Comhshaol, Pobal agus Rialtas Áitiúil
Environment, Community and Local Government

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Fiona Marshall *By email*
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Dear Ms Marshall

Re Communication to the Aarhus Convention Compliance Committee concerning compliance by Ireland in connection with the cost of access to justice (ACCC/C/2014/113)

1. Thank you for your letter of 15th April 2015 inviting Ireland to submit the within Response of Ireland.

2. As the extension granted was shorter than that requested, Ireland reserves the right to request the opportunity to supplement this Response should same be required.

Summary of the Applicant's Communication

3. The Communicant alleges that Ireland is in breach of the following provisions of the Aarhus Convention:

Art. 3(2) ''*Each Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters*'';

Art. 3(3) ''*Each Party shall promote environmental education and environmental awareness among the public, especially on how to obtain access to information, to participate in decision-making and to obtain access to justice in environmental matters*'';

Art. 3(8) ''*Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings*'';

Art. 9(4) ''*In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible*''.

4. In the Summary of Communication dated 5th June 2014, the Communication of 5th June 2014 (revised 5th August 2014), and the Communicant's Clarification letter dated 17th December 2014, the Communicant claims that:

1 (a) section 7 of the Environment (Miscellaneous Provisions) Act 2011 (‘‘E(MP)A 2011’’) does not provide an adequate mechanism to protect an applicant who unsuccessfully seeks to invoke the Aarhus Convention from bearing legal costs;

(b) section 50B(3) of the Planning and Development Act 2000 (‘‘PDA 2000’’) and section 3(3) of the E(MP)A 2011 create uncertainty in providing for exceptions to the special costs rules on the basis of the conduct of the applicant or the nature of his claim;

(c) uncertainty is created in circumstances where courts may apportion costs between elements of the case which fall under section 50B PDA 2000 or section 3 E(MP)A 2011, and those elements of the case which do not;

2 (a) Order 99 Rule 29(13) of the Rules of the Superior Courts unfairly penalises litigants who seek to challenge their own lawyer’s fees;

(b) Applicant’s own costs are not transparent and/or have the potential to be prohibitively expensive;

(c) Costs rules in respect of appeals to superior courts and preliminary references to the Court of Justice of the European Union (‘‘CJEU’’) create increased fear of prohibitively expensive costs;

(d) Applicants may require to initiate direct actions in the General Court of the European Union;

3 Ireland does not publish:

(a) the majority of outcomes of legal costs adjudications;

(b) the outcomes of professional complaints procedures;

(c) information in respect of the special costs procedures.

5. Ireland considers that these claims, which this Response will address in turn, are variously misconceived and unfounded. The Communicant effectively states that applicants:

(a) who believe their proceedings to be environmental (irrespective of whether they are in fact environmental), enjoy a right under 9(4) to engage lawyers, and

(b) enjoy a right under Article 9(4) never to be exposed to any risk of any award of costs against them, even if their conduct is wrongful or their claim is baseless, and

(c) enjoy a right under Articles 3 and Article 9(4) to have available to them post-hoc state assessment of costs in entire substitution of private contracts previously entered into with their own lawyers.

6. These propositions are, in Ireland's respectful submission, not merely misconceived, but entirely outside the scope of rights conferred upon applicants under the Aarhus Convention.

7. First, however, Ireland challenges the admissibility of the within Communication; second, it sets out a brief description of Ireland's implementation of the Aarhus Convention and its implementation in European Union law; and third, the Response deals with the substance of the Communication.

8. In summary, contrary to the underlying premise of the within Communication, Article 9(4) of the Aarhus Convention is not designed to ensure that Contracting Parties regulate private contractual arrangements for the provision of legal services: rather, it is designed to ensure that the costs awards within legal systems do not render access to justice prohibitively expensive. That is precisely what Ireland has done in the establishment of its special costs rules.

Admissibility of the within Communication

9. Pursuant to paragraph 9 of the Committee's Preliminary determination of admissibility dated 19th December 2014, and to your letter dated 15th April, Ireland takes the opportunity in these submissions to deal with both the admissibility of the within Communication and its substance.

10. For the reasons set out below, Ireland very strongly considers that the present application is not only substantially unfounded, but is entirely academic and of no concern whatsoever to the Communicant.

11. Paragraph 21 of the Annex to Decision I/7 imposes a requirement upon complainants to exhaust domestic remedies unless the remedy is prolonged, ineffective or insufficient as a means of redress. As the Committee underlined at paragraph 5 of its preliminary determination dated 19th December 2014, the provision does not impose any strict requirement that all domestic remedies must be exhausted: however, the Committee stated that failure to make use of available domestic remedies might be grounds for the Committee to determine that the matter should be pursued at the level of domestic procedures rather than through the Compliance mechanism. All admitted Compliance Committee cases concern concrete potential breaches of the Aarhus Convention in respect of which there is a factual nexus of alleged harm to the Communicant at the time of the Communication.[1]

12. Underpinning the entire obligation is that there must be an alleged harm which is required to be remedied or redressed.

13. However, the Communicant has not availed of any available domestic remedy <u>for the precise reason that there is no circumstance disclosed in his Communication which the Communicant seeks to remedy or redress</u>.

[1] In Decisions ACCC/C/2008/33, ACCC/C/2010/48, ACCC/C/2010/59, ACCC/C/2012/68, ACCC/C/2012/77 and ACCC/C/2005/12, even where the exhaustion of domestic remedies was not considered to render the Communication inadmissible by the Committee, there was an underlying factual nexus complained of. In ACCC/C/2010/53 and ACCC/C/2010/59, the Committee declined to address aspects in respect of which domestic remedies had not been exhausted. See also the Guidance Document on the Aarhus Convention Compliance Mechanism at pages 34-35.

14. The Communicant has not gone before the Irish courts. He has not shown that he was stopped from doing so. More fundamentally, in the year since he made his Communication, the Communicant has shown no evidence, nor even once raised, any issue which he would have wished to put before the Irish courts and which fell under the provisions of the Aarhus Convention.

15. Rather, the Communicant makes an entirely speculative Communication about Ireland's implementation of the Aarhus Convention, with no factual nexus in respect of which he complains. For this reason, Ireland also respectfully submits that the Communication is (to use the terminology of Decision I/7) an abuse of the right to make a communication[2] and is manifestly unreasonable.[3]

16. Notwithstanding that he fails to identify any issue which concerns him, the Communicant states that he has not invoked domestic procedures because:

1 *The Aarhus Convention is not part of domestic law and is not directly enforceable by the Irish courts.* As a dualist system, it is correct to state that the Aarhus Convention does not form part of domestic law in the strict sense. However, European Union law is a monist legal order incorporating the Aarhus Convention to which it is a signatory. The Aarhus Convention is itself applied directly in Union law via the EIA, IPPC Directives and Public Participation Directives. Under Article 29 of the Irish Constitution and the European Communities Act 1972 as amended, directly effective and applicable European Union law such as the EIA, IPPC and Public Participation Directives (and the Aarhus Convention as it applies to them) may be relied upon by any person before the Irish courts. Union law, in its field of application, is normatively superior to any contrary provision of Irish law. Ireland has transposed those Directives into domestic legislation. It has also legislated for special legal costs rules for environmental cases, in particular section 50B of the Planning and Development Act 2000 and Part 2 of the Environmental (Miscellaneous Provisions) Act 2011 and by section 8 of the latter Act requires that judicial notice must be taken of the Aarhus Convention

[2] Paragraph 20(b) of the Annex to Decision I/7.
[3] Paragraph 20(c) of the Annex to Decision I/7.

in such cases. Moreover, Union law governs almost the entirety of environmental law in Ireland. Consequently, both the Aarhus Convention and the Union's implementation of it can be invoked in any environmental case in which Union law is at issue in Ireland. Finally, the Communicant has adduced no evidence whatsoever of any claim, and so has not identified any claim in respect of which the Aarhus Convention or its provisions could not be relied upon before the Irish courts;

2 *To enforce Directive 2003/35/EC (''The Public Participation Directive'') in the Irish courts, legal costs would be prohibitive.* However, the Communicant does not state how he is affected by the alleged failure to implement the Public Participation Directive. The Directive does not stand on its own, but arises in respect of environmental matters (the substance of the Aarhus Convention and related EU and domestic law). The Communicant has disclosed no cause of action before the Irish courts, nor indeed any issue he has which affects him personally. He has not indicated any potential claim he had or might have. Consequently, merely to state that legal costs are a bar to redress does not answer what it is the Communicant seeks to be redressed. Moreover, even if the Communicant had identified a particular cause of action, it is recognised within the case-law of the European Court of Human Rights that mere doubts as to the effectiveness of a remedy will not suffice to excuse not attempting to avail of the remedy.[4]

17. A Communicant cannot avoid the obligation to exhaust domestic remedies in circumstances where he has neither evidenced nor even claimed any cause of action which would entitle him to avail of domestic remedies.[5]

18. Should similarly unfounded communications be accepted by the Aarhus Convention Compliance Committee, the process by which genuine communicants can be facilitated by the Compliance Committee will be significantly jeopardised.[6] This

[4] App. 39678/09, Decision of 15th January 2013, paragraph 27.
[5] See also Paragraph 6(b) of Decision V/9 on general issues of compliance: *"the Committee should ensure that, where domestic remedies have not been utilized and exhausted, it takes account of such remedies"*.
[6] The Committee has itself recognised the importance of the exhaustion of domestic remedies with regard to its administrative workload. In its Guidance Document, at page 37, the Committee states that: *"Should the*

would fundamentally undermine the Compliance Committee's ability to allocate its limited resources to communicants who allege that they have suffered harm by an alleged breach of the Aarhus Convention. The Compliance mechanism is to provide advice, facilitate assistance or make recommendations to non-compliant parties.[7] It is not, nor was it ever intended to be, a forum for adjudication of purely academic communications.

19. Moreover, the Communicant himself accepts (at page 3 of his Clarification) that *"it is not possible to prove that Aarhus related litigation is prohibitive"*. Had he been personally affected, the Communicant would be alleging exactly that, on the basis of a concrete set of facts upon which Ireland could respond and the Compliance Committee could adjudicate.

20. On the basis of the Communication's failure to comply with paragraphs 20 and 21 of Decision I/7, we respectfully request the Compliance Committee to find the present Communication inadmissible in its entirety.

Committee be faced with a mounting workload, non-exhaustion of a domestic remedy might also constitute a reason for the Committee to decide not to proceed beyond initial consideration of a communication."

[7] Veit Koester, *"The Aarhus Convention Compliance Mechanism"* in Charles Banner (ed.), *"The Aarhus Convention: A Guide for UK Lawyers"*, Bloomsbury, 2015, at page 204.

Ireland's compliance with the Aarhus Convention

21. This being the first Communication to be before the Compliance Committee which has not been disposed of at the admissibility stage, Ireland takes the opportunity to set out, in brief, the relevant applicable legislative provisions by which effect has been given to the Aarhus Convention in Irish law.

22. The Aarhus Convention was ratified by Ireland on 20th June 2012, and entered into force on 18th September 2012, following full transposition of each part of the Convention into Irish domestic law.[8] Ireland was obliged to ensure that domestic law was brought into conformity with the Aarhus Convention.[9]

Proceedings potentially involving environmental matters

23. The standard procedure for review of an administrative decision is judicial review,[10] which includes public law and private law remedies. The traditional public law remedies of *certiorari* (quashing), prohibition, *mandamus* (mandatory orders) and *quo warranto* (challenges to the holding of office) are available together with injunctive and declaratory relief. Specific remedies are also available under statute.[11] The review procedure required by Article 9(2) of the Aarhus Convention is satisfied by the judicial review procedure.

Protective Costs Orders

24. It has long been recognised that the Irish courts have an inherent jurisdiction to make a protective costs order at any stage of proceedings.[12] However, the enactment of section 50B of the PDA 2000 and section 3 of the E(MP)A 2011 has rendered any

[8] Ireland denies the Communicant's allegations of delay in ratification, and the purported rationale therefor (see page 1 of the Communication). Nor has Ireland failed to provide data to the Council of Europe.
[9] *McCallig v An Bord Pleanála* [2014] IEHC 353 at paragraph 26.
[10] See Order 84 of the Rules of the Superior Courts.
[11] Examples include: section 160 of the Planning and Development Act 2000; section 57 of the Waste Management Act 1996; section 99H of the Environmental Protection Agency Act 1992; section 11 of the Local Government (Water Pollution) Act 1977; and, section 28 of the Air Pollution Act 1987.
[12] *Village Residents Association Ltd v An Bord Pleanala (No 2)* [2000] 4 IR 321; *Friends of the Curragh Environment Limited v An Bord Pleanala & Ors* [2009] 4 IR 451, Kelly J.

requirement for protective costs orders (other than under the new statutory scheme) moot in certain environmental matters.

The statutory special costs rules

25. The Aarhus Convention envisages the charging of reasonable costs (Article 3.8).[13] Ireland's changes in the costs rules represent a radical change in the manner in which costs are applied in environmental litigation in Ireland. They go far beyond what is required by the Aarhus Convention, the Public Participation Directive, the Impact Assessment Directive and the IPPC Directive. They facilitate and enable access to justice by both any member of the public and any NGO.

26. The Irish legal system is a common law system operating under a written Constitution and the European Union Treaties. Dispute resolution operates primarily by way of an adversarial system and not an inquisitorial system.[14] Litigants generally operate by way of assistance from legal practitioners, i.e., solicitors and barristers who represent and advocate for their interests in the courts. Legal proceedings are heard and decided before independent judges and operate within a court system provided and funded by the State.

27. In Ireland, pursuant to Order 99 of the Rules of the Superior Courts, costs are generally awarded to the winner of the proceedings:[15] this is known as *"costs following the event"*.[16]

28. However, prior to its ratification of the Aarhus Convention, Ireland created a special statutory costs regime for environmental proceedings to be found in Section 50B(1) Planning & Development Act 2000 ("PDA 2000"), [17] and in Part 2 of the

[13]The Court of Justice of the European Union has recognised that the parties can be fixed with reasonable costs. See Case C-427/07 *Commission v Ireland*, paragraph 92 of the judgment of the Court and paragraph 94 of the Opinion of Advocate General Kokott; see also her Opinion in *Edwards* at paragraph 34.
[14] Arbitration, mediation and conciliation are also available.
[15] Costs of specific (interlocutory) steps within proceedings are either awarded to the winner of same or the winner of the entire proceedings.
[16] The Communicant's use of terminology (the 'American Rule' and 'English Rule') is neither accurate nor helpful.
[17] Inserted by the Planning and Development Act 2010 and amended by the Environment (Miscellaneous Provisions) Act 2011. They came into operation in their amended form on 23rd August 2011.

Environment (Miscellaneous Provisions) Act 2011 ("E(MP)A 2011"). [18] These provisions are set out in Annex I to this letter. Applicants in such proceedings are also absolved from applicable court filing costs.

29. Unlike in the United Kingdom, to which the Communicant refers, the special costs rules mean that *no* costs are imposed in Ireland upon an applicant in environmental litigation. Rather, the applicant will bear his own legal costs if he chooses to use legal representation, and if the legal representative is not doing so on a conditional fee (*"no-foal, no-fee"*) basis.

30. These significant changes to Ireland's legal system mean that an applicant will very rarely be obliged to pay the costs of a respondent, even if the applicant is unsuccessful. On other hand, by application of the normal costs rules, the applicant is generally entitled to his or her costs if successful. Furthermore, in cases of exceptional public importance, an unsuccessful applicant may be awarded his or her costs.

31. There is therefore a complete disparity of treatment between applicants and respondents in respect of certain environmental matters. Respondents will normally never obtain their costs if they win - whereas applicants can litigate in the knowledge that they will normally obtain their costs if they win. If they lose they are (bar rare circumstances due to their own conduct) protected from the making of a cost award against them.

32. Consequently, save in extreme circumstances, applicants are absolved of any award even of the reasonable and not prohibitively expensive costs envisaged by the Convention. This is an extremely privileged position for applicants, which, it is respectfully submitted, far exceeds Ireland's obligations under the Aarhus Convention.

33. The introduction of the special costs rules on 23rd August 2011 rendered entirely moot the judgment of the Court of Justice in Case C-427/07 *Commission v Ireland*, which the Communicant relies upon at page 4 of his Clarification.[19]

[18] These provisions are set out in Annex I to this letter. They came into operation on 23rd August 2011.

Public consultation

34. Ireland has recently undertaken a full public consultation on the implementation of Article 9 of the Aarhus Convention,[20] the outcome of which will be taken into consideration in the ongoing amendments made to the planning and environmental legislation. The consultation will also take into account the general principles of the Aarhus Convention set out in Article 3.

35. The public consultation demonstrates Ireland's ongoing commitment to improving its Aarhus compliance by co-operating with the public in examining the operation of its legislation.

36. It can be noted that the Communicant did not make any representation during the public consultation until after he made his Communication, which, once again, demonstrates that he has failed to exhaust any domestic remedy.

[19] Contrary to what the Communicant alleges at page 1 of his original Complaint and page 4 of his Clarification the CJEU did not make a finding that legal costs in Ireland were prohibitively expensive. The Court found that Ireland had failed to adequately transpose the provisions of relevant directives into domestic law by permitting what it described as a discretionary practice to exist in relation to the award of legal costs.
[20] See Annexes IV and V.

The legal system in Ireland

37. Throughout the Communication and the subsequent Clarification, the Communicant predicates his complaint on a wholesale misunderstanding of Ireland's legal services market. This reinforces and doubtless stems from the entirely abstract and academic nature of the Communication.

38. Whilst the operation of Ireland's legal system is a purely internal matter, not itself subject to the Aarhus Convention, the legal context within which Ireland's special costs rules operate is important to bear in mind. Accordingly, and in very general terms relevant to the present Communication, Ireland takes the opportunity to describe the market for legal services in Ireland. It reserves the right to make further, specific, submissions on these matters should same be required.

Retention of legal representation by Applicants

39. As seen above, under the special costs rules, a successful applicant can be awarded costs and an unsuccessful applicant will not have to bear the costs of his opponents but can expect to bear his own costs.

40. However, in Ireland applicants need not incur any own legal costs (other than administrative expenses). Moreover, if they choose to engage legal representation, Irish lawyers are required by statute and professional code to provide estimates of fees. Clients can choose to contract with lawyers on various bases, including a possible cap on the level of fees. Should any dispute arise, a resolution mechanism exists whereby a client's own costs are assessed (or, as it is known, "taxed") by the Taxing Master. Finally, many Irish lawyers will represent clients with a reasonable prospect of success on a conditional fee basis, thus further enabling access to justice even for those who do not have the means to pay their own costs of legal representation.

41. Thus, Ireland's legal system – taken as a whole – enables access to justice in environmental matters and ensures that prohibitively expensive legal costs are not incurred.

There is no requirement for legal representation before the Irish courts

42. Unlike many legal systems, the Irish courts permit individuals to represent themselves,[21] thus eliminating own costs altogether. Accordingly, in environmental proceedings in Ireland, own costs need never be 'prohibitive' in terms of access to justice.

43. Nothing in the Aarhus Convention requires that litigants within the Contracting Parties be allowed to represent themselves in the Courts as a way of reducing costs for litigants. Consequently, this too goes beyond the requirements of the Aarhus Convention. The choice by litigants to retain lawyers at their own cost cannot be said to constitute a prohibitive cost under Article 9(4).

Legal representation in proceedings

44. Should litigants choose to have legal representation, they need only be represented by a single solicitor, who has full rights of audience before the Irish courts. Solicitors are trained in advocacy, and many across the country have specialist knowledge of environmental law and litigation.

45. Barristers, a specialist body of court advocates, are not required to be retained at any time by a client: still less are senior counsel (senior barristers recognised for their expertise in advocacy).

46. The choice whether to retain any lawyer, and the choice as to the numbers and type of lawyers, are, therefore, entirely for each party.

Whether legal representation can be obtained via legal aid

47. Article 9(5) of the Aarhus Convention does not require the provision of legal aid. Notwithstanding that, Ireland's statutory civil legal aid scheme is open to

[21] The Irish judiciary actively facilitates lay participation, and, where possible, invites lawyers for the other parties to assist the lay litigant in understanding court procedure.

environmental claims. However, very few claims of this type are provided with legal aid, funds which are typically exhausted by family and housing law applications.

Ireland's market for legal services generally

48. Ireland's legal system is highly competitive. There are over 2,210 self-employed barristers[22] and 7,389 solicitors[23] in private practice in 2,377 firms[24] in a country of only 4.5 million. This level of competition compares favourably to many other jurisdictions. The highly competitive environment permits litigants to 'shop around' between solicitor's firms and between barristers in terms of cost, quality, reputation and expertise. It ensures that, at the level of the private client, a litigant has negotiating power in terms of his *"own costs"*.

49. With regard to the current economic climate, not only has there always been considerable leeway for prospective litigants to negotiate a reduced fee, but there remains considerable pressure upon providers of legal services in the present market. This is reflected by the fact that the purchasers of the majority of legal services in Ireland (the Irish State, State agencies, and the criminal and civil legal aid schemes) have substantially, and in some cases by over a third, reduced the fees paid to legal practitioners. This downward pressure on the cost of legal services in Ireland has widened throughout the market for legal services.

The transparency of the costs of legal services in Ireland prior to engagement

50. Ireland's legal system is completely transparent at the point of engagement of legal services.

51. As the price of any legal service will depend on the time and skills required, the documents to be prepared, and other factors, lawyers will rarely be able to offer (or advertise) blanket or indicative fees, save for very basic work (i.e., not litigation).

[22] Bar Council Annual Report 2014-2015.
http://issuu.com/thinkmedia/docs/barcouncilannualreport_web_546da5efab9552
[23] Law Society Annual Report 2014.
https://www.lawsociety.ie/Global/About%20Us/Annual%20Reports/AnnualReport2014.pdf
[24] Law Society Annual Report 2014.
https://www.lawsociety.ie/Global/About%20Us/Annual%20Reports/AnnualReport2014.pdf

Additionally, the fees proposed to be charged may also vary depending on whether payment is to be received on a staged basis or at the determination of proceedings.

52. However, solicitors are required by statute[25] and barristers are required by rules of professional conduct[26] to provide written estimates of costs at the outset of their engagement for specific legal services. This system permits and encourages negotiation of fees, creates transparency, fosters competition, and guarantees predictability in relation to own legal costs.

53. The estimate of costs of engagement of legal services will be determined on a case by case basis, depending on factors such as the time and skills required, the number of litigants involved in the case, the number and nature of documents to be prepared, the

[25] Section 68(1) of the Solicitors (Amendment) Act 1994 provides:

"On the taking of instructions to provide legal services to a client, or as soon as is practicable thereafter, a solicitor shall provide the client with particulars in writing of—

(a) the actual charges, or

(b) where the provision of particulars of the actual charges is not in the circumstances possible or practicable, an estimate (as near as may be) of the charges, or

(c) where the provision of particulars of the actual charges or an estimate of such charges is not in the circumstances possible or practicable, the basis on which the charges are to be made,

by that solicitor or his firm for the provision of such legal services and, where those legal services involve contentious business, with particulars in writing of the circumstances in which the client may be required to pay costs to any other party or parties and the circumstances, if any, in which the client's liability to meet the charges which will be made by the solicitor of that client for those services will not be fully discharged by the amount, if any, of the costs recovered in the contentious business from any other party or parties (or any insurers of such party or parties)."

[26] Rule 12.6 of the Code of Conduct of the Bar of Ireland provides:

"On the taking of instructions to provide legal services, or as soon as practicable thereafter, a Barrister shall on request, provide to an instructing solicitor, or the client in the case of access under the Direct Professional Access Scheme, with particulars in writing confirming:-

(a) the actual charges, or

(b) where the provision of particulars or the actual charges is not in the circumstances possible or practicable, an estimate (as near as may be) of the charges, or

(c) where the provision of particulars of the actual charges or an estimate of such charges is not in the circumstances possible or practicable, the basis on which the charges are to be made,

The format of any such particulars shall be at the discretion of each barrister."

duration and the complexity of the legal proceedings, and the likely number of interlocutory hearings and likely duration of substantive hearing(s).

54. Fees will then be agreed by the lawyer and client. These fees are matters of private contractual relations. The level of fees agreed is a matter for free negotiation between the private client and the legal professional. Clients can impose conditionality, such as fee caps, and require notifications when fees reach certain levels. If a potential client is dissatisfied with the fee proposal (which will comprise a structure of fee items in the applicable case, the level of those fees, and the proposed arrangements as to payment), he can go to a competing lawyer. The Communication makes no reference to the nature of this private contractual arrangement - again a reflection of the fact that the Communication is entirely theoretical.

55. As a result of the transparency at the point of engagement of legal services, predictable own costs can be shared amongst various litigants. This is particularly important in access to justice matters, as environmental proceedings typically concern not just single individuals. Litigants have the opportunity to bring proceedings together with other members of the public (either as litigants to the same action, or through separate actions heard together, or by combining themselves into a community group or NGO). Consequently, even in circumstances where predicted and negotiated own costs may not be affordable to a particular individual, that individual is not disbarred from combining with other affected persons to access justice through legal representatives.

Pro bono and conditional fee arrangements by legal practitioners in Ireland

Conditional fee arrangements

56. The principle of costs following the event permits a conditional fee arrangement.[27] A lawyer will represent a litigant on the basis that, if the litigant wins, an order for costs will be obtained against the other party and the lawyer will be able to recover his or her fees pursuant to that order. If the litigant loses, the lawyers are not entitled to any

[27] In Ireland, these are typically referred to as *"No-foal, no-fee"* arrangements. As its name suggests, the practice is common in horse-breeding to waive a stud fee if a live foal is not produced.

fee. This is an arrangement to which recourse is regularly had. Consequently, it simply cannot be said that the costs of litigation are prohibitive.

57. This practice is informal but long-established and widespread across both legal professions, with anecdotal evidence from practitioners suggesting that it is an effective and useful means to permit access to justice for litigants of modest means but with legitimate complaints (including from both private citizens and non-governmental organisations).

58. Whilst a matter of discretion for the individual legal practitioner, access to justice through conditional fee assistance is an integral part of the Irish legal system and the basis of work of many practitioners across all fields of litigation.

59. The Report of the Legal Costs Working Group[28] noted that the system has the striking advantage of permitting persons of moderate means to engage legal representatives to vindicate their rights, so long as: (a) in the view of the lawyer, it is a case which can be won (i.e., that there is a reasonable prospect of success, which is also a condition of Ireland's own statutory Legal Aid Scheme), and, (b) the other party is sufficiently well-resourced to cover the eventual costs. In section 50B and Part 2 of the E(MP)A 2011 matters, the Respondent will invariably be an emanation of the State, so the question of adequate resourcing would not arise to discourage lawyers on behalf of an applicant. In its report, the Legal Costs Working Group noted the *"absence of a convincing case of change"* and did not recommend altering this principle.

60. Accordingly, Ireland considers the conditional fee system to be an invaluable part of the overall costs system across the Irish State, and one which has long enabled litigants to access justice.

28 Report of the Legal Costs Working Group, 07 November 2005 <http://www.justice.ie/en/JELR/legalcosts.pdf/Files/legalcosts.pdf>.

Pro bono activities

61. In a 2005 study of voluntary work by barristers (all of whom are self-employed), the Bar Council found that 98% of Irish barristers (then over 1,500, now over 2,300) conducted voluntary work as part of their practice.

62. Moreover, the Bar Council operates a Voluntary Assistance Scheme, of which all Irish barristers and the majority of the largest solicitors firms in the country are members, through which Irish barristers offer free advice to NGOs, charities and other organisations, including the Free Legal Aid Centre and other local community legal services.

Summary

63. Whilst therefore a matter of discretion for the individual legal practitioner, access to justice through *pro bono* and conditional fee assistance is an inherent part of operation of the Irish legal system.

Prospective changes in respect of legal practitioners

64. The Legal Services Regulation Bill 2011 (‘‘The Bill’’) is now before Seanad Éireann (Senate), having completed the Second Stage therein on 13th May 2015. The Government’s intention is that the Bill will be enacted by the end of 2015, in order that the new Legal Services Regulatory Authority can come into operation early in 2016.

65. As the Bill is currently not enacted, and is in the process of being amended in the Oireachtas (Ireland’s Parliament), the Communicant’s complaints in respect of same must, by definition, be considered inadmissible (in that no redress in respect of same could be required). Moreover, for the same reason, Ireland reserves the right to make full submissions in respect of the Bill when enacted and commenced (i.e., when it is law).

66. As the Bill is presently subject to proposals for further amendments, the numbering of provisions of the Bill referred to within this Response are those of the Bill as passed by Dáil Éireann, the Irish legislative body.[29]

- *Ireland's market for legal services*

67. The Bill makes a number of proposals which will fundamentally alter the nature of the legal services market. These include: 'legal partnerships' (defined in the Bill as partnerships between solicitors and barristers or between barristers only); barristers in employment; direct access to barristers in non-contentious matters; and, subject to the results of public consultations, multi-disciplinary practices (defined in the Bill as partnerships between lawyers and non-lawyers, providing both legal and other services), the handling of clients' funds by barristers, direct access to barristers in contentious cases, and the possible introduction of a new profession of 'conveyancer'.

68. Section 151 provides that no professional code shall prevent a practising barrister from taking up paid employment or from providing legal services to that employer (including representing the employer in court). Consequently, NGOs who have barristers within their ranks will be able to draw on their services to further reduce their own costs. This will further ensure access to justice in environmental matters.

- *Transparency in, and taxation of, lawyer's fees*

69. Part 10 of the Bill requires legal practitioners to provide greater transparency in the charging of legal costs.[30]

[29] http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2011/5811/b58b11d.pdf.

[30] Section 122 will prohibit specific practices contrary to the principle that legal fees should be based on necessary work actually done. Section 123 will require a notice of legal costs, in clear language, which must be provided when a legal practitioner takes instructions: this develops the present statutory provision in respect of solicitors and the professional obligation in respect of barristers. The notice will be required to set out either the costs which will be incurred or the precise basis upon which variable costs are to be calculated. Should any emergent factor later arise which would significantly add to estimated costs, a new notice will be required. A 10 day cooling off period is provided for, and legal practitioners are not to engage service providers (such as counsel, expert witnesses etc.) without first gaining confirmation from the client. Section 124 provides that legal practitioners and their clients can make agreements as to fees for services, subject to adjudication by a Legal Costs Adjudicator in the event of a dispute. Section 125 provides *inter alia* for an itemised statement specifying the legal services provided, that the fee-related agreements are set out clearly in writing, and to specify the mechanism for the communication and resolution of disputed items.

70. Section 126 imposes an obligation on legal practitioners to attempt to resolve disputes with their clients before resorting to an application to the Legal Costs Adjudicator. This reflects the present and continuing emphasis on mediation and other informal resolution avenues.

71. In respect of the taxation of disputed legal costs, a new Office of the Legal Costs Adjudicators, headed by a Chief Legal Costs Adjudicator, will replace the Office of the Taxing Master. As occurs at present, this Office will deal with both party and party and lawyer-own client disputes.[31] The Bill sets out, for the first time in legislation, a series of 'Principles Relating to Legal Costs'.[32] As is the case at present, only those costs that have been reasonably incurred and are reasonable in amount will be permitted.[33] However, a disputed charge will stand only if it is found to be *"fair and reasonable in all the circumstances"*.[34]

72. Section 113 provides for a public register of determinations which will disclose the outcomes and reasons for decisions made by the Legal Costs Adjudicators. This does not, however, include the minutiae of determinations of legal costs specifically incurred.[35]

73. Section 129 also provides that hearings shall be held in public unless, in the interests of justice, all or part of the hearing should be in camera. Likewise, section 135 provides for the protection of lawyer-client privilege in the adjudication.

74. Section 131 provides that the costs of the adjudication process will be charged against any legal practitioner who is found to have issued a bill of costs that is determined by the Adjudicator to be at least 15% higher than it should be. If less, the applicant must

[31] Section 127.
[32] Schedule One.
[33] In considering what might constitute a reasonable amount, Adjudicators will consider a number of relevant factors, including, for example, the complexity and difficulty of the legal work concerned; any relevant skill or specialised knowledge applied; the amount of time and labour on the work; and the number and complexity of the documents that were required to be drafted or examined. Section 128 provides for the matters to be ascertained by the Adjudicator in the course of an adjudication such as: the work actually done by the legal practitioner; what would constitute a reasonable fee for that work; how long it took to do the work; and whether it was appropriate in the circumstances that a charge was made for the work concerned.
[34] Section 130.
[35] Section 130 provides for the determinations that an Adjudicator may make.

pay the cost of the adjudication (but will benefit from the outcome of the adjudication otherwise). Moreover, the costs of the adjudication will be set off against the aggregate amount owed as determined by the adjudicator, thus negating the need for an applicant to access funds directly for this service.

- *In respect of the Aarhus Convention*

75. Section 142, which provides that costs in civil proceedings normally follow the event, provides expressly that nothing in that part shall affect section 50B PDA 2000 or Part 2 E(MP)A 2011.

76. Section 115 requires that the Minister for the Environment, Community and Local Government is consulted in relation to the guidelines to be prepared by the Chief Legal Costs Adjudicator setting out how the adjudication process works, what is required for an application to the Office, the applicable fees etc. As the applicable Minister is responsible for Aarhus Convention matters, the policy intention is that the guidelines will have regard to Ireland's obligations.

The substance of the Applicant's complaints

Complaint 1(a) – Section 7(1) of the Environment (Miscellaneous Provisions) Act 2011

77. If, in a motion brought in accordance with section 7(1) E(MP)A 2011, it is determined that the proceedings concern an environmental matter (specified in sections 4 to 6 E(MP)A 2011), then the special costs rules under Section 3(2) E(MP)A 2011 apply (i.e., the parties bear their own costs but if the applicant wins he gets his costs). If it is determined that the proceedings do not concern an environmental matter, then the ordinary costs rules apply. This ensures that any environmental matter is treated in accordance with Ireland's obligations under the Aarhus Convention.

78. The Communicant complains that the exposure of an Applicant to an award of costs in bringing the motion is itself to risk prohibitive legal costs. Very few section 7 applications have thus far been brought, possibly because there is agreement between the parties as to the nature of the litigation and that the special costs rules apply as envisaged by ss. 7(3) and (4) of the 2011 Act.

79. First, there is nothing in the Aarhus Convention that requires States to provide for the costs of procedures for the assessment of whether or not proceedings are related to the environment in circumstances where the proceedings are not, in fact, related to the environment. Such an interpretation of the Aarhus Convention would be impermissibly to extend its scope. Of necessity, domestic courts must assess whether a matter falls within the scope of the Aarhus Convention. The application of Ireland's generous statutory special costs rules likewise falls to be determined by the courts. The costs of that section 7 motion cannot be considered within the scope of Aarhus Convention where the proceedings in respect of which they are brought are determined by the Courts not to be within the scope of the Aarhus Convention.

80. Second, the Communicant has not evidenced any risk of prohibitive legal costs upon such an application under section 7 E(MP)A 2011.[36] In ***McCoy***,[37] the High Court

[36] Insofar as the Communicant refers to costs cited in Case C-427/07 *Commission v Ireland* [2009] ECR I-6277, this predated Ireland's new cost rules under Section 50B PDA 2000 and Section 3 E(MP)A 2011. The Applicant's reference to ACCC/C/2008/27, a case concerning the United Kingdom jurisdiction of Northern

found that the Oireachtas intended the section 7 application to be made in a summary fashion (by motion and not by originating pleading). A motion is – typically – of very limited duration, requiring limited paperwork and legal argument, and cannot be compared to the costs of a full hearing. Due to the necessarily abstract nature of the within Communication, the Communicant invents figures without regard to the content of pleadings (i.e., the Notice of Motion and the Grounding Affidavit), the likely number of replying affidavits, the likely number of lawyer-client consultations, the extent of client instructions, the necessity for written submissions, whether there is a requirement for counsel, and if so how many, the likely number of court appearances; the number of respondents and notice parties, and the likely differential input of legal representatives for these respective parties. Consequently, the costs of a section 7 motion cannot be predicted in the abstract. The Communicant's simplistic comment that a basic section 7 hearing could exceed a certain figure is, therefore, not based on any concrete evidence. Nor can any reliable estimate be based upon a simplistic division of the number of Certificates issued by the Taxing Master's Office every year.[38]

81. Third, section 7(1) E(MP)A 2011 must be read in light of the judicial notice the Court is required to take of the Aarhus Convention under section 8 E(MP)A 2011, and the provisions of the Aarhus Convention implemented by directly applicable European Union law. Even if costs are awarded against an unsuccessful applicant in a motion brought under section 7(1) E(MP)A 2011, a Court, in awarding costs, can ensure that the awarded costs are not prohibitive (by measuring the costs or otherwise).

Ireland, is wholly inapplicable and incomparable. It can also be noted that in ACCC/C/2008/23 (UK), £5,130 plus interest was found not to be prohibitively expensive.

[37] [2014] IEHC 512 at paragraph 6.

[38] The Communicant bases this on the fact that the costs processed in the Office of the Taxing Master are not only High Court cases on foot of Court Orders, but also involve solicitor-own client cost disputes. The latter does not necessarily involve litigation. It could, and frequently does, relate to conveyancing, probate, or any contractually involved legal costs dispute. Further, the Office adjudicates upon other costs, such as costs of registration of Judgment Mortgages, bankruptcy etc.

Therefore, to assume that the total amount of costs certified on a number of Certificates give an average cost for High Court cases is fundamentally wrong.

It also fails to take account of the fact that the total number of Certificates issued has no bearing or relevance on the average or median costs. Some of those Certificates that issued would be costs of default motions in the High Court. Such motions might typically involve a total amount certified of €1,500 to €2,000.

Finally, the diversity of claims that are taxed by a Taxing Master involve Commercial Court actions, Personal Injury actions, Debt Collection, Contractual Cases, Motions, and Judicial Review - all of which are fundamentally different in context, content and costs to a section 7 application.

The Communicant, however, has compiled all of these and suggested that their amalgam, divided by the number of Certificates issued, leads to an average.

82. Finally, the Communicant's claim is entirely speculative: he does not complain of any inability to bring proceedings because he claims that he is discouraged by the fear of any prohibitive costs upon a motion under section 7(1) E(MP)A 2011. The Communicant complains that he was unable to locate the outcome of section 7 hearings: *"I have therefore been unable to access the outcome of the costs of any Aarhus encompassed case, nor the cost of any of Section 7 application"*. However, the Communicant does not take account of the fact that the basic mechanism to determine whether the special costs rules apply is an agreement between the parties that they do so (section (4) provides for such an agreement prior to commencement of proceedings, subsection (3) to an agreement at any time thereafter). Only should parties fail to reach such an agreement would a motion under section 7(1) require to be brought. Due to the specificity of both section 50(1) PDA 2000 and sections 4 to 6 E(MP)A 2011, it would be rare that the parties would not be able to agree the applicability of those provisions to all or part of prospective proceedings or proceedings in being. Consequently, as would become evident to the Communicant if this Communication was grounded in a real set of facts, his apprehensions of prohibitive costs could only crystallise after: (a) a prospective respondent refused to agree that prospective proceedings fell within the scope of the special costs rules; and (b) he had consulted a solicitor or a costs accountant in respect of the prospective costs of the specific motion he intended to bring, and based on the information given, had determined same to be prohibitive (objectively and subjectively). As this is not the case, and he has brought forward no evidence of prohibitive legal costs in respect of an unsuccessful section 7 motion (even if same is considered to fall under the Aarhus Convention, which Ireland contends it is not) the Communication is inadmissible in this respect.[39]

The burden of proof

83. The burden of proof is upon an applicant in a Section 7 motion. If the motion is being heard, it is because the parties are in dispute. The proof that section 3 applies must therefore lie with the person seeking the benefit of that assertion, who is bringing the

[39] See ACCC/C/2008/32 (EU) at paragraph 93.

motion. He is also the only person who knows what the nature of his proposed proceedings are. However, the burden is upon the Respondent to show that any of the exceptions apply.[40]

The requirement to bring the motion on notice

84. The Communicant misinterprets the Court's decision in ***Coffey***. There, the applicant was not granted protection under section 3 E(MP)A 2011 because the applicant had failed to bring the motion on notice to the respondent, a requirement under section 7 E(MP)A 2011. The requirement to place the respondent on notice is a fundamental matter of justice in order to ensure that all parties be given the opportunity to be heard (or to resolve the matter amicably in advance of the motion being heard).

Complaint 1(b) - Section 50B(3) of the Planning and Development Act 2000 and Section 3(3) of the Environmental (Miscellaneous Provisions) Act 2011

85. Once again, the abstract nature of the Communicant's claim makes it difficult for Ireland to respond. There has never been a determination by the courts based on the provisions of section 50B(3) PDA 2000 or section 3(3) E(MP)A 2011 against a party to environmental proceedings in Ireland (applicant or otherwise).

86. By design, these provisions arise to be applied only in the most extreme and unusual circumstances, when, due to the conduct of a party or the nature of the case, costs may be awarded.

Frivolous or vexatious claims

87. In Irish law, a frivolous or vexatious claim is one which has *"no reasonable chance of succeeding"*.[41]

[40] *Hunter v Nurendale Limited trading as Panda Waste* [2013] IEHC 430 at pages 17-18.

[41] Barron J, Supreme Court, *Farley v Ireland* [1998] WJSC-SC 1512 (1st May 1997) at 3.

88. The Irish courts have an inherent jurisdiction to strike out proceedings on the basis that the claim is frivolous or vexatious. This jurisdiction is rarely exercised. In such circumstances, costs follow the event. It would be illogical if proceedings doomed to failure were afforded the extensive protections offered by the special costs rules.

89. The proper procedure to seek to strike out proceedings for being frivolous or vexatious is at the outset of proceedings, when the applicant's claim is disclosed and before the respondent has set out his case. In environmental proceedings this will often be to bring an application before leave for judicial review has been granted.[42] At this stage, the respondent's costs will be low, and will be limited to the motion seeking to strike out the applicant's claim. An Irish court will be loath to entertain an application that a claim is frivolous or vexatious after a respondent has treated it as serious by incurring the costs of defending proceedings. Even if it does, it would be unlikely (in the context of the general application of section 3 E(MP)A 2011 to the proceedings) for the Court to award those later costs against the applicant.

90. Moreover, in ***Edwards***,[43] the CJEU found that, in assessing costs, an objective analysis of the amount of the costs included *inter alia* an assessment of the frivolous nature of the claim at its various stages. Consequently, it is respectfully submitted that national courts properly have within their jurisdiction the power to strike out frivolous and vexatious claims. It is further submitted that access to justice protected by the Aarhus Convention does not protect such claims. Even if it did, the Communicant has advanced no evidence to suggest that an award of costs against an applicant would be prohibitively expensive. He is unlikely to be able to do so, given the early stage at which such a motion to strike out proceedings would be brought.

[42] In Judicial Review proceedings, once leave for judicial review has been granted by the High Court on the basis that the claims constitute an *"arguable case"* or *"substantial grounds"* depending on the proceeding, any motion to strike out on the basis of frivolousness or vexatiousness would be very unlikely to succeed. Where proceedings are to be brought for the grant of leave on an *ex parte* basis, a judge who does not consider the applicable test for the grant of leave to be met will either refuse leave or place the leave application on notice to the respondents.

[43] Case C-260/11 *Edwards & Pallikaropoulos* ECLI:EU:C:2013:221 at paragraphs 40-48.

Conduct of proceedings and contempt of court

91. Applications for the respondent's costs in respect of the applicant's conduct of proceedings or the applicant's contempt of court may arise and be made at any stage. Once again, such applications are rarely made and only arise in the case of failing to comply with the directions of a court (not incompetence).[44] Both improper conduct and contempt of court have the result of increasing costs within proceedings. Imprisonment or the imposition of a fine are no remedy for the party to proceedings in the case of another party's contempt. These forms of cost awards are essential provisions to the operation of Ireland's legal system, to discourage the abuse of court procedure and the wasting of the court's time and to enable the court to control its hearings and procedures.

Non-prohibitive nature of these costs

92. Finally, these provisions must be read in light of the judicial notice the Court is required to take of the Aarhus Convention under section 8 E(MP)A 2011 and the provisions of the Aarhus Convention implemented by directly applicable European Union law.[45] Thus, even if costs are awarded under Section 50B(3) PDA 2000 or Section 3(3) E(MP)A 2011, a Court, in awarding costs, must ensure that the awarded costs are not prohibitive (by measuring the costs or otherwise).

Complaint 1(c) - Cases where an action encompasses a number of claims

93. Article 9(4) does not extend to protect from prohibitive costs aspects of proceedings which are unrelated to environmental matters. An applicant is not entitled to a level of protection such that, by mere inclusion of an environmental claim, non-environmental claims can be given the benefit of the generous special costs rules, or of Article 9(4) of the Aarhus Convention. Consequently, it is entirely permissible, and indeed necessary for the proper functioning of the Irish courts, to apportion costs in respect of aspects of proceedings, applying the special costs rules to matters in respect of

[44] *McCoy v Shillellagh Quarries* [2014] IEHC 511 at paragraph 39, quoted by the Communicant at page 9 of his Clarification, supports this analysis.
[45] *McCallig v An Bord Pleanála* [2014] IEHC 353 at paragraph 26: in the event of ambiguity, provisions of national law must be read in conformity with the international obligations to which Ireland is giving effect.

which the Aarhus Convention applies, and not otherwise. That is the basis of the ***McCallig*** decision,[46] of which the Communicant complains. Due to the abstract nature of the present Communication, the Communicant has alleged no particular example of prejudice.

Complaint 2 – applicants' own costs

The nature of the Irish legal market and the inadmissibility of the Communication

94. The Communicant's allegation[47] that the Irish Government has a policy of deterring citizens from accessing the courts is not only baseless, but – in the context of the open market for legal services and the right of access of lay litigants to the courts – wholly unmerited.

95. It is respectfully submitted that this results from the Communication's fundamentally inadmissible nature.

96. The Communicant is unable to point to circumstances in which a litigant under the special costs procedure has been bound to *"a surprisingly high legal bill"*. This is hardly surprising in circumstances where: (a) conditional fee arrangements are commonplace; (b) negotiations of fees are a matter of contract at the outset of the retention of legal services, based upon fee estimates which are required to be provided under statute and the Code of Conduct of the Bar of Ireland; and (c) in the event of dispute, the matter can be referred to the Taxing Master for adjudication.

97. Therefore, the Communicant entirely ignores – or chooses to ignore – the control the litigant has in: (i) choosing to be legally represented; (ii) choosing his legal representative; (iii) choosing to pay for legal representation; and (iv) choosing the contractual arrangements to which he will be bound.

[46] *McCallig v An Bord Pleanala* [2014] IEHC 353.
[47] At page 6 of the Communication.

Complaint 2(a) – the taxation of applicants' own costs

98. Section 68(6) of the Solicitors (Amendment) Act 1994 provides for a detailed bill of costs to be presented to the client.[48] Section 68(8) provides that disputes as to costs shall be resolved between the solicitor and the client;[49] but section 68(7) recognises the pre-existing right of either party to have the costs taxed by the Taxing Master of the High Court.[50]

99. A solicitor cannot lawfully sue a client for one month after delivery of the bill of costs, and a client has a period of twelve months from the delivery of a bill of costs within which to demand and obtain taxation (a period which is extendable in special

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[48] Section 68(6) provides:

"Notwithstanding any other legal provision to that effect a solicitor shall show on a bill of costs to be furnished to the client, as soon as practicable after the conclusion of any contentious business carried out by him on behalf of that client—

(a) a summary of the legal services provided to the client in connection with such contentious business,

(b) the total amount of damages or other moneys recovered by the client arising out of such contentious business, and

(c) details of all or any part of the charges which have been recovered by that solicitor on behalf of that client from any other party or parties (or any insurers of such party or parties),

and that bill of costs shall show separately the amounts in respect of fees, outlays, disbursements and expenses incurred or arising in connection with the provision of such legal services."

[49] Section 68(8) provides:

"Where a solicitor has issued a bill of costs to a client in respect of the provision of legal services and the client disputes the amount (or any part thereof) of that bill of costs, the solicitor shall—

(a) take all appropriate steps to resolve the matter by agreement with the client, and

(b) inform the client in writing of—

(i) the client's right to require the solicitor to submit the bill of costs or any part thereof to a Taxing Master of the High Court for taxation on a solicitor and own client basis, and

(ii) the client's right to make a complaint to the Society under section 9 of this Act that he has been issued with a bill of costs that he claims to be excessive."

[50] The Taxing Master's jurisdiction to tax solicitor-client costs derives from section 2 of the Attorneys and Solicitors (Ireland) Act 1849. Section 68(7) of the 1994 Act provides:

"Nothing in this section shall prevent any person from exercising any existing right in law to require a solicitor to submit a bill of costs for taxation, whether on a party and party basis or on a solicitor and own client basis, or shall limit the rights of any person or the Society under section 9 of this Act."

circumstances, such as where there was pressure upon the client, gross overcharging or where payment was made subject to a right to have the bill taxed).[51]

100. Under Order 99 Rule 14 of the Rules of the Superior Courts, the Taxing Master determines appropriate levels of costs awarded by the court or in disputes between solicitors and own clients. The process is set out on the website of the Courts Service.[52]

101. The purpose of an award of costs by a court is to indemnify the successful party against his reasonable costs which he is liable to pay to his own legal representatives. Costs are not punitive and the successful party is thus not entitled to recover more than the sum which he or she is liable to pay. Where costs are awarded against a party in litigation and they cannot be agreed by the parties, the successful party is entitled to have the costs taxed by the Taxing Master in the High Court.[53]

102. In taxation for party and party costs, only those costs that are reasonable and necessary are allowable against the party who has lost the litigation. The costs of proceedings depends on many factors, including the issues of fact and law required to be addressed, the oral and written evidence adduced, the actions of the parties in reducing costs and the length of the proceedings and hearing. Consequently, there can be no typical set of proceedings. The Complainant is correct in saying that the taxation of costs is conducted by reference to the value of the matter and its importance and complexity. However, he omits to say that these are not the sole criteria to be applied. These three principles (the value of the matter, its importance, and its complexity) are neither the primary determinants of any fee nor the starting point for any assessment. Rather, the work done and the time and labour expended are the primary determinants of any fee. The complainant selectively quotes and refers to these factors but fails to mention the full list of criteria.[54]

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[51] Sections 2 and 6 of the Attorneys and Solicitors (Ireland) Act 1849, as interpreted by the High Court (Mr Justice McCarthy) in *State (Gallagher Shatter & Co) v de Valera* [1986] ILRM 3.
[52] http://www.courts.ie/offices.nsf/lookuppagelink/8AFDD6975A6F081380256E7B004D9971.
[53] Or the County Registrar of the Circuit Court where applicable.
[54] The powers of Taxing Master are set out in section 27 of the Court and Courts Officers Act 1995: section (1) refers to *"a power on such taxation to examine the nature and extent of any work done, or services rendered or provided"*.

Order 99 Rule 37(22)(ii) provides:

103. Whereas the taxation of party and party costs arises by operation of law i.e. on foot of a court order, the level of costs arising between a solicitor and his client is founded principally upon the original contract between the solicitor and the client. However, in both forms of taxation, the Taxing Master enquires into the original costs arrangements.

104. In respect of own client costs, the legal costs taxation system exists to protect clients where they have failed to negotiate reasonable costs, where unpredicted costs have arisen or where there is a dispute as to the reasonable incurrence of same. Moreover taxation is not a substitute for the responsibility of both the legal professional and the private client to negotiate in advance of legal services being incurred, a responsibility which is facilitated by the statutory obligation upon solicitors and the professional obligation upon barristers to provide fee estimates.[55]

105. Each party can recover costs of representation before the Taxing Master in the event that it is successful. Where a client is unrepresented at a taxation, the Taxing Master invariably 'steps into the shoes' of the client and makes the appropriate enquiries.

"In exercising his discretion in relation to any item, the Taxing Master shall have regard to all relevant circumstances, and in particular to—

(a) the complexity of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved;

(b) the skill, specialised knowledge and responsibility required of, and the time and labour expended by, the solicitor;

(c) the number and importance of the documents (however brief) prepared or perused;

(d) the place and circumstances in which the business involved is transacted;

(e) the importance of the cause or matter to the client;

(f) where money or property is involved, its amount or value;

(g) any other fees and allowances payable to the solicitor in respect of other items in the same cause or matter but only where work done in relation to those items has reduced the work which would otherwise have been necessary in relation to the item in question."

[55] The charged hourly rate of the barrister or solicitor does not reflect the amount they will be paid upon taxation (but rather operates as a maximum to same).

106. The Communicant (at page 16 of the Clarification) also makes general assertions about the number of lawyers which will be used in a given case. However, not only is this unsubstantiated by reference to any Irish case (let alone an environmental matter), but it overlooks that only those costs that reflect the work actually and necessarily undertaken will be recoverable on taxation. The necessity for different personnel is a matter for analysis on a case-by-case basis, having regard to the issues raised by the parties and the documentation introduced.

The stamp duty on certificates of taxation

107. Stamp duty is an Irish tax on documents. It is applied to a wide variety of documents at different rates, and is present at 8% in respect of certificates of taxation. The Aarhus Convention does not govern the application of national taxes. Article 9(4) only applies to prevent the costs of the substantive proceedings from being prohibitively expensive. It does not apply to prevent Contracting Parties from imposing taxes on the use of state-provided dispute resolution mechanisms in respect of legal costs.

The one-sixth rule

108. In both solicitor/own client and party and party proceedings before the Taxing Master, the costs of taxation and Court fees on the Bill of Costs and the certificate of taxation are awarded in favour of the winning party on taxation. However, the Taxing Master may exercise his discretion not to do so.[56]

109. The one-sixth rule does not apply to costs awarded to a party in proceedings (other than the assets of a company in liquidation or the costs payable out of a fund or estate). Rather, Order 99 Rule 29(13) of the Rules of the Superior Courts provides for an exemption for solicitor/own client costs, under which the costs of taxation and the Court fees on the Bill of Costs and the certificate of taxation shall be disallowed if one-sixth or more of the fee charged is reduced on taxation. Consequently, a client

[56] For example, court fees were recently waived in *BM to MG Solicitors Ruling No 2* [2014] IELCA 5 where the application was the first of its kind and determined future such family law costs adjudications: http://www.courts.ie/offices.nsf/(WebFiles)/0AADAB86FC5B61A280257D850036911F/$FILE/%5B2014%5D%20IELCA%205%20-%20BM%20TO%20MG%20Solicitors%20RULING%20NO.%202.doc.

does not have to pay the costs of taxation and court fees if the bill of costs is reduced by one-sixth or more. This operates as a sanction upon the lawyers in such circumstances. For solicitor and own client taxations the one-sixth rule is weighted against the lawyer as it is designed to ensure that the lawyer is sanctioned for any significant overcharging.

110. This system provides a reasonable regulation of a dispute resolution system provided by the State in respect of private contracts.[57] In both party and party and solicitor/own client disputes, amicable resolution using the services of legal costs accountants and alternative dispute resolution is to be preferred over an adversarial court mechanism. The award of costs of taxation where costs are not reduced by at least one-sixth reflects that the Taxing Master is a limited State service which exists not to regulate legal costs nor to set prices in the legal market, but rather to resolve specific costs disputes.[58]

111. Finally, most cases of an environmental nature are taken on a conditional fee basis and in the event of an unsuccessful application, the applicant is unlikely to have any responsibility to his/her own lawyers for costs and the one-sixth rule is unlikely to arise.

112. As indicated above, the one-sixth rule is to be amended to 15% in the forthcoming Bill.

Complaint 2(b) – applicants' own costs generally

Generally – Ireland's legal system and the admissibility of the Communication

113. Ireland refers to the open and competitive market for legal services described above, and the widespread availability of lawyers on a conditional fee basis. The Communicant has identified no difficulty with obtaining legal representation for a fee

[57] The Communicant's suggestion at page 10 of his original Complaint, that the costs of taxation which the solicitor can pass onto the client are about 9% of adjudicated costs, is without foundation, as is the suggestion at page 24 of his Clarification that the 8% stamp duty facilitates lawyer's overcharging by up to 8%.

[58] Order 99 Rule 29(13) is also to be seen in light of Order 99 Rule 14(e), under which the client seeking taxation of costs must, in order to avail of the taxing service offered, undertake in writing to discharge any balance the Taxing Master determines.

which is not prohibitively expensive in relation to a specific case. This, again, emphasises the speculative nature of the Communication which should be deemed inadmissible.

114. In Ireland, litigants are free to initiate proceedings as a lay litigant or with legal representation. The Communication, entirely abstract-mannered, suggests that an applicant may not be able to initiate proceedings as a lay litigant. This is manifestly inadmissible. The Communicant (even if he required redress, which he does not) has advanced no evidence that he could not act as a lay litigant (and, indeed, as a postgraduate law student, he is better placed than most to do so).

115. It is to be recalled that the Aarhus Convention confers no right to legal representation, but rather guarantees a negative right not to be precluded from environmental litigation by reason of prohibitively expensive costs.

116. Even if the Applicant were unable to represent himself for some unidentified reason, the Irish legal system offers a strong capacity for *pro bono* and conditional fee representation which has been neither referred to nor contested by the Communicant.

The Aarhus Convention does not require the provision of legal aid

117. The Aarhus Convention, at Article 3.8, expressly recognises the right of national courts to award reasonable costs. The Aarhus Convention clearly envisages both resolution of environmental disputes by courts and the retention (at least by the applicant's opponents) of lawyers. Article 9.4 only requires that such costs not be prohibitive. Article 9.5 makes it manifestly clear that the parties must consider[59] mechanisms to remove or reduce financial barriers to justice, but also makes it clear that this is an ongoing requirement. Consequently, Article 9.4 was not intended to mandate the provision of legal aid, nor can it be interpreted as doing so.

[59] Aarhus Convention Implementation Guide at page 135

Advertising by the legal professions

118. In respect of the specific complaints made against the barristers' profession (in particular, in respect of the advertising of fees), Ireland refers to the statement of the Bar Council attached hereto.[60] In particular, the Communicant is incorrect in stating that barristers are not allowed to advertise. Rather, they are discouraged from advertising fees. Instead, barristers are required to provide specific fee estimates in the circumstances of a given case.

119. Moreover, in respect of taxation, the absence of published hourly rates does not hamper a litigant in challenging fees at taxation, as the underpinning basis of the engagement of a legal professional when assessed on a solicitor-own client basis will be the contract (i.e., the negotiated and accepted fee estimate) and the reasonableness and necessity of the costs incurred.

Fee complaints against lawyers to professional bodies

120. Clients can make complaints regarding their solicitors to the Law Society of Ireland[61] and the Solicitors Disciplinary Tribunal[62], and can make complaints regarding their barristers to the Bar Council of Ireland[63] in respect of fees. These complaints

[60] Annex II. Given the division of the Irish legal profession, where solicitors develop an expertise in selecting counsel suitable for given cases, public advertising of fees is of less assistance: moreover, Ireland endorses the view of the Bar Council that its prohibition on advertising of fees does not have an anti-competitive effect.

[61] The Law Society of Ireland is the regulatory body for solicitors and, under the Solicitors Acts 1954 to 2011, may investigate complaints by or on behalf of clients alleging inadequate professional services, excessive fees (under section 9 of the Solicitors (Amendment) Act 1994) or misconduct. A complainant who is unhappy with how the complaint was handled by the Law Society may refer the matter for review to the Independent Adjudicator. There is no cost implication for a complainant who makes a complaint under section 9 S(A)A 1994. All complaints are treated in confidence.

[62] The Solicitors Disciplinary Tribunal deals with allegations of misconduct: the proceedings are conducted in public; the Tribunal may sanction the solicitor or refer the matter to the President of the High Court for sanction (including being struck off the Roll of Solicitors). All outcomes are published in the publicly available Law Society Gazette, available online. The members of the Tribunal are independent of the Law Society and are appointed by the President of the High Court, and the Tribunal consists of 20 solicitor members and 10 lay members. It sits in divisions of three, comprising two solicitor members and one lay member.

[63] In respect of barristers, the Barristers' Professional Conduct Tribunal investigates allegations of misconduct made by any person or body against a barrister and decides whether that barrister has been guilty of misconduct constituting a breach of the Code of Conduct of the Bar of Ireland, or constituting a breach of proper professional standards. There are nine members – four practising barristers appointed by the Bar Council and five non-lawyers. All proceedings are heard in private. Where a complaint is upheld it will be published except where the appropriate sanction is minor in nature. Appeals can be made by the complainant or the barrister to the Barristers Appeals Board: any decision to impose a sanction must be published. Fuller details of this are set out in the Bar Council Response at Annex II.

procedures take the form of internal discipline within the professions (which can impose serious sanctions ranging from fee determination to fines and removal from practise). These are effective disciplinary remedies which form part of the backdrop to Ireland's legal system, but are not material to Ireland's compliance with the Aarhus Convention.

Complaint 2(c) - Costs upon appeal or preliminary reference to the Court of Justice

121. The Communicant contends that, upon bringing judicial review proceedings, he must take into account the costs of the High Court, the Court of Appeal, the Supreme Court and any potential reference to the CJEU. The Communicant's apprehensions in this regard are misconceived.

Preliminary reference to the CJEU

122. Moreover, as the costs of preliminary references to the CJEU are to be determined by the national court which made the reference. Accordingly, the special costs rules likewise cover the costs of any such reference within proceedings.

Costs upon appeal

123. The special costs rules apply to both the court of first instance and appellate courts. Contrary to paragraph 4 of the Clarification, it is not the case that Order 99 of the Rules of the Superior Courts provides that the outcome of an appellate hearing determines the costs award in the inferior court. Rather Order 99 Rule 1(3) provides that the costs shall follow the event. In the exceptional case hypothesised by the Communicant where a case is determined by the High Court as an Aarhus case, but subsequently determined by the Supreme Court not to be an Aarhus case, the Supreme Court would have determined that the matter was not an environmental matter and thus special costs rules did not apply, neither would Article 9(4) of the Aarhus Convention.

Complaint 2(d) - Costs upon direct action in the General Court of the European Union[64]

124. The costs of direct actions against Member States or Union institutions (i.e., proceedings initiated in the General Court of the European Union) are a matter for the European Union (another Contracting Party), and it is not a matter to which Ireland can respond. It does not relate to Ireland's ratification of, or compliance with, the Aarhus Convention.

Complaint 3 – the transparency of decisions and procedures

125. In general, the Communicant's criticisms regarding the uncertainty of own costs misconstrues the intention and purpose of Article 9(4). There is no requirement in that provision that assessments of solicitor/own client costs (the only applicable costs in most Aarhus matters, save in disputed awards to applicants) require publication.

Publication of decisions of the Taxing Master

126. The principles to be applied upon taxation are to be found in the case-law of the Superior Courts (which are publicly available and are the subject of legal commentary) and are applied in rulings of the Taxing Masters. (There is jurisprudence of the superior courts on the issue because there is a right to seek High Court review of a decision of a Taxing Master under section 27(3) of the Courts and Courts Officers Act 1995.[65]) Since 2012, rulings of the Taxing Masters of a precedential nature (i.e., where policy is stated) are published on the website of the Courts Service.[66]

127. However, the overwhelming bulk of the work of the Taxing Masters is not determining policy, but recalculating disputed legal bills based on a paper trail, itemised Bills of Costs and justifications regarding what was a reasonable amount in all of the circumstances. Detailed reports are, in fact, not produced. Consequently,

[64] Page 4 of the Communication.
[65] This placed in statute a pre-existing common law right to judicial review of decisions of Taxing Masters.
[66] http://www.courts.ie/offices.nsf/0/2099E1F8486CF1C480257D850037247C?opendocument.

decisions of the Taxing Master are generally not made in report form in the manner in which judgments of a court are. Nor would it be useful if they were. It cannot be assumed from any particular decision that the same fee item will bear the same fee in entirely different proceedings.

128. Moreover, decisions of the Taxing Masters concern disputes concerning documents (the solicitor's file) which are the subject of legal advice and litigation privilege[67] (the latter legal professional privilege extends to the litigation file and not merely the substance of legal advice). These are a privilege of the client, not of the lawyer. Moreover, data protection issues arise. Both privilege and data protection fall within the right to privacy guaranteed by Article 8 ECHR and legal professional privilege is itself a guarantor of access to justice. Consequently, decisions of the Taxing Masters are not generally made publicly available. Whilst the Bill will impose an obligation to publish, contrary to the Communicant's contentions at page 7 of his Communication, redactions are necessary in the interests of the administration of justice and the Article 8 rights of parties before the Taxing Master.

129. Furthermore, the correct basis for assessing costs, as clearly defined by law, is to assess costs on a case-by-case basis, examining the particular circumstances and facts of every case and coming to a determination in accordance with the appropriate criteria. That involves an assessment of the file and the instructions particular to each case. Access to previous determinations is not necessary for this exercise. The older approach of using comparators for assessment is no longer the basis of taxation.

130. The complainant also refers in his Clarification to the use of comparators as being the primary determinants of fees on taxation and that the absence of their publication deprives a litigant of the necessary armoury to then argue against costs. This is incorrect. He fails to refer to the fact that there are clear statutory obligations on the Taxation Masters only to use comparators at the end of the process as a verification or checking mechanism. Consequently, evidence of comparators (referred to at paragraph 21 of the Clarification) is not required to be given on oath.

[67] *Patricia Lord v Master Flynn & Master Moran* [1999] 5 JIC 1405.

131. However, where a client has concerns over any fee items charged, he can engage a legal costs accountant, whose profession it is to advise on legal costs, and who may appear before the Taxing Master. Such professionals can be consulted for advice by any client as to the principles to be applied in the context of the particular case and the reasonableness of the specifically incurred costs. This would be the most prudent course of action for any client engaged in a dispute with his solicitor, rather than abstract assessment based on comparators of cases, the details of which must inevitably be privileged and confidential.

Transparency of fee complaints procedures before professional bodies

132. Contrary to the apprehensions of the Communicant, the processes before the Solicitors Disciplinary Tribunal, the Barristers' Professional Conduct Tribunal and the Barristers' Appeal Board are transparent. In the event that serious disciplinary action is taken, outcomes are published.[68] All proceedings before the President of the High Court are in public, as are hearings before the Solicitors Disciplinary Tribunal.

133. Whilst it is the case that the Law Society does not publish information of what constitutes an unreasonable legal fee, given that the Law Society's determination on own costs relates to the specifics of each contract and the particular case, the non-publication of what objectively might constitute a reasonable legal fee is not material. Moreover, these mechanisms, whilst part of the domestic context in which own costs issues can be remedied, cannot themselves be assimilated to the obligation upon Ireland in respect of prohibitively expensive legal costs. Finally, the utility of these mechanisms, and the Communicant's apprehensions surrounding them, are – once again – entirely theoretical.

Publication of information in respect of the special costs procedures

134. Article 9(4) does not provide for any particular level of specificity or any particular form. Rather, the information must be publicly available and transparent on its face, and it must contain all of those aspects relevant to the rights of the public. Practical

[68] See above footnotes 61-63.

information on review procedures is available on the websites of the Department of the Environment, Community and Local Government,[69] An Bord Pleanála[70] and the Citizen's Information Board.[71] These include information in respect of the special costs procedures introduced on 23rd August 2011.

Irrelevant claims

135. The Communication and Clarification are beset with irrelevant and unpursued asides. Examples include:

(a) The reference to the Small Claims Court, an administrative procedure which has nothing to do with the special costs rules at issue in the Communication, is not understood;

(b) Nor is the reference to the number of judges in Ireland understood (page 3 of the Clarification) though it can be noted that this may be a reflection of the fact that the Irish legal system is an adversarial system rather than an inquisitorial system;

(c) Moreover, it is noted that the Communicant does not pursue or detail his late-introduced questioning of the scope of the special costs procedures (page 6 of the Clarification). The Communicant alleges that not all forms of environmental litigation are encompassed by the new costs provisions. This is

[69] The department's website has recently been updated to expand on Judicial Review in Planning and Environment matters and to provide links to the Citizen's Information website: http://www.environ.ie/en/Environment/AarhusConvention/ and http://www.environ.ie/en/DevelopmentHousing/PlanningDevelopment/Development/Planning/Overview/AppealsandJudicial Review/

[70] Information on appealing a decision of the Board is set out at http://www.pleanala.ie/guide/appeal_guide.htm. Information on Judicial Review is set out in a document entitled "Judicial Review Notice" available at http://www.pleanala.ie/publicaitons/2012/j_r_notice.pdf.

[71] The Citizen's Information website provides information on appeals and judicial review at http://www.citizensinformation.ie/en/environment/planning_and_development_in_ireland/ and http://www.citizensinformation.ie/en/environment/environmental_law/judicial review_in_planning_and_environmental_matters.html. Information on legal fees is contained at the following link: http://www.citizensinformation.ie/en/justice/civil_law/cost_of_the_case.html. This website contains a link to a Law Society document detailing legal charges: https://www.lawsociety.ie/Documents/pdfs/LegalCharges.pdf. Finally, detailed information is available in relation to applications to the Legal Aid Board for either legal advice or legal aid: http://www.citizensinformation.ie/en/justice/legal_aid_and_advice/civil_legal_advice_and_legal_aid.html.

not a clearly grounded aspect of the Communication and Ireland does not respond in detail at this time. The Communicant simply disagrees with the reasoning of a judgment which found that the case before it concerned not the environment but the regulation of fishing licences (in respect of which the Communicant has no interest). It is the legitimate and proper function of any court system to determine in any given case whether litigation falls under the Aarhus Convention. For the avoidance of doubt, section 50B(1) PDA 2011 and sections 4 to 6 E(MP)A 2011 (having regard to the Aarhus Convention) enumerate in detail the various forms of environmental litigation which come before the Irish courts and the special costs provisions are applied to them;

(d) It is incorrect to state that judgments of court hearings are not published (page 18 of the Clarification). As the footnote thereto clarifies, this relates only to circumstances in which no written judgment is delivered by the court, and only an Order given to the parties (an order the substance of which is, of course, made in open court). There is no obligation under the Aarhus Convention to publish same.

Conclusion

136. For all of the above reasons, Ireland invites the Compliance Committee to find that the within Communication is manifestly inadmissible and does not disclose any substantive breach of the Aarhus Convention.

137. Should you require any further information, please do not hesitate to contact me.

Yours sincerely

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Marguerite Ryan
National Focal Point Aarhus
Assistant Principal Officer
Department of the Environment, Community and Local Government

Cc Permanent Mission of Ireland to the United Nations Office and other international organisations in Geneva

TABLES OF ANNEXES AND HYPERLINKS

ANNEXES

HYPERLINKS

The Planning & Development Act 2000 revised (consolidated) and updated to 10th September 2015:
http://www.lawreform.ie/_fileupload/RevisedActs/WithAnnotations/HTML/EN_ACT_2000_0030.HTM

The Environment (Miscellaneous Provisions) Act 2011 revised (consolidated) and updated to 11th November 2014:
http://www.lawreform.ie/_fileupload/RevisedActs/WithAnnotations/HTML/en_act_2011_0020.HTM

Report of the Legal Costs Working Group, 7th November 2005
http://www.justice.ie/en/JELR/legalcosts.pdf/Files/legalcosts.pdf

ANNEX I

EXTRACTS OF RELEVANT LEGISLATION

1 Section 50B of the Planning and Development Act 2000 as amended

Costs of environmental proceedings.

50B (1) This section applies to proceedings of the following kinds:

(a) proceedings in the High Court by way of judicial review, or of seeking leave to apply for judicial review, of—

(i) any decision or purported decision made or purportedly made,

(ii) any action taken or purportedly taken, or

(iii) any failure to take any action,

pursuant to a law of the State that gives effect to—

(I) a provision of Council Directive 85/337/EEC of 27 June 1985 to which Article 10a (inserted by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directive 85/337/EEC and 96/61/EC) of that Council Directive applies,

(II) Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, or

(III) a provision of Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control to which Article 16 of that Directive applies; or

(b) an appeal (including an appeal by way of case stated) to the Supreme Court from a decision of the High Court in a proceeding referred to in paragraph (a);

(c) proceedings in the High Court or the Supreme Court for interim or interlocutory relief in relation to a proceeding referred to in paragraph (a) or (b).

(2) Notwithstanding anything contained in Order 99 of the Rules of the Superior Courts (S.I. No. 15 of 1986) and subject to subsections (2A), (3) and (4), in proceedings to which this section applies, each party to the proceedings (including any notice party) shall bear its own costs.

(2A) The costs of proceedings, or a portion of such costs, as are appropriate, may be awarded to the applicant to the extent that the applicant succeeds in obtaining relief and any of those costs shall be borne by the respondent or notice party, or both of them, to the extent that the actions or omissions of the respondent or notice party, or both of them, contributed to the applicant obtaining relief.

(3) The Court may award costs against a party in proceedings to which this section applies if the Court considers it appropriate to do so—

(a) because the Court considers that a claim or counterclaim by the party is frivolous or vexatious,

(b) because of the manner in which the party has conducted the proceedings, or

(c) where the party is in contempt of the Court.

(4) Subsection (2) does not affect the Court's entitlement to award costs in favour of a party in a matter of exceptional public importance and where in the special circumstances of the case it is in the interests of justice to do so.

(5) In this section a reference to 'the Court' shall be construed as, in relation to particular proceedings to which this section applies, a reference to the High Court or the Supreme Court, as may be appropriate.

2 Sections 3-8 of the Environmental (Miscellaneous Provisions) Act 2011 as amended

Costs of proceedings to be borne by each party in certain circumstances.

3.— (1) Notwithstanding anything contained in any other enactment or in—

(a) Order 99 of the Rules of the Superior Courts (S.I. No. 15 of 1986),

(b) Order 66 of the Circuit Court Rules (S.I. No. 510 of 2001), or

(c) Order 51 of the District Court Rules (S.I. No. 93 of 1997),

and subject to subsections (2), (3) and (4), in proceedings to which this section applies, each party (including any notice party) shall bear its own costs.

(2) The costs of the proceedings, or a portion of such costs, as are appropriate, may be awarded to the applicant, or as the case may be, the plaintiff, to the extent that he or she succeeds in obtaining relief and any of those costs shall be borne by the respondent, or as the case may be, defendant or any notice party, to the extent that the acts or omissions of the respondent, or as the case may be, defendant or any

notice party, contributed to the applicant, or as the case may be, plaintiff obtaining relief.

(3) A court may award costs against a party in proceedings to which this section applies if the court considers it appropriate to do so—

(a) where the court considers that a claim or counter-claim by the party is frivolous or vexatious,

(b) by reason of the manner in which the party has conducted the proceedings, or

(c) where the party is in contempt of the court.

(4) Subsection (1) does not affect the court's entitlement to award costs in favour of a party in a matter of exceptional public importance and where in the special circumstances of the case it is in the interests of justice to do so.

(5) In this section a reference to "court" shall be construed as, in relation to particular proceedings to which this section applies, a reference to the District Court, the Circuit Court, the High Court or the Supreme Court, as may be appropriate.

Civil proceedings relating to certain licences, etc.

4.— (1) Section 3 applies to civil proceedings, other than proceedings referred to in subsection (3), instituted by a person—

(a) for the purpose of ensuring compliance with, or the enforcement of, a statutory requirement or condition or other requirement attached to a licence, permit, permission, lease or consent specified in subsection (4), or

(b) in respect of the contravention of, or the failure to comply with such licence, permit, permission, lease or consent,

and where the failure to ensure such compliance with, or enforcement of, such statutory requirement, condition or other requirement referred to in paragraph (a), or such contravention or failure to comply referred to in paragraph (b), has caused, is causing, or is likely to cause, damage to the environment.

(2) Without prejudice to the generality of subsection (1), damage to the environment includes damage to all or any of the following:

(a) air and the atmosphere;

(b) water, including coastal and marine areas;

(c) soil;

(d) land;

(e) landscapes and natural sites;

(f) biological diversity, including any component of such diversity, and genetically modified organisms;

(g) health and safety of persons and conditions of human life;

(h) cultural sites and built environment;

(i) the interaction between all or any of the matters specified in paragraphs (a) to (h).

(3) Section 3 shall not apply—

(a) to proceedings, or any part of proceedings, referred to in subsection (1) for which damages, arising from damage to persons or property, are sought, or

(b) to proceedings instituted by a statutory body or a Minister of the Government.

(4) For the purposes of subsection (1), this section applies to—

(a) a licence, or a revised licence, granted under section 83 of the Environmental Protection Agency Act 1992,

(b) a licence granted pursuant to section 32 of the Act of 1987,

(c) a licence granted under section 4 or 16 of the Local Government (Water Pollution) Act 1977,

(d) a licence granted under section 63, or a water services licence granted under section 81, of the Water Services Act 2007,

(e) a waste collection permit granted pursuant to section 34, or a waste licence granted pursuant to section 40, of the Act of 1996,

(f) a licence granted pursuant to section 23(6), 26 or 29 of the Wildlife Act 1976,

(g) a permit granted pursuant to section 5 of the Dumping at Sea Act 1996,

(h) a licence granted under section 40, or a general felling licence granted under section 49, of the Forestry Act 1946,[72]

[72] Note a substitution of subsection (4)(h) *"a licence granted under section 7 of the Forestry Act 2014"* has not yet commenced.

(i) a licence granted pursuant to section 30 of the Radiological Protection Act 1991,

(j) a lease made under section 2, or a licence granted under section 3 of the Foreshore Act 1933,

(k) a prospecting licence granted under section 8, a State acquired minerals licence granted under section 22 or an ancillary rights licence granted under section 40, of the Minerals Development Act 1940,

(l) an exploration licence granted under section 8, a petroleum prospecting licence granted under section 9, a reserved area licence granted under section 19, or a working facilities permit granted under section 26, of the Petroleum and Other Minerals Development Act 1960,

(m) a consent pursuant to section 40 of the Gas Act 1976,

(n) a permission or approval granted pursuant to the Planning and Development Act 2000.

(5) In this section—

"damage", in relation to the environment, includes any adverse effect on any matter specified in paragraphs (a) to (i) of subsection (2);

"statutory body" means any of the following:

(a) a body established by or under statute;

(b) a county council within the meaning of the Local Government Act 2001;

(c) a city council within the meaning of the Local Government Act 2001.

(6) In this section a reference to a licence, revised licence, permit, permission, approval, lease or consent is a reference to such licence, permit, lease or consent and any conditions or other requirements attached to it and to any renewal or revision of such licence, permit, permission, approval, lease or consent.

Proceedings relating to Information Regulations.

5.— (1) Section 3 applies to civil proceedings, other than proceedings referred to in subsection (2), instituted by a person relating to a request referred to in Regulation 6 of the Information Regulations.

(2) Section 3 shall not apply to proceedings instituted by the Commissioner for Environmental Information or a public authority pursuant to the Information Regulations.

(3) In this section—

"Information Regulations" means the European Communities (Access to Information on the Environment) Regulations 2007 (S.I. No. 133 of 2007);

"public authority" has the meaning assigned to it by the Information Regulations.

Additional proceedings to which section 3 applies.

6.— Section 3 applies to—

(a) *proceedings in the High Court by way of judicial review or of seeking leave to apply for judicial review, of proceedings referred to in section 4 or 5,*

(b) *an appeal (including an appeal by way of case stated) from the District Court, Circuit Court or High Court in any proceedings referred to in section 4 or 5 or paragraph (a), and*

(c) *proceedings for interim or interlocutory relief in relation to any proceedings referred to in section 4 or 5 or paragraph (a).*

Application to court for determination that section 3 applies to proceedings.

7.— *(1)* *A party to proceedings to which section 3 applies may at any time before, or during the course of, the proceedings apply to the court for a determination that section 3 applies to those proceedings.*

(2) *Where an application is made under subsection (1), the court may make a determination that section 3 applies to those proceedings.*

(3) *Without prejudice to subsection (1), the parties to proceedings referred to in subsection (1), may, at any time, agree that section 3 applies to those proceedings.*

(4) *Before proceedings referred to in section 3 are instituted, the persons who would be the parties to those proceedings if those proceedings were instituted, may, before the institution of those proceedings and without prejudice to subsection (1), agree that section 3 applies to those proceedings.*

(5) *An application under subsection (1) shall be by motion on notice to the parties concerned.*

Judicial notice to be taken of Convention.

8. *Judicial notice shall be taken of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998.*