Response of Kieran Fitzpatrick to Department of Environment's public consultation on Aarhus Convention – specifically Article 9 thereof:

I include here the substantial part of my "communication" to the Aarhus Convention Compliance Committee; which was submitted in June 2014.

While the public consultation seeks to address Article 9, I submit that this Article cannot be viewed in isolation to the other provisions of the Convention; I have therefore retained reference to alleged breaches of other Articles of the convention, which directly affect the provision under Article 9(4) that costs should not be prohibitive. While I have referred to Article 3(2) being violated; this violation can equally be encompassed under Article 9(5).

Contents:

Email --- acconsultation@environ.ie

Date: 19th August 2014

Deadline; 26th September 2014

Facts of the communication

Introduction -

Ireland was the last member of the EU to ratify the Aarhus Convention and became eligible for Communications (complaints) subsequent to October 2013. This delay comes from the general reluctance by the Irish government to deal with the sensitive subject of "prohibitively expensive" legal costs, which prevail in Ireland. Despite 3 years of promises to reform the legal system, little reform has been implemented to date. Proposed reforms [the Legal Services Regulation Bill[2011]), despite much hype and public relations efforts to the contrary, will , if implemented in its current draft format [LSRA 2014 as Amended] , fail to adequately deal with the problem of high legal costs.

The ECJ prosecuted Ireland for failing to comply with Aarhus related EU directives. The ECJ ruled that judicial review in Ireland (relating to environmental actions) was prohibitively expensive.

Ireland's response was to bring in legislation, the effect of which is to ostensibly alter the general rule on legal costs from the normal English Rule[1] to the American Rule[2] for actions that relate to the EU directive implementing certain Aarhus compliance measures.

First part of my complaint:

Ostensibly, this *American rule* means that a party could at least represent herself, without being threatened with a huge adverse legal costs bill, if she fails in her legal action. However; there is a "catch 22" in this special-costs-regime (SCR)). To determine that one's civil action falls under the ambit of the SCR, one has to risk a huge adverse legal costs award in making an application for such a declaration, if one fails to obtain such a declaration. This "catch 22" should have been evident to the Irish government from the start. However, this "catch 22" became starker in one particular case[3] as outlined in Áine Ryall's article[4]. In this case, the applicant effectively sought an assurance from the court that no adverse cost award would be burdened on her if her lawsuit was subsequently deemed not to have fallen under the ambit of the special costs regime.

Áine Ryall writes—"While expressing sympathy for the applicant, Hedigan J insisted that there was no legal authority to permit him to make the order sought by the applicant. However, Hedigan J observed that:

[It was] very arguable that the absence of some legal provision permitting an applicant to bring such a motion, without exposure to an order for costs, acts in such a way as to nullify the State's efforts to comply with its obligation to ensure that costs in certain planning matters are not prohibitive. As things stand, I have no power to change this. "

The above case was in 2012, and the government has not acted to remedy this deficiency.

However, there are further "legal uncertainties":

While, Ireland altered its legislation to allow the "American Rule" to apply to certain legal actions (although still not facilitating any procedure to clarify the "ambit" of the rule) in its 2010 Planning

[1] The English Rule is referred to as "the costs following the event" in Irish legislation, and means that the loser pays all the costs of a legal action.
[2] The American Rule means that each side to a legal action pays their own costs.
[3] In the matter of an application by Dymphna Maher [2012] IEHC 445
[4] http://environmentaljustice.ie/wp-content/uploads/2013/04/Ryall-Beyond-Aarhus-Ratification-IPELJ-2013.pdf

and Development (Amendment) Act in Section 2 of the Act; it "rowed back" significantly on this concession in Section 3 of the same Act: it introduced 3 "uncertainties" or conditions:

(i) It allowed the American Rule to be set aside, if the claim is frivolous or vexatious.
(ii) It allowed the American Rule to be set aside, if the applicant conducts her litigation in a manner disapproved of by the court.
(iii) It allowed the American Rule to be set aside, if the applicant acted in Contempt of Court.

Again; the second of these introduces a huge level of fear due to the lack of clarity as to how this sanction might be implemented. The third item, "contempt of court" also introduces uncertainty. This became evident in the ECHR case of *The Sunday Times V UK* [1979] [i] (re Thalimide article case). In this case the Sunday Times argued that "the uncertainty of the law of contempt had also been noted by the *Phillimore Committee* which had therefore found it necessary to make proposals for its clarification by statute." While the ECHR did not find that the law violated the convention, 3 judges issued dissenting opinions on the subject.[5] The UK immediately introduced "contempt of court" legislation limiting the scope of the offence, and giving clarity to the various offences. Ireland totally ignored the necessity to bring clarity to *contempt of court*, and has continued to do so subsequently.

The ECHR described contempt of court as follows: (para 18)[6] "Contempt of court is, with certain exceptions, a criminal offence punishable by imprisonment or a fine of unlimited duration or amount or by an order to give security for good behaviour; punishment may be imposed by summary process without trial by jury and the publication of facts or opinions constituting a criminal contempt may also be restrained by similar process."

The government has not advanced any good cause as to the necessity to introduce "contempt of court" as grounds for negating the special costs regime. Even if a party acted in *contempt of court*, why should the opposing party be rewarded for that behaviour? Any fine, if appropriate, should be awarded to the state. Also, the fine is totally arbitrary, and may be totally disproportionate to the offence committed, bearing in mind that adverse cost awards can run into the hundreds of

[5] Judge Zekia said—"In my view, the branch of the common law that concerns contempt of court dealing with publications in the press and other media in connection with pending civil proceedings was - at any rate on the material date - uncertain and unsettled - and unascertainable even by a qualified lawyer - to such an extent that it could not be considered as a prescribed law within the purview and object of Articles 1 and 10 (1) and (2) (art. 1, art. 10-1, art. 10-2) of the Convention. The phrase "prescribed by law" in its context does not simply mean a restriction "authorised by law" but necessarily means a law that is reasonably comprehensive in describing the conditions for the imposition of restrictions on the rights and freedoms contained in Article 10 (1) (art. 10-1). As we said earlier, the right to freedom of the press would be drastically affected unless pressmen, with a reasonable degree of care and legal advice, can inform and warn themselves of the risks and pitfalls lying ahead due to the uncertainties of contempt of court". --- Judge O'Donoghue agreed.
Judge Evrigenis said—"... I consider that the interference, as grounded in law by the decision of the House of Lords, could not be regarded as "prescribed by law" within the meaning of the Convention.... there was an obligation on the Court to be more prudent before adopting a generous interpretation of the phrase "prescribed by law"; the consequence of such an interpretation would be to weaken the principle of the rule of law and to expose a fundamental freedom, which is vital to the democratic society envisaged by the drafters of the Convention, to the risk of interferences that cannot be reconciled with the letter and spirit of that instrument."

[6] Case Of The Sunday Times v The United Kingdom (no. 6538/74) ECHR judgement on 26th April 1979

thousands of Euro in Ireland. This potentially disproportional fine also violates Article 49 (3) of the EU Charter of Fundamental Rights of the EU.[7]

I contend that the absence of a "special-costs-ambit-clarification procedure" and the contempt of court "legal uncertainty", plus the further uncertainty in the introduction of a totally undefined "conduct of proceedings" finding, all conspire to undermine Ireland's so called "special costs" regime.

Even the term "vexatious" could introduce uncertainties in the Irish context: There is very little case-law where this term has been developed in Ireland. It is therefore potentially subject to "novel" interpretation. Some dictionaries define the word as meaning = annoying, irritating, or irksome ., which would cover almost any legal action. One legal dictionary offers the following definition:

vexatious litigation[8] n.= "filing a lawsuit with the knowledge that it has no legal basis, with its purpose to bother, annoy, embarrass and cause legal expenses to the defendant."

In the absence of a clearly developed legal definition of this term in Ireland, I submit that transparency and clarity demand that it would be better to define the term accurately within the legislation (such as the format described above), to avoid generating unnecessary uncertainty.

The application for leave for judicial review already contains a "screening" mechanism – requiring an applicant to show that-- "there are substantial grounds for contending".. and that she has "sufficient interest" (or other more onerous grounds).[9] In the US (in one State) a "vexatious" suit has been defined as one instituted without sufficient grounds, serving only to cause annoyance.[10] Since "substantial grounds" is more demanding than "sufficient grounds"; then the use of the term "vexatious" seems to be redundant [at least, as it applies to applicants], unless a meaning other than that in usage in the US is intended. Hence; it's problematic.

So, the only effort made by Ireland to comply with the 2009 ECJ decision[11] against it, was to introduce a flawed special costs regime, that contains a "catch 22", plus other totally unpredictable adverse outcomes, any of which could leave an applicant (seeking to partake in an environment related legal action) with a life-ruinous adverse legal bill. These uncertainties are directly inconsistent with the requirements expressed by the ECJ in the EU Commission's prosecution of the UK for its failure to insure that costs are not prohibitively expensive.[12] [My review of the UK's efforts in this regard, indicates that it took effective measures to insure that an applicant had confidence that no excessive adverse costs award would befall them. Ireland continues to fail to follow the UK's example, despite being put on effective judicial notice of its shortcomings. However, Ireland should not follow the UK in every aspect – the UK's SCR violates "Equality before the law" by allowing a higher recoverable costs cap for applicants *vis a vis* respondents].

---

[7] COFR Article 49(3)—"The severity of penalties must not be disproportionate to the criminal offence."
[8] < http://legal-dictionary.thefreedictionary.com/Vexatious+litigant >
[9] See – Planning and Development (Amendment) Act – Section 3 (a & b).
[10] http://corporate.findlaw.com/litigation-disputes/frivolous-litigation-in-pennsylvania-recovery-of-counsel-fees.html#sthash.kGJXuPVT.dpuf
[11] Case C-427/07 *Commission v Ireland* [2009] ECR I-6277
[12] Case C-530/11 *Commission v UK* on 13th Feb 2014 – The court said: (*para 69)"It must, accordingly, be found that it is not clear from the documents submitted to the Court that the requirement that proceedings not be prohibitively expensive is imposed on the national courts in this area with all the requisite clarity and precision."*

The government needs to provide a means of access to the courts where the claimant has reasonable assurance that she will not be burdened with having to pay huge legal costs, to her opponent. The absence of an appropriate procedure (such as that introduced in the UK, described above) and the other threats of adverse costs, introduces too much risk of financial ruin to a potential claimant.[13] The government, by its failure to implement the Aarhus convention in good faith is not- "Desiring to ... to encourage ... participation in, decisions affecting the environment ..." (from Preamble)

The Second part of my complaint:

While the American Rule if properly implemented (without a "catch 22" operating), would be of great assistance to applicants for judicial review in environment related matters, this should not be seen as a complete solution to the problem of prohibitively high legal costs.

This is so for 3 reasons.

1. An applicant (who may have concerns for the environment) may not always have the wherewithal to initiate legal proceedings as a lay litigant.
2. Many environmental related legal actions inevitably fall under the ambit of EU law, which can result in a reference to the ECJ. The rules of procedure of the ECJ require that any applicant must be represented by a lawyer before the ECJ.
3. Some legal actions can, in exceptional circumstances, demand that an Irish citizen applies directly to the EU General Court, if she wants to review a decision of an EU institution related to the environment.

In each of the above 3 circumstances, an applicant must give consideration to the employment of a lawyer. The right of reference (in 2 above), is the prerogative of the Irish court hearing a case, not the applicant. Therefore, any applicant for judicial review almost inevitably runs the risk of having to hire an Irish Lawyer. I contend that Ireland has not taken sufficient efforts to insure that the legal fees of lawyers involved in litigation are not prohibitively expensive.

A litigant who hires a lawyer to represent her is often in a tricky position when she comes to deal with the legal bill issued by that lawyer, at the end of proceedings. If she receives a surprisingly high legal bill, she is left with 2 choices:

(a) Complain to the Law Society [or the Bar Council, in the case of barristers' fees] that she is being overcharged. However, the outcome of this process is generally not known to the public, so it is unclear to anyone considering such a complaint procedure, how effective the complaint procedure is. [It may operate in an entirely fair manner, but this is not subject to transparency]. So this process fails to comply with the demands of Article 3(1). [Each Party shall take the necessary legislative, regulatory and other measures, ...**to establish and maintain a clear, transparent** and consistent framework to implement the provisions of this Convention.]

[13] Note- a further infringement formal notice was issued by the EU Commission to Ireland in 2012 relating to non-compliance with EU directives implementing Aarhus

(b) The second option available to a litigant who has received an unexpected "prohibitively high" legal bill is to avail of the Taxation process (legal costs adjudication) for Solicitor –own client costs. However, this process is also lacking transparency and operates rules that are totally unfair to complainants. These rules include:

(i) Costs are assessed taking into consideration- the value of the matter in dispute, the importance of the matter, the complexity of the matter etc (rather than work done).

(ii) The complainant must show that she has been overcharged by one sixth[14], or she must pay the "costs of the hearing".(These include the costs of representation by the lawyer (by a legal costs accountant), the travelling expenses of the lawyer[15] and other expenses(such as the hearing application fee and cost of itemised bill of costs).

(iii) The complainant generally does not receive any expenses; even if it is proven that she has been overcharged by one sixth.

(iv) The complainant must pay an 8% stamp duty (to the government), if she fails to prove she has been overcharged by one sixth.

(v) The complainant is at a disadvantage in assessing the merits of the procedure, as being usually a "one-off litigant", she will have no knowledge of what might be construed as a fair fee, relative to a Solicitor, who may have attended many such hearings, and is therefore better positioned to evaluate what are the maximum fees that he will be allowed to charge in a particular case.

All of the above rules that relate to the adjudication of legal costs illustrate the failure of the government to bring in effective measures to reduce prohibitively high legal costs. There is no suspension of these rules in relation to litigants to take legal action in environmental related matters. These pro-lawyer rules also violate "equality before the law" requirements as well as other human rights. I explain this further in this endnote. [ii]

The Irish government has a general policy of deterring citizens from accessing the courts. This policy undemocratically transfers power to the executive which would otherwise face greater accountability via the courts if legal costs were at a more reasonable level. The *English Rule* is ostensibly presented as a pro-fairness policy, when arguably its primary aim is to deter litigation. In the one instance where the *English Rule* might encourage litigation, in small claims actions, the government conveniently sets the rule aside, and coerces claimants to pay the €40 application fee, and prevents recovery of the fee from the losing defendant. This discourages persons from making low-value small claims, as they face being out of pocket, even if they win. This policy appears to violate an EU directive on small claims, evidencing the government's proclivity for ignoring International legal obligations, in order to deter litigation. In certain instances, some small claims could be deemed to fall within the ambit of "environmental matters", such as where if an electrical

[14] See page 27 of the booklet at this website: <http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/50D5D627B60958E780257B6A0039A937/$FILE/Taxation%20of%20Costs%202013.pdf > . The Legal Services Reform Act [2014], Section 125(2)). proposes to alter this rule somewhat: Under this proposal – the threshold will change from the current 20% (or one sixth rule- which actually allows a one-fifth overcharge) to 17.6 % (the section refers to 15%, but this is in fact 17.6% in its effect).

[15] Order 99 Superior rules committee: (12) The Taxing Master may allow a solicitor attending to oppose the taxation of costs, otherwise than as between party and party, proper charges for his attendance.

retailer refused to accept the packaging of a purchased home appliance (and hence failed to operate its re-cycling obligations). The relevant Irish and EU legislation is detailed in this endnote.[iii]

The above hurdles which any litigant faces, breach the requirement within the convention to make the necessary legislative changes[16] to facilitate access to justice, and to insure that there are fair and effective judicial remedies.[17] Imposing an 8% stamp duty on a litigant who seeks to challenge the high legal fees of her own lawyer (who has represented her in an environmental legal action), particularly in circumstances where it is adjudged that she has been overcharged, is a penalisation of her involvement in legal action related to environmental matters violating Article 3(8) of the convention.[18]

Hence, any person contemplating litigation in Ireland is potentially faced with huge uncertainty as to whether she may be afflicted with a "prohibitively high" legal bill. Even, if the flaws identified earlier in relation to the special costs regime are remedied, a litigant is still left in a vulnerable position.

Third part of my complaint – lack of transparency

The government fails to allow the sunlight of public scrutiny (or democratic accountability) to shine on the oppressive legal costs system that prevails in Ireland. It does not publish the outcomes of legal costs adjudications (a small number of cases excepted: about 10 cases published in 2013, for example) and therefore makes it very difficult to do effective comparative analysis with legal costs in other countries.

While the newly amended Legal Services Regulation Act (LSRA-2014)[19] lifts the cloak of secrecy that applies to lawyer-own-client legal costs adjudications somewhat compared to the original draft (LSRB-2011); transparency problems remain: Adjudicators will now have discretion to hold secret hearings, where the adjudicator determines that secret hearings are "in the interests of justice", but are not mandated to publish compelling justifications for doing so.[20]

Online access to determinations is not envisaged (registers of determinations shall be available for inspection only). This practice will hamper research of legal costs and does not comport with a 21st century approach to transparency. It may even cost more than the use of a searchable centralised website. Further, there is no clarification in the proposed new Bill [LSRA2014] as to whether published "determinations" include the costs of adjudication hearings.

---

[16] Article 3(1); Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve ...access-to-justice provisions in this Convention,

[17] Articel 9(4); the **procedures** referred to...**shall** provide adequate and effective remedies...and **be fair**, equitable, timely and not prohibitively expensive.

[18] Article 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.

[19] http://www.oireachtas.ie/documents/bills28/bills/2011/5811/b58a11d.pdf

[20] Allowing adjudicators to hold secret hearings on the grounds of "the interests of justice", is too broad a discretion and arguably violates Article 6.1 ECHR and 14.1 ICCPR. I refer to the cases of *Scarth v UK*[1998] ECHR*, Olujić v Croatia*[2011] ECHR*).*

The proposed redaction of clients' names from published outcomes (LSRA S.107(5)c.) necessarily precludes linkage to the original case that gives rise to the dispute, thus hampering transparency in lawyer-own-client disputes. Transparency must extend to the costs of environment related court actions and requires that such cases be identifiable. This is necessary, as otherwise, it would be impossible to assess whether the costs of procedures related to environmental matters are "not prohibitively expensive".

The redaction of clients' names in lawyer-own-client disputes violates open justice and "equality under law" principles: It clearly violates Article 14(1) of the ICCPR – "...but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children". Equality is breached due to the applicant and respondent being differentiated in a contractual dispute.

The government also fails to provide much of the data requested by the Council of Europe for its Efficiency of Justice reports. This was mentioned by the EU Commission in its recent country specific reports.(reported in *The Irish Times* 3rd June 2014).

By maintaining a cloak of secrecy over much of the legal costs system, the government is violating democratic norms[21], (and human rights) in order to stifle any democratic advocacy for real and effective reforms of the legal costs system which currently involves prohibitively high legal costs. It is failing to implement transparency measures that would assist advocacy for reform of the prohibitively expensive legal costs system. By stifling transparency, it is breaching Article 3(1); [Each Party shall take the necessary ... (other) measures, including measures to achieve ...access-to-justice provisions in this Convention] I submit that transparency in relation to legal costs outcomes is one of the measures necessary to instigate reform of the prohibitive legal costs system.

Also, Article 9(4) demands – "Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, **shall be publicly accessible**." I submit that since Article 9(4) stipulates that "procedures... shall...be...not prohibitively expensive", the term "Decisions under this article" must include the actual outcomes of legal costs adjudications that relate to the "procedures". This is necessary, as otherwise, it would be nearly impossible for the Aarhus Convention Compliance Committee to assess whether the costs of procedures related to environmental matters are "not prohibitively expensive". Therefore, I submit that Ireland, by its failure to publish legal costs adjudication outcomes that relate to environmental legal actions, is directly violating Article 9(4) of the convention.

Failure to provide guidance to outline rights to access to justice in Environmental matters:

The legislative framework that outlines the (flawed) special costs rules that apply to certain legal actions and the conditionality that attaches to them is near incomprehensible. The legislation is strewn out over at least 3 separate Acts (with numerous *Statutory Instruments* determining when particular sections of the various Acts are signed into law), with no consolidation of the applicable

[21] *["...in administrative procedures, transparency serves the very specific purpose of ensuring that the authorities are subject to the rule of law,..."]* (para 64- Opinion of AG Cruz Villalón,16 May 2013) -- Case C-280/11 P Case C-280/11 P *Council of EU v Access Info Europe* [2013]

legislation.[22] One judge referred to the relevant legislation as "this patchwork of legislative changes".[23] Add to this the uncertainty in relation to various conditions (described earlier); the rights of any person in seeking to engage in legal action are totally unclear. Article 3(2) demands: "Each Party **shall endeavour to ensure that officials and authorities assist and provide guidance** to the public ... **in seeking access to justice** in environmental matters." By maintaining an incoherent legislative framework, the Irish government is making it very difficult for officials to assist the public. Only lawyers will likely be capable of attempting to navigate and decipher the relevant legislation. It needs to provide a single Consolidated Act that outlines an effective special costs regime, and provide an explanatory Booklet to explain all the options available to the public for judicial review of environmental related matters in a clear and transparent manner. I submit that Ireland is failing to comply with Article 3(2).

Provisions of the Convention relevant for the communication

If one reads Article 3(1) with Article 9(4) --- then it becomes clear that Ireland is obligated to : "...to establish and maintain a clear, transparent and consistent framework to"... facilitate judicial review which is "not prohibitively expensive". Ireland is breaching Article 3(1) and Article 9(4).

By not providing a fair procedure for contesting a contractual arrangement between a client and her lawyer (in relation to legal fees), and by imposing an 8% stamp duty on a complainant, even where she has been overcharged[24]; Ireland is violating its undertaking in the Aarhus convention that a person taking legal action—"shall not be penalized, persecuted or harassed in any way for their involvement". The 8% stamp duty charged often exceeds the administrative cost to the state of the hearing; the excess is operating as a penal deterrent against a litigant contesting a prohibitively high legal bill.

---

[22] This general practice of government is violating the "spirit" of the constitution's requirement to publish legislation, if not the letter. A purposeful interpretation of this publication requirement demands that such publication be comprehendible. The "scattering" of legislation, coupled with "tokenistic" publication, is arguably unconstitutional. Modern word-processing negates any purported advantage to not consolidating legislation. It appears, at least from an intuitive analysis, that not consolidating legislation actually takes more work. If this is so, it adds to the case to halt this practice- democracy demands transparency- this I contend requires that all reasonable steps be undertaken to enhance transparency; Consolidation must become the norm.

[23] Kimpton Vale Developments v An Bord Pleanála [2013] IEHC 442 -see para (48): "While not denying that the new costs rules operate somewhat haphazardly as a result of this patchwork of legislative changes..." <http://www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/47be640e9619bd6a80257bff00322ed3?OpenDocument >

[24] A complainant has to pay the stamp duty, if she has been overcharged by between 0.01% and 18.66 %.

Suggestions as to how Ireland should comply with A. 9(4) of Aarhus----(to ensure that legal costs are not prohibitive)

The key element of the 2009 judgement against Ireland was the rejection of "judicial discretion" as a means of ensuring that costs are not prohibitive. This aspect was emphasised in the subsequent and similar prosecution of the UK in 2014. Here the ECJ pointed out the need to ensure that applicants are assured that costs will not be prohibitive- "with the requisite clarity and precision".

Ireland needs to respond to this issue. The conditions that currently attach to the SCR are wholly dependent on judicial discretion; thus not meeting the requirement for certainty.

Another key issue that needs to be addressed is the "catch 22", which I referred to earlier; how can you introduce an effective SCR into a system that insists that the *English Rule* should be the prevailing one?

I propose the following solution:

1. Allow an applicant to apply for an SCR costs protection declaration, initially, on an *ex-parte* basis via a written submission and/or a hearing if necessary.
2. If a judge determines that there is a reasonable chance that the application, meets a threshold of having a "reasonable chance of success", then an SCR proposal notice should be then served on the respondent. If the respondent accepts the proposal, then the SCR is established. If the respondent seeks to challenge the proposal, then a hearing is set down for a ruling.
3. Only one lawyer[25] should be allowed to represent either the applicant or the respondent at such a hearing. The recoverable costs of such a hearing should be set at a maximum of €1500.00
4. If an SCR is then established, then a recoverable cost cap should apply to the main hearing of the substantial matter of the dispute relating to an environmental matter. I suggest that a recoverable cost cap should be set at about €5,000 for all legal persons.
5. Where the sum of €5,000 is still prohibitive for persons of low income and wealth, then an earmarked fund should be created by the Dept of Environment, to provide legal aid to assist such persons to pay part of the €5,000 contingency.[26] This fund should be administered by an independent agency (such as the Legal Aid Board) on a priority basis - taking into account the public interest, and the importance of the matter in dispute for the applicant or defendant.

The above 5 steps would go a long way to advancing Ireland's compliance with Aarhus. These proposals are modest, proportionate, fair and do not put any undue burden on the state's resources. While some funds would need to be set aside for the legal-aid assistance; the probability is that the state would gain more in additional taxes from the employment of more lawyers and judges (from increased litigation) than would be required to administer the fund.

[25] Many EU countries use "one lawyer" systems. Ireland's suggestion that a so-called "common-law" system requires multiple lawyers is outdated and disproportional. The fact is that most of environmental law is circumscribed by "statute law". Under the Aarhus heading of "other measures"- this needs to be considered.
[26] Further legal assistance could be provided, where necessary, using a job-bridge program for newly qualified solicitors or barristers at a low cost. The ECR case (C-279/09) of *DEB v Germany* should also be considered.

While some might argue that the inability of a respondent to recover all of their legal costs in a situation where they are adjudged to be the winner of a particular legal action, this is a necessary compromise to ensure access to justice. The property rights of a winning defendant have to balanced against the exigencies of the common good – the protection of the environment and the right of access to justice for citizens (who would otherwise be deterred from asserting their rights of access to justice).

Agreement should also be allowed between the parties to seek judicial review from the Circuit Court. This would allow some actions to be dealt with locally (avoiding unnecessary travel costs, and pollution). Also, judicial review should be put on a clear statutory footing--- rather than as a rule of the Superior Courts Rules Committee. All applicable *Statutes of Limitations* should also be reviewed.

Own-lawyer legal costs adjudication:

The one-sixth rule should be consigned to history [along with the proposed 15% rule]. Stamp duty should only be payable by the loser of the hearing, and should be capped at €1,500. All outcomes of legal cost adjudications should be published on a central searchable court website; detailing the names of the parties involved, the court case details that gave rise to the dispute, and all documentation[27] relating to the legal costs. (Those seeking privilege should be afforded it only on the basis of them paying their own costs!) Recoverable representation costs at legal costs adjudications should be capped at 5% or €2,000 (whichever is the lower), and must be published.

This revised SCR would then provide the necessary "clarity and precision". The "vexatious", "contempt of court", "conduct of proceedings" and "frivolous" conditions should be set aside; the €5,000 recoverable costs will provide a sufficient and proportionate protection against inappropriate legal actions.

Further clarity required:

A single consolidated Act should be drafted--- for example: "The Protection of the Environment Act 2015". Any subsequent amendments should be "re-consolidated" within 12 months of initiation [This should be stipulated in the Act]. All statutory instruments initiating aspects of the Act should have a maximum 3 months, overall, implementation date.

A list should be produced listing all the types of legal action that fall within the SCR of the Act. A further list should be produced detailing those types of legal actions that do not fall within the ambit of the Act. *Kimpton Vale Developments v An Bord Pleanála* [2013] IEHC 442 – illustrates the confusion on this issue—a "brighter-line" approach needs to adopted to ameliorate the confusion.

---

[27] Section 129 LSRA 2014, states--- "*Proceedings and documents created or furnished to the parties to a legal costs adjudication are absolutely privileged except..."* This provision flies in the face of open justice. It arguably violates Article 34 of the Constitution, Article 14.1 ICCPR, and Article 47 of the Charter of Fundamental Rights of the EU (as Aarhus litigation generally involves the "application of EU law"). As I understand it, the High Court has already ruled [June 2013] that court documents should be accessible, and this decision is currently under appeal to the Supreme Court. "High Court Judge Mr Justice Gerard Hogan said the open administration of justice is "a vital safeguard" in any democratic society which ensures the judicial branch is subjected to scrutiny. - See more at:< http://www.independent.ie/irish-news/courts/public-entitled-to-see-legal-papers-high-court-rules-29329278.html#sthash.HFc5EKqa.dpuf >" . This being so; should government not await the outcome of that appeal?

As “contempt of court” is a common law offence; the removal of a specific reference to the offence in the Act, will not adequately deal with the matter - the offence can still be declared by a court, thus potentially undermining the requirement to ensure that prohibitive costs are not feared by an applicant with the “requisite clarity and precision”. Contempt of court fines in relation to Aarhus related cases should be capped at €10,000 and this should be detailed in the Act. [More egregious cases could be dealt with via prison sentences].

All of the above measures, if implemented would demonstrate Ireland’s commitment to taking the most important aspects of Aarhus seriously. I would give consideration to withdrawing my “communication” to Aarhus, if measures approximating the above proposals were implemented.

To summarise the problems:

1. Judicial discretion as a remedy to prohibitive legal costs does not provide the “requisite clarity and precision” to assure applicants that costs will not be prohibitive.
2. The “catch 22” in the current SCR, and **all** “uncertainties” need to be resolved.
3. Legal costs adjudications must be afforded the same fair procedures as any other contract dispute: Equality before the law, open justice, and reasonable court costs (payable by the loser, regardless as to whether that be the complainant or the lawyer).
4. The Legal Services Regulation Act [2014] needs to be amended to comply with modern transparency expectations—online access to outcomes and documents. The proposed redaction of clients’ names is a violation of open justice and equality before the law, and should be reversed. The proposal to allow secret hearings on the grounds of “the interests of justice” is arguable not compliant with the constitution. The Constitution demands open court, except in “special and limited cases”. The term – “in the interests of justice” is more expansive and vague than the term “special and limited cases”; the term “special and limited” has been judicially interpreted to mean that secrecy should only apply where there are “compelling reasons” to suspend open justice. In this context, the term “in the interests of justice” is too un-restrictive. This term may also be unconstitutional on grounds of vagueness alone.
5. Open justice needs to be viewed with more than a simple “tick-box” approach. The current proposal to allow secret hearings does not clarify how such a decision will be arrived at. It appears to suggest that the parties and the public might attend a hearing, one or both of the parties will make a request for a secret hearing, and the adjudicator can then direct members of the public to leave. This flies in the face of “open justice”. It ignores that the public will be dissuaded from attending, if they may be effectively ”turfed out” when they turn up. If the government is insistent on creating an option for secret hearings, then it needs to put in place a separate procedure to allow a party to apply for a secret hearing, at least one week in advance of a proposed hearing. This way, the public will be assured that any hearings that are presented as “open hearings”, are in fact open hearings. What I understand to be the current practice of mixing ”open hearings” with closed or potentially closed hearings is unsatisfactory, when Legal Costs hearings are published on the Courts’ website: A clear distinction needs to be published to identify those hearings that are open to the public [no maybe’s] and those that are closed. This is why it is essential to have a procedural requirement to apply in advance to seek a secret hearing; and any secret hearings granted should generate a publication of any compelling reasons for the secrecy.

ENDNOTES below---

[i] < http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57584#{"itemid":["001-57584"]} >

[ii] **This 1/6th Rule violates human rights laws :**

Where a client challenges her lawyer's bill at a Taxation Master's hearing ; the client must prove that the bill submitted is excessive by at least 1/6th (or 18.66%) . Otherwise, the complainant will have to pay for the costs of the hearing, plus a stamp duty.

The costs of the hearing may include Legal costs accountant representation, plus travel expenses, plus stamp duty. So, even if a litigant is overcharged by say, 18% , the client is penalised for challenging such a bill.

This is unfair and unlawful on a number of grounds:

1. It is an attack on the property rights of the client. (in breach of Protocol 1 of the ECHR (European Convention of Human Rights)).
2. It allows solicitors to overcharge the litigants by at least 17% with impunity (or even more, as costs of a hearing will likely be about 9% of adjudicated costs, plus 8% stamp duty, and the risk of this adverse cost award has to be considered by the litigant), without any effective remedy. This violates clients' rights under Article 13 of the ECHR --- the right to an effective remedy in matters of civil obligations. Further, lawyers will be better skilled in assessing what bill might be allowed than a client, who is often a "one-off" litigant.
3. It violates "equality under law", a basic requirement to comply with the rule of law. This also violates article 14(1) of the ICCPR (All persons shall be equal before the courts and tribunals.)

Equality under law is broken on 2 grounds: Firstly; It treats a client as being different to a solicitor in the matter of a contractual obligation. Secondly; it treats solicitors differently to other professionals, such as doctors, or dentists in the collections of their contractual right to be paid professional fees. Dentists, for example must dispute a clients bill via a normal court, where there is no one sixth rule in operation. They (Dentists) don't enjoy the privilege of being allowed to effectively overcharge with some degree of impunity. (Article 20 of the Charter of Fundamental Rights is also breached).

The US Supreme court has ruled that imposing different legal rules on one party to litigation as opposed to another party, particularly on arbitrary grounds violates the equality under law clause of the US Constitution, and overturned a statute allowing for such a process. U.S. Supreme Court said in the case of <GULF, C. & S. F. R. CO. v. ELLIS, 165 U.S. 150 (1897) 165 U.S. 150> (see; http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=165&invol=150). This case ruled that it was unlawful to impose a recoverable costs statue on one type of company and not to do so for all legal persons.

The Judge said: *'Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed.*

"The state may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis".

"All litigants, whether plaintiff or defendant, should be regarded with equal favour by the law, and before the tribunals for administering it,..."

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground,- some difference which bears a just and proper relation to the attempted classification,- [165 U.S. 150, 166] and is not a mere arbitrary selection. Tested by these principles, the statute in controversy cannot be sustained."

This above US case has clear resonance to the favourable rules relating to legal costs that are applied to lawyers, and which are not available to any other service providers.

[iii] **Small claims Procedure in Ireland -** Relevant EU laws and Irish statutes:

Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure- Article 16- states: ***Costs: The unsuccessful party shall bear the costs of the proceedings.*** *However, the court or tribunal shall not award costs to the successful party to the extent that they were unnecessarily incurred or are disproportionate to the claim.*

****

(Note also that under Article (37) [of EU directive], Ireland has decided to be a participant: *In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom and Ireland have given notice of their wish to take part in the adoption and application of this Regulation*.)

District Court Rules Order: 53A -Small Claims : S.I. No. 519 of 2009;

"13. **The Court shall not award costs** or witnesses' expenses to any party when determining any matter referred to it by a Small Claims Registrar under the Small Claims Procedure." See- <http://www.courts.ie/rules.nsf/lookuppagelink/64034533C237933D802576A5003A81C7?opendocument&l=en >

****

The Irish government appears to violate the above EU small claims directive by requiring a plaintiff in a small claims action to pay a €40.00 Application Fee, and not requiring the losing defendant to refund the fee. (Violating Article 3(1)[of Aarhus convention]). *END OF COMMUNICATION.-19/8/2014*