



## INFORMATIVE NOTE No. 74/2016

### THE TC PARTLY UPHOLDS THE APPEAL BROUGHT AGAINST JUDICIAL FEES, ON THE GROUNDS THAT THEIR AMOUNT INFRINGES THE RIGHT TO EFFECTIVE JUDICIAL PROTECTION

The Plenary Meeting of the Constitutional Court (TC) has unanimously and partly upheld the appeal lodged by the Socialist Parliamentary Group in Congress against Act 10/2012, of 20 November, regulating certain fees related to the Administration of Justice and the Spanish Institute of Toxicology and Forensic Science, and has declared the fees established therein as unconstitutional and null and void, both to access the courts and to file appeals, on the grounds that they breach the right to effective judicial protection (Art. 24.1 Spanish Constitution (CE)). The fees in question are only those imposed on legal persons; the legislative reform under Royal Decree-Law 3/2013, of 22 February, released natural persons from payment of the duty, which is why the Court has declared the object of the appeal as non-existent as regards said fees.

Specifically, the Court has repealed those sections of Art. 7.1 of the Act that established the following fixed fees: 1) 200 euros to file a summary contentious-administrative appeals and 350 euros to file ordinary contentious-administrative appeals; 2) 800 euros to lodge a remedy of appeal and 1,200 euros for motions to vacate and extraordinary appeals for a procedural breach, before the civil courts; 3) 800 euros for a remedy of appeal and 1,200 euros for motions to vacate, in any form, before the contentious-administrative courts; 4) and has declared null and void the 500 euro fee for appeals for reconsideration and 750 euros for motions to vacate in any form, before the labour courts.

Art. 7.2 has also been declared unconstitutional, which requires a variable payment depending on the result of applying to the economic value of the suit the tax rate in question, following this scale: from 0 to 1,000,000€: 0.5%; the rest, 0.25%. Maximum variable: 10,000€.

The Constitutional Court considers that the establishment of fees in order to be entitled to bring judicial action before the civil, contentious-administrative and labour courts, does not *per se* infringe a citizen's fundamental right to effective judicial protection (Art. 24.1 CE); does not breach the need for the Administration to be subject to judicial review (Art. 106 CE), or the principle of legal aid (Art. 119 CE). The legislator, explains the judgment, is free to regulate the requirements for legal aid, as long as it guarantees that this right may be exercised by anyone evidencing insufficient income for litigation purposes.

However, it considers that the fee amount (both the fixed and variable payment) is not proportional and, as claimed by the plaintiffs, could discourage citizens who intend to address the Courts of Justice when exercising their fundamental right to effective judicial protection (Art. 24.1 CE). In order to reach this conclusion, the Court analyses the requirements that the case-law expects from any rules which, like the one challenged, limit a fundamental right: the legitimacy of the purposes sought and the proportionality of the legislative measure.

The purposes followed by the challenged act, states the judgment, are constitutionally legitimate. This is the case with the first, i.e. to avoid any “*abuse*” on the part of litigants not seeking court protection but advantages, by delaying the proceedings; and also with the second, i.e. the semi-public financing of the Justice system. With respect to the latter, its legitimacy is based on the fact that the taxable situation encumbered by the fee is not the public service offered by the Justice system (i.e. the provision of material and human resources), but the “*exercise of jurisdictional powers*”. Litigation, in each jurisdictional order, “*consolidates the task exclusively entrusted by the Spanish Constitution to the Judiciary, one of the State’s public powers (...)*”.

However, the legitimacy of this second purpose cannot entail excessive fees that prevent access to the Justice system, guaranteed by Art. 24.1 CE. This is why the Court should also analyse the proportionality of the measure. Following constitutional case-law, in order for a legislative measure to be proportionate it must meet the requirements of suitability, need and proportionality in strict terms.

In this case, the measure is not suitable to achieve an intended end of abusive appeals. In fact, as in the fee system everyone pays the same, the aim to prevent or discourage the filing of abusive appeals “*is diluted for any litigant with sufficient economic resources*”; on the other hand, “*it harms (...) a citizen who is adequately exercising his right to appeal*”, who is obliged to pay a fee aimed at eradicating behaviour beyond his control. The impossibility of establishing prior control over appeals “*cannot justify indiscriminate payment of this fee, justified on the need to discourage a pathology that, in the end, is minor*”. Furthermore, Spanish law already contemplates a discouraging instrument, i.e. the deposit that must be paid in order to bring an appeal. The judgment concludes that payment of the fee is not suitable because it fails to meet its objective and because there are no objective reasons justifying the imposition of a new dissuasive measure due to the alleged non-effectiveness of deposits.

However, payment of the fee is in fact a suitable measure to achieve the second purpose, i.e. a semi-public financing of the Justice system. It is also necessary, as there is no alternative (nor have the appellants claimed otherwise) to the fee in order to achieve the purpose of “*establishing an economic joint responsibility amongst anybody generating litigation, entailing a cost for the State*”.

The last requirement analysed by the Court is proportionality in strict terms. As regards the fixed payment required to file a suit before the contentious-administrative courts (the claim does not make any allegations about the civil courts, on which the Court is unable to pronounce itself), the judgment advises that when accessing this jurisdiction not only is the right to effective judicial protection (Art. 24.1 CE) in play, but also the “*effectiveness*” of the mandates ordered in Arts. 103.1 and 106.1 CE, guaranteeing that the Public Administrations are subject to judicial review.

The dissuasive effect of these fees is not annulled by the limit established (up to a maximum of 50% of the economic sanction appealed) or by any reduction in the sanction, if it is voluntarily paid. Furthermore, states the judgment, contentious-administrative proceedings are not exhausted in appeals against fines. Finally, the Court has pointed out how burdensome it would be for a litigant to have to pay lawyer and court attorney fees, in addition to the fee. This is why the fixed 200 euro fee for the filing of a summary contentious-administrative appeal and 350 euros for an ordinary one are not proportional and, consequently, are contrary to the right to access the courts.

As regards the fees paid to file the appeals, the judgment considers that the justification contained in the economic report of the act is insufficient, as it merely points out that it is legitimate to establish higher amounts than those set at first instance. In this regard the judgment states, on the one hand, that “*the aim of a semi-public financing of the Justice system cannot entail the sacrifice of a fundamental right*”; and, on the other hand, that the fee amount in order to appeal judicial resolutions “*does not cover the economic situation of a significant majority of its beneficiaries, for whom it is excessive*”; this latter affirmation is made by the Court based on official statistic data for the trade sector. Consequently, these fees infringe the right protected by Art. 24 CE as they may discourage the right to file an appeal.

With respect to the variable payment (the second amount payable by a litigant, based on a certain percentage over the economic value of the suit), the Plenary Meeting considers that “*it unnecessarily increases the economic burden*” on the appellant, without the legislator specifying the grounds for this requirement. Consequently, it is unconstitutional due to infringing the fundamental right of access to the courts and to bring an appeal.

The Court clarifies that, by virtue of the principle of legal certainty, a declared nullity of fees will only be effective *pro futuro*, i.e. in relation to new cases or proceedings where a final resolution has not yet been delivered.

The judgment has not ordered a return of any amounts paid in relation to the fees declared null and void, both in proceedings completed with a final resolution and in ongoing proceedings, where the fee was paid without being challenged on the grounds of infringing Art. 24.1 CE. In fact, in this latter case, the failure to challenge the rate has rendered the tax settlement final.

Madrid, 29 July 2016