling on the merits, the judgment at first instance deprived the communicants of one level of jurisdiction and contributed significantly to increasing the cost of the proceedings. They argue that, if it had been established at first instance that the permit was indisputable, as became clear at the appeal stage, no appeal would have been brought, and the costs arising from the appeal would therefore have been avoided.⁴¹

47. The communicants further dispute the Court of Appeal’s finding that the communicants had not adequately established their exact financial position in a way that would allow the Court to reduce the case preparation allowance. The communicants claim that the accounts of non-profit associations are public, since they are lodged at the Registry of the Commercial Court in accordance with article 26 novies, §1, of the Law of 27 June 1921.⁴²

48. The communicants argue that, although the respondent had not, in its own submissions, requested production of the non-profit associations’ accounts, if the Court of Appeal was of the opinion that it should seek broader clarification, an order for the hearing to be re-opened and the communicants’ accounts to be produced would have displayed the procedural fairness required by article 9, paragraph 4, of the Convention. The communicants claim that this was particularly necessary because, two days after the communicants lodged their Appeal Submissions on 9 April 2013, the Court of Justice of the European Union gave its judgment on Case C-260/11 *Edwards* clarifying the meaning of “not prohibitively expensive” proceedings, whereas European Union law was in issue before the Court of Appeal and this judgment required consideration of the factors thus defined by that new case-law.⁴³ The communicants refer in that regard to the *Edwards* judgement where it states:

“The cost of proceedings must neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable.”⁴⁴

49. The communicants further claim that it is self-evident and therefore common knowledge that non-profit associations in the Party concerned generally do not have large resources.⁴⁵

50. The Party concerned emphasizes that the Committee has only been provided with the communicants’ submissions in the court proceeding and not the respondent’s and that it is important to take into account the claims of all the parties concerning the costs because the

³⁸ Re-submitted communication, p. 3.

³⁹ Re-submitted communication, p. 4.

⁴⁰ Re-submitted communication, p. 4.

⁴¹ Re-submitted communication, p. 2.

⁴² Re-submitted communication, p. 4.

⁴³ Re-submitted communication, p. 5.

⁴⁴ Re-submitted communication, p. 6 referring to EU Court of Justice, Case C-260/11 *Edwards and Pallikaropoulos* (Judgement of the Court, 4th Chamber, 11 April 2013) ECLI:EU:C:2013:221, para. 40.

⁴⁵ Re-submitted communication, p. 5.

judge may only award the costs which have been mentioned by the parties in their detailed statements.⁴⁶

51. The Party concerned further submits that the Court based its assessment of the costs in its judgment of 29 October 2013 on the criteria provided by its domestic law, as described in the following paragraphs.⁴⁷

52. Firstly, with regard to the financial situation of the communicants, the Party concerned submits that the communicants failed to satisfactorily demonstrate their difficult financial situation to the Court and this was expressly recognized in the judgment of the Court:

“Both above-mentioned non-profit associations have not adequately established reasons relating to their exact financial position that would allow the court to reduce the case preparation allowances”

53. In this regard, the Party concerned points out that in their appeal submissions, the communicants requested a reduction of the case preparation allowance to €75 based on the fact that “non-profit associations are involved, which take recourse to a remedy that is specifically created for them and should serve the collective environmental interest, and that they should not be penalized for their efforts”. While the communicants requested that account should be taken of their financial capacity, they did not provide supporting documents to prove this capacity or at least any sufficient supporting documents.⁴⁸

54. With regard to the communicants’ argument that the accounts of non-profit associations are public, the Party concerned submits that the judge will decide on the basis of documentary evidence and that the parties have to put forward the facts that support their claims. The judge may not base his/her decision on facts that do not form part of the debate or on personal knowledge acquired outside of the hearing. The Party concerned also states that it is not common knowledge that non-profit associations have limited means.⁴⁹

55. Secondly, the Party concerned submits that the court did take into account the complexity of the case, which may result in a reduction or an increase of the case preparation allowance, but that in the present case the criterion resulted in an increase.⁵⁰

56. Thirdly, the Party concerned states that the court applied the criteria established by the Court of Justice of the European Union in the *Edwards* case, namely it took account of “whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure and the potentially frivolous nature of the claim in its various stages”.⁵¹ In that regard, the Party concerned submits that it appears that the cause of action in the present case was highly questionable and that an appeal which is manifestly bound to be unsuccessful does not serve the general interest.⁵²

57. The Party concerned therefore submits that the Court of Appeal made use of the possibility to adapt the amount in the light of the specific facts of the case and that the

⁴⁶ Response to the re-submitted communication, p. 5.

⁴⁷ Party concerned’s opening statement for the hearing at the Committee’s fifty-third meeting, dated 23 June 2016, p. 2.

⁴⁸ Party concerned’s opening statement for the hearing at the Committee’s fifty-third meeting, dated 23 June 2016, p. 2-3.

⁴⁹ Party concerned’s opening statement for the hearing at the Committee’s fifty-third meeting, dated 23 June 2016, p. 3.

⁵⁰ Party concerned’s opening statement for the hearing at the Committee’s fifty-third meeting, dated 23 June 2016, p. 3.

⁵¹ Party concerned’s opening statement for the hearing at the Committee’s fifty-third meeting, dated 23 June 2016, p. 3-4 referring to Case C-260/11 *Edwards and Pallikaropoulos* (Judgement of the Court, 4th Chamber, 11 April 2013) ECLI:EU:C:2013:221, para. 42.

⁵² Party concerned’s opening statement for the hearing at the Committee’s fifty-third meeting, dated 23 June 2016, p. 3-4.

communicant could have obtained a reduction of the amount if they would have been more diligent in providing evidence of their financial capacity.⁵³

Other examples of prohibitively expensive proceedings

58. The communicants claim that the allegedly prohibitively expensive costs order of 29 October 2013 is not an isolated occurrence and submit that several other judgments have involved orders for relatively high costs, effectively restraining those who seek to protect the environment (whether natural persons or legal entities).⁵⁴

59. In support of this allegation, the communicants refer to a judgement of the Court of Appeal of Liège dated 14 June 2013, which required payment of €1320 as costs of proceedings.⁵⁵ The communicants state that the applicants in that case had each tabled an activity report as a proof of resources and relied in their argumentation on the Convention.⁵⁶ The communicants referred to four other judgements involving NGOs where the basic case preparation allowance of €700 Euros was not adjusted.⁵⁷

60. With respect to the Court of Appeal's judgement of 14 June 2013 referred to by the communicants, the Party concerned points out that the applicants provided only an activity report and not their accounts. It submits that an activity report does not indicate the financial capacity of an applicant and that the judge accordingly could not have reduced the costs on this basis.⁵⁸ With regard to the other four examples provided by the communicants, the Party concerned submits that the communicants have not indicated whether the accounts were provided in those cases either.⁵⁹

61. The Party concerned states that it has researched the database of the Court of Appeal in Liege but that this only produced the cases in which the communicants were involved.⁶⁰ It notes that it has no computerized system in place which would enable searching cases in which the minimum amount has been granted more generally. It further states that the most recent system of reducing the case preparation allowance in administrative cases was only introduced in 2014 and there are so far an insufficient amount of decisions under environmental law to draw any kind of conclusions in that regard. The Party concerned submits that, for that reason, the administrative court decisions referred to by the communicants that predate the introduction of the 2014 law are irrelevant.⁶¹

III. Consideration and evaluation by the Committee

62. Belgium ratified the Convention on 21 January 2003. The Convention entered into force for Belgium on 21 April 2003, being ninety days after the deposit of its instrument of ratification.

Admissibility

63. The Committee notes that both parties agree that the communicants could in theory have appealed the Court of Appeal's judgment of 29 October 2013 to the Court of Cassation. The communicant claims, however, that such an appeal could only concern points of law, not fact. It submits that the question of whether or not proceedings are prohibitively expensive is a fact within the jurisdiction of the ordinary courts and it would

⁵³ Party concerned's opening statement for the hearing at the Committee's fifty-third meeting, dated 23 June 2016, p. 4.

⁵⁴ Re-submitted communication, p. 6 referring to Annex 10 and Annex 11.

⁵⁵ Annex 11 to the re-submitted communication.

⁵⁶ Communicants' reply to the Committee's questions, dated 13 January 2017, p. 1.

⁵⁷ Communicants' reply to the Committee's questions, dated 13 January 2017, p. 2-4.

⁵⁸ Party concerned's comments on the communicant's reply to the Committee's questions, dated 20 January 2017, p. 1.

⁵⁹ Party concerned's comments on the communicant's reply to the Committee's questions, dated 20 January 2017, p. 1.

⁶⁰ Letter of the Party concerned, dated 8 December 2016 p. 2 and Party concerned's reply to the Committee's questions, dated 13 January 2017, p. 1.

⁶¹ Letter of the Party concerned, dated 8 December 2016, p. 2.

therefore not have been possible to appeal the Court of Appeal's costs order. The Party concerned did not expressly address this point (see paras. 30 and 32 above).

64. The Committee, taking into account the apparent uncertainty as to whether it would have indeed been possible to challenge the Court of Appeal's costs order before the Court of Cassation, and bearing in mind that the Party concerned has not challenged the admissibility of the communication, finds the communication to be admissible.

Party concerned's legal framework on costs of judicial procedures

65. As the Committee has held in earlier findings, when evaluating compliance with article 9 of the Convention, it pays attention to the general picture regarding access to justice in the Party concerned, in the light of the purpose reflected in the preamble of the Convention that "effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced" (see e.g. findings on communication ACCC/C/2006/18 (Denmark), para. 30). Accordingly, 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 (findings on communication ACCC/C/2008/33 (United Kingdom) para. 128). Therefore, while the communication concerns the Court of Appeal's costs order of 29 October 2013, the Committee also examines the applicable legal framework for such costs.

66. The Committee notes that, in accordance with the Judicial Code as described in paragraphs 18-20 above, the unsuccessful party shall, as a rule, be ordered to pay the case preparation allowance as a flat contribution to the costs and legal fees of the successful party. The basic, minimum and maximum amounts of the case preparation allowance are fixed by the Royal Decree of 26 October 2007. At the time of the Court of Appeal's costs order, the basic amount of the case preparation allowance was €1,320, minimum €82.50 and maximum €11,000 for cases not evaluable in money.

67. The Committee understands that the basic amount represents the flat-rate case preparation allowance, but the judge has the discretion, upon request by one of the parties, to modify the allowance within the range of the minimum and the maximum amount. In exercising this discretion, the judge can take into account the unsuccessful party's financial capacity as a factor in reducing the amount of the allowance, as well as other relevant aspects of the case, namely the complexity of the case, the allowances awarded on a contractual basis to the successful party and "the manifestly unreasonable nature of the situation" (see para. 20 above).

68. The Committee accordingly considers that the situation in this case differs from the one examined by the Committee in its findings on communication ACCC/C/2008/33 (United Kingdom), where the Committee found that "the considerable discretion of the courts of England and Wales in deciding the costs, without any clear legally binding direction from the legislature or judiciary to ensure costs are not prohibitively expensive, leads to considerable uncertainty regarding the costs to be faced where claimants are legitimately pursuing environmental concerns that involve the public interest."⁶²

69. Regarding the amount of the case preparation allowance, the Committee considers that, taking into account the other costs typically involved in court proceedings (including own-side costs), the basic amount could potentially represent a prohibitive financial barrier to access to justice in environmental matters for some members of the public in the Party concerned, including some environmental NGOs. In this respect, the Committee recalls its findings on communication ACCC/C/2011/57 (Denmark), in which it noted that when assessing if a system of costs of judicial procedures is "prohibitively expensive", the

⁶² ECE/MP.PP/C.1/2010/6/Add.3, para. 135.

Committee also considers the contribution made by appeals by NGOs to improving environmental protection and the effective implementation of relevant legislation.⁶³

70. However, according to the law of the Party concerned, in every case the unsuccessful party can request the court to exercise its discretion under article 1022 of the Judicial Code to reduce the basic case preparation allowance taking into account that party's financial capacity. In exercising its discretion, the court must take into account the criteria of article 1022, paragraph 3, of the Judicial Code and is limited by the minimum and maximum amounts set by the Royal Decree of 26 October 2007. At the time of the Court of Appeal's judgment at issue in this case, the minimum amount of the case preparation allowance was €75. The Committee does not consider the minimum amount of the case preparation allowance to be prohibitively expensive for members of the public, including environmental NGOs.

71. In light of the foregoing, the Committee does not find the Party concerned's legal framework on costs of judicial procedures to itself be prohibitively expensive under article 9, paragraph 4 of the Convention.

Court of Appeal of Liège's costs order of 29 October 2013

72. The Committee next examines if the costs order made by the Court of Appeal of Liège in its judgment of 29 October 2013 was prohibitively expensive under article 9, paragraph 4 of the Convention in the circumstances of this case.

73. As a preliminary point, the Committee notes that in its court proceeding at first instance and then on appeal, the communicants sought to challenge the validity of the environmental permit for Bodarwe & Fils' quarry development on the ground that the quarry was being operated without a proper environmental permit as required by national law. The communicant's claim accordingly may be considered to be a procedure to challenge an act (operating the quarry) or omission (failure to regularize its permit) by a private person (Bodarwe and Fils) which contravenes provisions of national law relating to the environment, as envisaged in article 9, paragraph 3, of the Convention. The Committee thus considers that the requirements of article 9, paragraphs 3 and 4, of the Convention are applicable to those court proceedings.

74. When assessing if the costs of procedures under article 9 of the Convention are prohibitively expensive in a specific case, the Committee first evaluates whether, taking into account the financial situation of the applicants, the total amount of costs would prevent them from challenging decisions, acts and omissions which fall under the Convention. With respect to environmental NGOs, the Committee held in its findings on communication ACCC/C/2011/57 (Denmark),⁶⁴ that the financial capacity of any particular NGO to meet the cost of access to justice may depend on a number of factors, including the amount of the membership fee, the number of members and the amount of resources allocated for access to justice activities in comparison with other activities. The Committee note that these criteria should be duly considered by the courts in specific cases under article 9 of the Convention.

75. Moreover, as already mentioned in paragraph 70 above, in legal proceedings within the scope of article 9 of the Convention, the public interest nature of the environmental claims should be given sufficient consideration by the courts with respect to the apportioning of costs (see for example, the Committee's findings on communication ACCC/C/2008/33 (United Kingdom)).⁶⁵

76. Accordingly, as with any criteria laid down in national law for standing in procedures under articles 9, paragraphs 2 and 3, of the Convention, the expected costs of the proceedings under article 9, paragraph 3 should not effectively bar all or almost all environmental organizations from challenging acts or omissions that contravene national

⁶³ ECE/MP.PP/C.1/2012/7, para. 48.

⁶⁴ ECE/MP.PP/C.1/2012/7, para. 47.

⁶⁵ ECE/MP.PP/C.1/2010/6/Add.3, para. 134.

law relating to the environment. On the contrary, access to such procedures should be the presumption, not the exception (see the Committee's findings on communication ACCC/2005/11 (Belgium), paras. 35-36 by analogy).⁶⁶ This does not prevent the parties from imposing reasonable requirements which the members of the public must meet to be granted the protection against prohibitive costs provided in article 9, paragraph 4 of the Convention.

77. Applying the above general principles to the communicants' case, the Committee considers that the amount of the case preparation allowance which the communicants were ordered to pay (€3,700), together with other costs of the case, imposed a considerable financial burden on the communicants, which, as demonstrated by the extracts of accounts submitted to the Committee,⁶⁷ are small NGOs with limited financial capacity. It is clear to the Committee that costs of this level could effectively prevent small environmental NGOs from challenging decisions, acts and omissions under article 9 of the Convention.

78. At the same time, as stated in paragraph 76 above, the Convention does not prevent its Parties from imposing reasonable requirements for members of the public to meet in order to be granted the protection against prohibitive costs provided in article 9, paragraph 4 of the Convention. The Committee understands that, in order for the court to exercise its discretion under article 1022 of the Judicial Code to reduce the case preparation allowance in any particular case on the basis of the financial capacity of the unsuccessful party, it is usual court practice to require that the party provide sufficient evidence to substantiate its financial situation (see para. 37 above). The Committee does not consider this requirement unreasonable or excessively burdensome. In the present case, the Court of Appeal held that the communicants did not provide sufficient justification demonstrating their financial situation.⁶⁸ Since the communicants did not provide the Court with sufficient evidence to substantiate their financial situation, the Committee finds that the fact that the Court, in its judgment of 29 October 2013, did not reduce the amount of the case preparation allowances below the basic level does not amount to non-compliance of the Party concerned with article 9, paragraph 4 of the Convention, in the circumstances of this case.

79. The Committee stresses, however, that if the communicants had indeed provided sufficient evidence to demonstrate their limited financial capacity, the Court should have exercised its discretion under article 1022 of the Judicial Code to reduce the basic case preparation allowance, taking the communicants' financial capacity into account.

80. With respect to the communicants' allegation that the Court's refusal to reduce the case preparation allowance in its costs order of 29 October 2013 is not an isolated occurrence, the Committee takes note of the judgments provided by the communicants in support of this allegation (see paras. 58-59 above). Still, the Committee considers that the communicants have not demonstrated that the claimants in those cases provided the courts with sufficient documentary evidence to substantiate their financial situation. In one case, the communicants state that the claimants provided an activity report (see para. 59 above). However, the Committee considers that, as submitted by the Party concerned, mere provision of an activity report falls short of providing adequate proof of the financial situation of the NGO in question. With respect to the other four judgments cited by the communicants, the communicants did not provide the Committee with any information as to what, if any, evidence the claimants in those cases had put before the courts to prove their financial situation.

81. The Committee further considers the communicants' allegations that they were misled by wrong information by the administrative authorities concerning the specific date of expiration of the permit in question and by the uncooperative attitude of the defendant (see para. 45 above). The Committee notes that the Court of First Instance dismissed the application of the communicants as inadmissible, as it found that the communicants did not have standing to challenge the permit. However, this view was not shared by the Court of

⁶⁶ ECE/MP.PP/C.1/2006/4/Add.2.

⁶⁷ Annexes 4 and 5 to the re-submitted communication.

⁶⁸ Annex 2 to the re-submitted communication, p. 6.

Appeal, which decided to deal with the case on merits. This meant that the issue of the date of expiration of the permit was discussed at the appeal stage for the first time, which could have contributed to the total amount of costs in this case. Had the issue of the permit's expiration been clarified before the Court of First Instance, the communicants may not have appealed the decision.

82. In its judgment of 29 October 2013, the Court of Appeal of Liège records that the communicants had written to various administrative authorities asking them to take measures regarding the allegedly invalid permit. The judgement however states that the communicants did not provide the Court with any of the administrative authorities' replies to these letters. It appears from the judgement that neither did the communicants put before the Court any other correspondence from the administrative authorities that may have shown that they misled the communicants regarding the relevant dates for calculating the validity of the permit. Moreover, the communicants have not provided the Committee with any evidence that they in fact argued before the Court of Appeal that the costs of those proceedings should be reduced on the ground that they were misled by wrong information by the administrative authorities concerning the relevant dates.

83. In light of the foregoing, the communicants have not demonstrated that, even if they were provided with wrong information by the authorities with regard to the date of expiration of the permit, the costs order of 29 October 2013 should be considered to be a breach of the Party concerned's obligation under article 9, paragraph 4 as a result.

84. Based on the above considerations, and in particular the fact that the communicants did not provide the Court of Appeal with sufficient evidence to substantiate their financial situation, the Committee finds that the Party concerned is not in non-compliance with article 9, paragraph 4, of the Convention in the circumstances of this case.

IV. Conclusions

85. In the light of the above considerations, the Committee finds that the Party concerned is not in non-compliance with article 9, paragraph 4 of the Convention in the circumstances of this case.
