Reply to questions (9) raised by the Committee on 19 May 2016

From Communicant (C113) – Date of Reply: 9 June 2016

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)

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Abbreviations used throughout reply:

ACCC = Aarhus Convention Compliance Committee

ADR= Alternative Dispute Resolution

The Authority = The Legal Services Regulatory Authority, established by the LSRA

ECHR= European Court (or Convention) of Human Rights

FCRT= Fees Complaint Review Tribunal ((*committee*) of the Authority)

HC = High Court

LCA = Legal Costs Adjudicator (or Adjudication) (Under LSRA)

LSRA = the Bill = Legal Services Regulation Act (2015)

S. __ = Refers to a particular Section of the LSRA (unless specified)

Section 7= s. 7 of Environment (Miscellaneous Provisions) Act, 2011

SC = Supreme Court

Some web-links are embedded. Any **emphasis** is mine.

Kieran Fitzpatrick - 9th June 2016

1. Please explain how the forthcoming Legal Services Regulation legislation will address the specific issues raised in the communication, especially as regards costs.

The LSRA [2015][1] has not yet been commenced as legislation. There are several examples of legislation being passed by the Oireachtas, but never commenced, or where several years have lapsed before commencement.

As regards my main criticisms of the Bill, I refer to my various references in my earlier submissions. Some of the provisions which I have criticised may have had new Section numbers assigned to them; I have referenced some of these new Sections herein. Most of the provisions earlier complained of, remain in the latest Bill. One complaint has been addressed – A requirement to publish the outcomes of the LCA process "online" is now included.[2] The details to be published still remain unclear, as earlier criticised.

I generally want to avoid "target moving", so I shall refrain, as far as is practical, from opening up new complaints in my analysis. However, where the "goalposts have moved" (due to revised legislative proposals), I think it is only fair to respond to new developments where those changes relate to the issues raised earlier in my communication. The LSRA 2015 was passed by the Dail on the 16 December 2015, and was only published in a consolidated form around the 31 December 2015. It contains a number of significant changes from the draft supplied by Ireland in its reply to the ACCC of 29th September 2015. A few changes, in particular, which are included in the latest Bill, need to be responded to, as they concern my criticisms of the LCA process.

New Review System-

The Bill introduces a new Judicial Review system[3] for the ADR system to be operated under the auspices of the new legal services "Authority".[4] At first glance, this represents a credible alternative to the unfair rules applicable to the LCA system, and might provide an escape route for the government in regard to some aspects of potential non-compliance with Article 9(4) or Article 3(8) of Aarhus. I had earlier refrained from scrutinising the predecessor to this system, as it did not hold any credibility as an alternative to the LCA process, due to its secret rules, non-publication of outcomes, and lack of any independent Review by a court. The new appeal process, demands that the whole ADR system be looked at more closely, in order to disassemble its first glance appearance of credibility.

Initially, fee complaints are to be handled by the Authority under S. 61 (6). It appears the Authority can make a determination itself,[5] or it can establish sub-committees[6] to adjudicate fee complaints. These sub-committees have to have a majority of laypersons,[7] and can include persons who are not members of the Authority.[8] Determinations are issued from the Authority[9] (from the above system) and these can be sent for Review (by client or lawyer) to a Review committee (S. 61 (7)) [the FCRT].

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[1] http://www.irishstatutebook.ie/eli/2015/act/65/enacted/en/pdf

[2] S. 140 (8). The register of determinations shall be available for inspection without payment, during office hours by any person who applies to inspect it, and on a website of the Courts Service.

[3] S. 63 (1).

[4] S. 8 and S. 9.

[5] S. 14(2) - The quorum for a meeting of the Authority shall be 5, of whom not fewer than 2 shall be lay members, and not fewer than 2 shall be members other than lay members.

[6] S. 13 (9). and S. 16(1) (a).

[7] S. 16 (3).

[8] S. 16 (4).

[9] S. 61 (6).

Objectively Impartial Tribunal?

The Fees Complaint Review Tribunal or FCRT[10] creates panels of three laypersons and two lawyers[11] to adjudicate fees.[12] No training is proposed for these adjudicators. Some of the laypersons may be experts in the provision of legal services.

Is it conceivable that most lawyers, if given the opportunity to contribute to the set of data which will constitute the comparators from which lawyers' fees will generally be set, will refrain from "turning the dial", in a particular case, more in a generous direction rather than an ungenerous direction, particularly when such potential prejudice is unlikely to ever be subjected to public scrutiny? [13]

Is it sustainable to believe that a lawyer adjudicator, operating as a part-time adjudicator, while likely making most of her money as a lawyer elsewhere (and where much of such income may be calibrated by the same adjudicative process), is going to perform her function in an objectively unbiased manner?[14]

Secondly, can three laypersons reverse any such bias from an objective viewpoint? These persons will likely have no training in legal fee adjudication and perhaps no legal background. **I submit that it is likely that they will haplessly defer to the trained lawyers whose relative expertise will likely overwhelm them**.[15]

Research has established that where persons without expertise are offered advice, they -"are more influenced by individuals whom they perceive to have more expertise".[16] Behavioural scientists suggest that the results of their research - "indicate that following advice is intrinsically rewarding."[17]

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[10] S. 62 (1) – [For ease of reference I have proposed this designation - FCRT.]

[11] S. 69 (10) or (11).

[12] S. 62 (2).

[13] See *Wilson v Ordre des Avocats du barreau de Luxembourg* C-506/04 (CJEU) – 9th November 2004. - para 53 -- "Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, **in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors** and its neutrality with respect to the interests before it (See, in that regard, *Dorsch Consult*, paragraph 36; *Köllensperger and Atzwanger*, paragraphs 20 to 23; and *De Coster*, paragraphs 18 to 21; see also, to that effect, Eur Court *HR De Cubber* v. *Belgium*, judgment of 26 October 1984, Series A No 86, § 24).

[14] See *Wilson* (n 13 above) para 55 – "As regards the Disciplinary and Administrative Appeals Committee, the amendment made to Article 28(2) of the Law of 10 August 1991 by Article 14 of the Law of 13 November 2002 **confers overriding influence on the assessors**, who must be registered on the same list and presented by the Bar Councils of each of the Bar Associations referred to in the preceding paragraph of this judgment, as compared with the professional magistrates."; See also, para 52 - ". That aspect requires objectivity (see, to that effect, *Abrahamsson and Anderson*, paragraph 32) and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law."

[15] Lay-persons' ability to adjudicate misconduct issues is likely to be significantly less influenced by the lawyers, as anyone can reach a decision as to whether a lawyer has acted unreasonably from their own experience as a consumer, however, determining market-rate legal fees demands much more expert knowledge.

[16] Dar Meshi, Guido Biele, Christoph W. Korn, & Hauke R. Heekeren 'How Expert Advice Influences Decision Making' - "This study provided evidence for the implicit influence of expertise on decision making, and although in the present study we focused on the explicit influence of expertise, our results agree with their behavioural findings, showing that people are more influenced by individuals whom they perceive to have more expertise." http://dx.doi.org/10.1371/journal.pone.0049748

[17] See- Guido Biele, Jörg Rieskamp, Lea K. Krugel, Hauke R. Heekeren, 'The Neural Basis of Following Advice'- http://dx.doi.org/10.1371/journal.pbio.1001089 - "Especially when decisions are difficult, people rely on advice or recommendations regarding a decision or course of action." (The Authors footnote a reference to

Research from Sweden, where three lay-judges sit with one professional judge in criminal cases, suggests a high level of deference to the professional judge's opinion. - Prof Christian Diesen's research on Swedish lay judges - "shows that they behave very passively during the deliberation process and that verdicts in which the lay majority outvotes the professional judge are very rare; only in 1-3 % of criminal cases has the verdict been the result of lay judges outvoting the professional judge."[18]

Luigi Zingales writes - "Regulators depend on the regulated for much of the information they need to do their job properly, and this dependency encourages regulators to cater to the regulated."[19] Zingales emphasises that capture does not imply any level of impropriety – "Since Stigler, when economists talk about regulatory capture, they do not imply that regulators are corrupt or lack integrity."[20]

Carpenter and Moss conclude (referencing Kwak) - "the problem is not that regulators are lured into favouring special interests at the expense of the public interest, intentionally and knowingly, but rather that they are so persuaded by the special interests' worldview that they come to believe they can best serve the public interest by advancing the agenda of the special interests."[21]

There is another source of potential bias. - Lay members selected to act as part-time members of the fees complaints review tribunal will likely be paid the same salary as their lawyer counterparts. The lawyer members will seek to be paid comparably to their earning capacity as lawyers, as otherwise they may be reluctant to take part. Hence, through the likely shadowing of lawyers' pay by the pay-scales applied to members, the lay members will be incentivised to promote generous rates of pay for lawyers and this may consciously or subconsciously affect their decision making in relation to lawyer fee decisions.[22] Zingales advises - "Regulatory capture is so pervasive precisely because it is driven by standard economic incentives, which push even the most well-intentioned regulators to cater to the interest of the regulated."[23]

There are other grounds as to why tribunal lay-members may be subject to regulatory capture. If we assume that no oral hearings will be held, they will be identifiable by the lawyer-members, but not the complainant or the public (unless regulations are drafted to the contrary). Prof James Kwak writes - "Relationships matter because we care about what other people think of us, in particular those people with whom we come into contact regularly. Relationship pressure is magnified both by visibility – the degree to which one party can observe the other's actions – and by the frequency with which people interact."[24] Ostensibly, the FCRT is adjudicating a dispute between a lawyer and her client, but

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another article in making this comment- See: Bonaccio S, Dalal R (2006), 'Advice taking and decision-making: an integrative literature review, and implications for the organizational sciences.' Organizational Behaviour and Human Performance 101: 127–151. http://www.sciencedirect.com/science/article/pii/S0749597806000719).

[18] Diesen Christian, 'Lay judges in Sweden. A short introduction', *Revue internationale de droit pénal* 1/2001 (Vol. 72), p. 313-315 www.cairn.info/revue-internationale-de-droit-penal-2001-1-page-313.htm.

[19] Luigi Zingales, 'Preventing economists' capture' (17 June 2014) http://www.chicagobooth.edu/capideas/magazine/summer-2014/preventing-economists-capture

[20] Ibid.

[21] David Moss and Daniel Carpenter, 'A Focus on Evidence and Prevention'(Cambridge University Press, 2014) http://tobinproject.org/sites/tobinproject.org/files/assets/Conclusion%20from%20Preventing%20Regulatory%20Capture.pdf (Conclusion-*Preventing Regulatory Capture: Special Interest Influence and How to Limit It, p456)*

[22] Of course, it is accepted that some members may participate for public spirited reasons alone.

[23] Zingales (n 19 above).

[24] James Kwak, 'Cultural Capture and the Financial Crisis' (Cambridge University Press, 2014) http://www.tobinproject.org/sites/tobinproject.org/files/assets/Kwak%20-%20Cultural%20Capture%20and%20the%20Financial%20Crisis.pdf (Chapter 4 of *Preventing Regulatory*

in reality, it is adjusting the "comparator" database of fees which will significantly affect the fee-scales of the two lawyer professions, each of which will have two members at the table.

All of the above factors cumulatively calls the impartiality and independence of the FCRT into question from an objective standpoint[25], regardless of the probity and integrity of any adjudicator.[26] Hence, this process is not an objectively fair one under Article 9(4) of Aarhus.

While in *Wilson,* the appeal body consisted for the most part of lawyers, as opposed to just two of five for a FCRT, little should turn on that distinction. Rather, the process should be reviewed holistically; lay adjudicators may be recommended by lawyer-members for reappointment by the Authority, and their lack of expertise, the likely absence of any public scrutiny[27], the fact that all procedural rules may remain unpublished, are all factors which must be fed into that analysis.

Costs of the FCRT – Costs to borne equally?[28]

This provision seems unclear, but on its face, means that all costs, including any representative costs of the lawyer whose fees are in dispute, shall be divided in half and the resulting sum will be billed to each side. This appears to allow a lawyer to run up costs and burden half of those costs on the client, if the client is unrepresented. As no rules are published, it is unclear if oral hearings will be held, but they are not excluded. This costs rule has no public interest justification advanced, and will almost inevitably favour lawyers.[29] If these costs evolve to be high, then they will deter complaints, similarly to the manner that the proposed 15% rule (and 8% stamp duty) will deter applications for LCA adjudications. Modest overcharging will have to be tolerated by clients, as the costs and effort involved, may make it not worthwhile. For example, if the (total) costs of the initial complaint process (including mediation (S.61(2)(b)) plus the FCRT review (S.63(1)) amounts to 20% of the amount in dispute, the client will have to pay 10%, and thus there will be no benefit to lodging a complaint, unless the overcharge is greater than 10%. This means that lawyers can overcharge with impunity by about 10% in such a scenario.[30]

Capture: Special Interest Influence and How to Limit It (p89), edited by Daniel Carpenter and David Moss - http://www.tobinproject.org/basic-page/preventing-regulatory-capture-special-interest-influence-and-how-limit-it).

[25] *Micallef v Malta ECHR (Appl. no. 17056/06) 15 October 2009* --Para 98. "In this respect even appearances may be of a certain importance or, in other words, "justice must not only be done, it must also be seen to be done" (see *De Cubber*, cited above, § 26). What is at stake is the confidence which the courts in a democratic society must inspire in the public. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see *Castillo Algar v. Spain*, 28 October 1998, § 45, *Reports* 1998-VIII)"

[26] Ibid—para 50 - "The concept of independence, which is inherent in the task of adjudication, involves primarily an authority acting as a third party in relation to the authority which adopted the contested decision (see, to that effect, inter alia Case C-24/92 *Corbiau* [1993] ECR I-1277, paragraph 15, and Case C-516/99 *Schmid* [2002] ECR I-4573, paragraph 36)."

[27] There may be some summarised and anonymised outcomes published, which doesn't equate to scrutiny.

[28] S. 65 (2) - Any costs arising from an attempt to resolve a complaint in the manner specified in section 60, 61 or 64 shall be borne equally by the parties to the complaint unless the parties agree otherwise.

[29] See, in regard to costs - *Stankiewicz v Poland,* (Application no. 46917/99) 6 April 2006 – Para 60 – "However, the Court is of the view that there may also be situations in which the issues linked to the determination of litigation costs can be of relevance for the assessment as to whether the proceedings in a civil case seen as a whole have complied with the requirements of Article 6 § 1 of the Convention… ".

[30] Whatever the percentage (costs as a percentage of fees challenged, divided by two), this percentage will act as a kind of rebate for repeat over-chargers (Where the overcharging is generally kept below this percentage, and thus won't be challenged) – meaning that "bearing costs equally" will be a mere fiction.

Under the LSRA, the charging of excessive fees will no longer be deemed to be misconduct, unless grossly excessive.[31] This was objected to, by the lay members of the Law Society complaints committee, but ignored by the government.[32]

Note also, that where lawyers face costs which may be imposed by the Authority, these costs are often capped, as under S. 71(5) (h) – which caps costs at €5,000 or S. 80 (4), where costs are capped at €1,000., but there is no cost-capping for clients' costs. S. 63(1) only allows 21 days to appeal a decision of the FCRT.

Review by HC –

Under S. 63, either the lawyer or the client can appeal a decision of the FCRT to the HC and "the Court may make such order as it thinks fit."

Hence, the HC can vary the costs, remit the case back to the FCRT, or remit it to an LCA, thereby subjecting the client to the unfair rules of the LCA process. Alternatively, the HC may decide to not vary the order, unless the excess (or shortfall) exceeds 25% of the fair amount, relying on the established precedents of the HC regarding the Review of legal costs outcomes.

While, this Section does not use the word "unjust", as used under Section 161(5) regarding appeals of the LCA, little would appear to turn on that distinction. It seems unlikely that the HC will apply a higher level of scrutiny to an arbitration process (FCRT) as opposed to the quasi-judicial LCA process.[33]

In a number of High Court decisions, the term "unjust" was held to equate to a 25% overcharge (or undercharge), meaning that the court would avoid varying an award of costs (by Taxing Masters) which fell within this non-interference margin.

In *Superquinn v Bray U.D.C.* (2001) - Kearns J., asked -"When does an error as to amount become "unjust"?-

> "It seems to me that, in exercising its powers of review under s. 27, the High Court should adopt a similar role and standard to that traditionally and habitually taken by the Supreme Court in reviewing awards of damages, that is to say that it should not intervene to alter a finding of amount made by the Taxing Master **unless an error of the order of 25% or more has been established** in relation to an item under challenge."[34]

[31] S. 51 (1) [misconduct] (l). consists of seeking an amount of costs in respect of the provision of legal services, that is grossly excessive,

[32] Mark Tighe, *Legal Services Bill fears ignored* , The Sunday Times (p.6) 17 April 2016 – "In a letter released under the Freedom of Information Act, the lay members warned the department: "The only effect of including the word 'grossly' before 'excessive' is to weaken the position of the client who makes a complaint. A valid defence [can be] that while the fees may be 'excessive' they are not 'grossly excessive'." " http://www.thesundaytimes.co.uk/sto/news/ireland/article1687993.ece

[33] Re arbitration deference, see - *Keenan v Shield Insurance* [1988] IR 89. - "… if policy considerations are appropriate as I believe they are in a matter of this kind, then every such consideration points to the desirability of making an arbitration award final in every sense of the term. … There may be instances in which an award which shows on its face an error of law so fundamental that the courts cannot stand aside and allow it to remain unchallenged."

[34] *Superquinn Ltd v Bray U.D.C.* (No. 2) IEHC [2001].

The 25% rule was subsequently followed in *Mahony v KCR* (2007)[35] and also in *Boyne v Bus Ã□tha Cliath* (2008)[36]. The Supreme Court has held that a pattern of precedents in binding on the High Court – "…unless he viewed that line of authority as obviously wrong or having been arrived at without proper consideration of relevant case law or the like."[37] Hence, the 25% rule appears to have binding authority, notwithstanding reservations being expressed by one judge.[38]

HC usually remits -

Further, a pattern has emerged in relation to appeals to the High Court of decisions of the Taxing Master, that even where an "unjust" error is determined to exist, the High Court usually remits the case back for re-assessment by the Taxing Master's office, sometimes directing the case be heard by a different adjudicator than the one from which the appeal arose.[39] Again, there is no reason to believe that this practice (of remittal to the FCRT or LCA) will be dis-applied to appeals under S.63.

Full Jurisdictional Review?

One issue which arises in relation to a "fair and independent tribunal" under ECHR law, [40] is whether the absence of fair procedures at 1st or 2nd instance, can be remedied on appeal to a higher court? [41] The fact that the HC or SC could remedy over-charges of up to 25%, but may not for FCRT appeals, may not equate to a full jurisdictional review.[42]

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[35] *Mahony v KCR Heating Supplies* [2007] IEHC 61 - see par 13 – "The variability in relation to an award of damages or allowance on taxation of €400,000, over 25% upwards and downwards from that point, supposing it to be the standard for non-interference,…"

[36] *Boyne v Bus Ã□tha Cliath (No. 2)* [2006] IEHC 209, [2008] 1 IR 92, - "It also has to be borne in mind from the perspective of this court, that counsel on the defendants' behalf is suggesting that the appropriate refresher fee for senior counsel for the plaintiff is a figure of â,¬2,500 which would not meet with the 25% yardstick as indicated by Kearns J. in *Superquinn Ltd.* as being a basis for interference by this court."

[37] *Kadri Governor of Wheatfield Prison v* [2012] IESC 27 when he said (at para. 2.3), (Clark J Opinion).

[38] See *Quinn v South Eastern Health Board* [2005] IEHC, where Peart J. questioned the 25% formula.

[39] See *Bourbon v Ward* [2012] IEHC 30, or *Cafolla v Kilkenny* [2010] IEHC 24 - ("A different Taxing Master should conduct the new taxation of the plaintiff's costs."), or *CD v Minister for Health* [2008] IEHC 299 ("I have therefore no option but to remit the matter back to be reassessed.") or *Landers v Dixon* [2015] IECA 155.

[40] Re Full Jurisdiction — See *Capital Bank AD v Bulgaria* (Application no. 49429/99),24 November 2005 – "The difficulties encountered in this respect could also be overcome through the provision of a right of appeal against the BNB's decision to an adjudicatory body other than a traditional court integrated within the standard judicial machinery of the country, but which otherwise fully complies with all the requirements of Article 6 § 1, or whose decision is subject to review by a judicial body with full jurisdiction which itself provides the safeguards required by that provision.

[41] *Judicial practice*: in order to take the reality of the domestic legal order into account, the Court has always attached a certain importance to judicial practice in examining the compatibility of domestic law with Article 6 § 1 (*Kerojärvi v. Finland*, § 42; *Gorou v. Greece (No. 2)* [GC] § 32). Indeed, the general factual and legal background to the case should not be overlooked in the assessment of whether the litigants had a fair hearing (*Stankiewicz v. Poland*, *(App. no. 46917/99) 6 April 2006,* § 70). [See: ECHR Guide on Article 6, 1/5/2013].

[42] *Capital Bank* (n 40 above) - See para 98. "As regards the first limb of the applicant bank's complaint, the Court reiterates that for the determination of civil rights and obligations by a tribunal to satisfy Article 6 § 1, the tribunal in question must have jurisdiction to examine all questions of fact and law relevant to the dispute before it (see *Terra Woningen B.V. v. the Netherlands*, judgment of 17 December 1996, *Reports* 1996-VI, pp.

Review – Prohibitively Expensive?

The 25% rule means that appellants risk an adverse costs award if they fail to establish an overcharge of 25% or more. Further, as the appeal (S.63(1)) is primarily against the FCRT (or the Authority), and not directly against the lawyer, the costs of both the FCRT and the lawyer (whose fees are in dispute, and who can become a *notice party*) will likely be awarded against the client (appellant/respondent). S. 169(3) means that an applicant can be burdened with the costs of the respondent and any other intervenor/notice party that might get involved in a case.

The usual *costs follow the event* rule[43] will apply; both the FCRT and the lawyer (as a notice party) will likely each deploy either 3 or 4 lawyers to defend themselves and seek to burden the client (who may have no legal representation) with all of these costs, should the client fail to win. The client, may be burdened with the costs of either six or eight lawyers, plus her own lawyer(s), plus half the total costs of the Authority's initial complaint system, plus any mediation, plus the costs of the FCRT system. These costs will inevitably be prohibitive, and can be further increased by an appeal to the Court of Appeal or to the SC, or both. Additionally, a client may have to pay interest on the costs for the period of any delay up to the final appeal hearing.[44]

The LSRA is also discriminatory in regards the requirement that all appeals must be made to the HC, regardless of the amount of fees which are in dispute. Normally, matters which fall below a value of €75,000 are dealt with in the Circuit Court, where the costs are lower.[45] S. 161(6) is unusual in this regard, as it allows some adverse costs appeals, to be directed to the Circuit Court, but not own-client costs disputes. A former Minister for Justice has indicated that the costs are 30% lower before the Circuit Court than the HC.[46]

Jurisdictional "gerrymandering" is sometimes used by the government to deter certain types of litigation (such as personal injury claims)[47], or to assuage potential public disquiet where more perceptible litigants' interests are at stake (such as, where persons risk eviction from their family homes)[48] or businesses[49] risk closure. Objectively, therefore, the requirement to go to the HC to appeal

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2122-23, § 52; *Chevrol v. France* [GC], no. 49636/99, § 77, ECHR 2003-III; and *I.D. v. Bulgaria*, no. 43578/98, § 45, 28 April 2005)."

[43] S. 169.

[44] S. 168(2)(e). - (I'm unclear what interest rate will apply, but I understand that the interest on unpaid costs is about 11% per year - See Order 42, subsection 15 of SCR Rules, supplied with my reply of 17/12/2014).

[45] Senior counsels normally don't appear before the Circuit court in civil matters, reducing the costs (normally 1 or 2 lawyers represent, rather than 3 or 4 at the HC).

[46] Minister Alan Shatter, in a speech to the Law Society said - "The purpose of these new jurisdictional limits is to ensure that the level of court that hears a case is appropriate to the potential value of a case and that the costs are not disproportionately high. As you will be aware, it is estimated that, on average, the legal costs of taking a case in the Circuit Court, subject to the complexity of the case, are 30% less than in the High Court"[46]. - See: http://www.merrionstreet.ie/en/News-Room/Speeches/speech-by-minister-alan-shatter-at-the-law-society-annual-conference.html#sthash.MlHaTLGK.dpuf

[47] Under Part 3 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013 the monetary jurisdiction of the Circuit Court increased to €75,000 (was €38,092.14) with effect from 3 February 2014. For personal injury actions the limit is set at just €60,000. (District Courts' jurisdictional limit is normally €15,000).

[48] Family home repossessions are dealt with in the Circuit Court, even where homes are valued at over €75,000. See- Kitty Holland, (*The Irish Times*) - "Seven family homes in Wicklow will be repossessed following decisions at Wicklow Circuit Court yesterday…" (15 December 2015) - http://www.irishtimes.com/news/social-affairs/court-grants-repossession-orders-on-seven-family-homes-1.2466512

[49] "The only real novelty in this part of the Act is the well publicised provision which allows small private companies to apply for examinership in the Circuit Court, the principle aim being a reduction of costs. Small private companies are defined here (Section 350) in the Act." - http://knowledgebase.ie/introduction/

own-lawyer fees outcomes, which fall below €75,000 is done to inflate the costs and to deter such challenges. The HC review option is thus prohibitively expensive and not 9(5) compliant.

A few other observations of the LSRA[50] -

The statute of limitations as regards submittal to the LCA process is reduced from 12 months (Taxation) to either 6 or 3 months.[51] My reading is that if the lawyer extracts her payment from the retained funds of her client (even without consent), the lawyer can benefit from the 3 month limit, as it appears that the fees can be deemed to have been paid. This appears to be a kind of "grab and gain" law.

The LCA costs adjudication process does not permit the adjudicator to evaluate the quality of the work done by a lawyer in the provision of legal services, as this is not one of the 16 factors to be considered in the LSRA.

The legal costs adjudication of lawyer-own-client costs by the LCA takes into account any written agreement between the client and the lawyer[52], but importantly, it does not mandate a written agreement and is not mandated to take into account the absence of any such agreement, or the unreasonableness of the lawyer in failing to provide an accurate written quotation, or the failure of the lawyer to more clearly outline her likely costs or the means of calculating them. Also, where there is no written agreement between the lawyer and her client, but a verbal agreement has been reached, it appears that no consideration will be allowed to be given to such a verbal agreement by the LCA.[53] Nor is there any requirement upon the lawyer to advise her client that should a written agreement not be entered into, a list of criteria will form the basis of the means of adjudicating any dispute and that any verbal agreement may have no legal status.

Even though S. 150[54] itemises several requirements which a lawyer must follow in regard to the provision of an estimate of likely costs, any failure to adhere to these requirements **can** be disregarded in assessing the lawyer's fees, **if** this is in the interests of justice,[55] as this failure is not one of the factors on the list of factors to be considered. [56] [57] All the matters to which the LCA has to have regard

[50] Where any claims under this heading equate to new claims, I do not seek that any findings be made in relation to same. As this legislation is prospective, rather than current, I include these additional comments to provide an overview of the whole Bill.
[51] S. 154 (7). (Most contracts enjoy a six-year statute of limitations.)
[52] S. 155 (6).
[53] S. 151 (3). - An agreement under subsection (1) shall constitute the entire agreement between the legal practitioner and the client… . See also the disregard in S. 157(6) - "… in the interests of justice…"
[54] Legal practitioner to provide notice of conduct of matter, costs, etc.
[55] See the disregard in S. 157(6) - "**unless**"… "… in the interests of justice…".
[56] *The State (Cussen) v Brennan* [1981] IR 181 applies – Factors, not outlined in legislation cannot be entertained in a decision. (See para 195 *Cussen*) - "Therefore, the introduction of the Irish test by the Commissioners was in excess of the statutory powers vested in them"; See also - *Dunne v Donohoe* [2002] 2 IR 533 – The court stated that adding requirements (the need to have secure storage) to the awarding of gun licences, the superintendant was acting *ultra vires* of the provisions of the Firearms Acts. - "By imposing extra 5rconditions, the superintendant was assuming the power of the legislature, thus violating the Constitution's provision that only the Oireachtas can enact law."
[57] This approach could be assessed as a breach of the unfair terms of contracts directive or the unfair omissions section of the Unfair Commercial practices directive of the EU (both transposed into Irish law). However, there appears to be no judicial remedy available to plead these claims, under Irish Law, as all contract disputes relating to legal costs are directed to a determination by the LCA process. Of course, in

to, do not include such a failure, but includes a multiple of other factors, many of which are likely to inflate the costs.[58] In this context, it is important to recall the findings of the Competition Authority that most persons do not reach any written agreement in advance – "…solicitors and barristers generally don't quote a fixed price".[59]

Conclusion-

The government has never explained why it does not allow a contract dispute between a lawyer and her client to be contested in the same manner as any other contract dispute for professional services, which can be litigated in court, where **all** factors can be taken into consideration.[60] Instead, it provides two choices for resolving legal costs disputes (for own lawyer-fees):

1. A quasi-judicial process via the LCA office.

OR

2. An alternative (quasi-arbitral) process via the FCRT under the Authority.

The ADR process (No.2) precludes availing[61] of the LCA process once a determination is made.[62]

The FCRT process is not Article 6(1) ECHR compliant, on a number of grounds – secret rules/outcomes, no public hearings, an objectively impartial tribunal and an unfair costs allocation system. The HC appeal process is likely to continue the 25% non-interference margin prescribed by the HC in relation to Taxing Master appeals, and is likely to be prohibitively expensive, particularly for lower value disputes.

This FCRT process should not be accepted as an acceptable alternative system of adjudication of own-lawyer costs, as compared to the LCA process[63] and it should therefore be held to be unfair and not compliant with A.9(4) of Aarhus. The LSRA unfortunately provides few clear measures designed to lower costs or enhance access to justice.

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practice, such claims are unlikely to ever be made, for the simple reason that those persons who are not aware of the importance of having a written agreement, are also unlikely to be aware of their rights being potentially violated under infrequently used consumer protection laws.

[58] The number of factors to be considered are scattered within the Act; see S. 155 (Subs 1 to 6) and the ten or so items outlined in Schedule 1 of the Act. (Near the end of Act).

[59] See page 28 of the CA report as supplied with my clarification.

[60] Deference to any specialist knowledge of LCAs can hardly be decisive, since the selection criteria for LCAs is similar as for normal judges (10 years experience as a lawyer (S.148(1)(d)) rather than 12 years for judges), and does not require any extra qualifications, notwithstanding that LCAs may gain knowledge through experience.

[61] The HC is not however precluded from directing a case to the LCA, when appealed from the FCRT.

[62] See S. 61 (10) – "Where pursuant to this section a dispute regarding a bill of costs between the client and the legal practitioner is resolved, the client shall not thereafter be entitled to seek adjudication of the bill of costs under Part 10 unless such adjudication forms part of the resolution."

[63] I refer to my earlier submissions in regard to the unfair rules applicable to the LCA process, in particular to the 15% rule (Now- S. 158(2)), the 8% stamp duty (separate secondary legislation- S.I. No. 24/2014) and the redaction of client's names (Now- S. 140 (5) (c) – "where subsection (3) (b) applies, the client concerned may not be identified, whether by name, address, or economic activity").

2. If the courts may reject Special Costs Protection (SCP) for the reason that there is not an environmental issue or for the reason that the claim is frivolous and vexatious, does the Court announce that before considering the claim on its merits?

I understand that the court engages in a partial assessment of the merits of the case in order to determine that a case has "a reasonable prospect of success"[64] (which is somewhat similar to the Judicial Review requirement to have "substantial grounds for contending"), AND that the case is "not frivolous or vexations", AND assesses that it is a case to which Section 3 (of 2011 Act) applies, in cases where the applicant seeks an SCP[65] in advance of the case under Section 7. It would therefore reject or announce the applicability of the SCP before a full consideration of the merits of the claim.

In circumstances, where an applicant waits until the end of a case, then the court would be assessing whether the case involved an environmental issue (within the prescribed and limited grounds of same as outlined in S.3 of the 2011 Act) or whether the case was frivolous or vexatious, *after* examining the claim on its merits.[66]

However, the court in *McCoy (HC)* also appears to suggest that even where an SCP is granted at the outset of proceedings, the court can still re-evaluate the criteria of being "frivolous of vexatious" at the end of proceedings as well.[67]

This issue was discussed by the Court of Appeal in the appeal of the *McCoy* SCP order.[68] I copy the two relevant paragraphs below:

> *34. It is also true that the protections given by the s. 7 order may nonetheless be subsequently lost, because the court can still ultimately make a costs order against the beneficiary of a protective costs order should it ultimately transpire that, for example, the claim is "frivolous or vexatious": see s. 7(3)(a). In this statutory context, this term does not simply mean a claim that discloses no cause of action or one which is not brought in a bona fide manner but it would also include a claim which is simply unsustainable in law: see, by analogy, Nowak v. Data Protection Commissioner [2012] IEHC 449, [2013] 1 I.L.R.M. 207 and Schrems v. Data Protection Commissioner [2014] IEHC 310, [2014] 2 I.L.R.M. 401.*
>
> *35. These considerations notwithstanding, it is nonetheless clear from the terms of s. 7 of the 2011 Act that the Court has a jurisdiction to make a final determination regarding a protective costs order at this early stage of the proceedings. Any other conclusion would defeat one of the principal objects of the 2011 Act and would be at odds with the actual language ("…at any time before, or during the course of the proceedings…") of s. 7(1).*

It is unclear to me what is the Court's position in regard to whether the SCP can be revoked by a court at the end of the proceedings or not, on grounds of being "frivolous or vexatious"; compare the reference in para (35) to - "*the protections given by the s. 7 order may nonetheless be subsequently*

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[64] See para 27- *McCoy v Shillellagh Quarries* [2014] IEHC 511

[65] SCP refers to a Special Costs Protection order made available under Sections (3) to (7) of the Environment (Miscellaneous Provisions) Act, 2011 (or the "2011 Act") or under Section (33) of the Planning and Development (Amendment) Act 2010.

[66] Ibid- see para 17 - "These retained discretions are exercisable by a court which has heard the evidence and would appear to lie at the conclusion of the case."

[67] Ibid.

[68] *McCoy v Shillelagh Quarries* [2015] IECA 28 *(McCoy (CA))*

lost" with the reference in para (36) to - *"has a jurisdiction to make a final determination".* I have to therefore submit that there appears to be some uncertainty remaining in relation to this issue.

One interpretation which may reconcile paras (35) and (36) above, is that while the court has jurisdiction to make a final order, the court is not obliged to make it *final*. In such a scenario, the court could declare that a provisional SCP should be granted on the basis of the partial review of the facts presented (at the outset), but that the court would leave open the option to re-assess any claim that the case was frivolous or vexatious at the end of the main proceedings. Such an approach would leave an applicant in the difficult position of having to defend a claim (from the respondent) that her case was "*unsustainable in law*" from the start, from a position of having lost the case.

3. Besides SCP, are there any other mechanisms established under Irish law to assist members of the public regarding the financial implications of seeking access to justice in environmental matters? Please describe any such mechanisms and explain the extent to which they are in practice used by the public.

The courts have awarded costs to a non-prevailing party, where there is a broader public interest at stake and where the case has implications for public rights generally, but this only happens in very exceptional cases such as *Sweetman v An Bord Pleanala (2007)* [69].

Legal aid is available for individual persons (but not NGOs) but apparently only a few applications are made each year, and it is unclear how many of these are successful. On page 15 of Ireland's reply (29/9/2015) to the ACCC, Ireland stated that "very few claims of this type [i.e. environmental claims] are provided with legal aid, funds which are typically exhausted by family and housing law applications."

Third party funding is prohibited if it can be construed as maintenance or champerty.[70]

[69] *Sweetman v An Bord Pleanala & Ors* [2007] IEHC 361.

[70] *Persona Digital Telephony Ltd v Minister for Public Enterprise* [2016] IEHC 187- Para 85 - "There is no doubt about the interpretation or ingredients of the torts or offence of maintenance and champerty on the basis of the existing Irish authorities. It has been defined in such a manner as to prohibit professional third party funding."http://www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/c29d05c1ce68d3a880257f9c0030e010?OpenDocument

4. Please provide case law demonstrating how the Irish courts interpret and apply the concept of "frivolous and vexatious" proceedings. Please also provide any relevant academic commentary on this issue, if such exists.

A recent judgement issued from the Supreme Court in relation to the meaning of "frivolous and vexatious". I'm not aware of academic commentary on this issue, which is up to date with this recent judgement. The theme which seems to emerge is that it means a claim which is "futile" or "bound to fail". I also refer to the Court of Appeal commentary above in Question 2 - to "unsustainable in law".

I enclose two paragraphs (15. and 16.) from the SC judgement below, which are most relevant to the meaning of the term:

Judgment Title: ***Peter Nowak v Data Protection Commissioner*** [2016] IESC 18 (28 April 2016)[71]:

> 15. While Costello J. in *Barry v Buckley* was careful to distinguish between cases which were bound to fail and those which were otherwise "frivolous and vexatious", that distinction, and the distinction between the jurisdiction provided by O.19 r.28 and the inherent jurisdiction have become blurred. Thus, it has come to be said that a case which cannot succeed in law is one which is frivolous and vexatious. The position was put perhaps most elegantly in the *ex tempore* judgment of the Supreme Court in *Farley v. Ireland* (Unreported, Supreme Court, 1st May, 1997) delivered by Barron J. and quoted by Mr Nowak in para. 19 of his submissions:
>
> > "So far as the legality of the matter is concerned, frivolous and vexatious are legal terms, they are not pejorative in any sense or possibly in the sense that Mr Farley may think they are. It is merely a question of saying that so far as the plaintiff is concerned, if he has no reasonable chance of succeeding then the law says that it is frivolous to bring the case. Similarly, it is a hardship on the defendant to have to take steps to defend something which cannot succeed and the law calls that vexatious."
>
> The same point was made by Birmingham J. in the High Court in this matter, referring to s.10(1)(b)(i):
>
> > "That section refers to complaints that are frivolous or vexatious. However, I do not understand these terms to be necessarily pejorative. Frivolous, in this context does not mean only foolish or silly, but rather that a complaint that was futile, or misconceived or hopeless in the sense that it was incapable of achieving the desired outcome, *see R v Mildenhall Magistrates' Courts Ex P Forest Heath* D.C. -16/05/1997 Times Law Reports. Having regard to the view the Commissioner had formed that examination scripts did not constitute personal data, he was entitled to conclude that the complaint was futile, misconceived or hopeless in the sense that I have described, indeed such a conclusion was inevitable."
>
> 16. To some extent, this question of whether a claim which is considered to be wrong in law is properly frivolous or vexatious is closely connected to the central question on this appeal, namely the scope of an appeal under s.26, and the true interpretation of s.10. Any public decision maker must have the capacity to screen claims and exclude at an early stage those which are plainly misconceived. If this form of decision-making triage cannot be carried out, and all complaints must proceed through to a formal determination, then the system becomes

[71] http://www.courts.ie/Judgments.nsf/0/6B842F8034292FE580257FA4003F01CF

overloaded, and will grind to a halt. This is wasteful of time and resources, and a real injustice to those with substantial complaints. This is as true of administrative decision makers as of the courts: indeed, perhaps more so. If, as the Commissioner appears to have considered, the only way to avoid a full investigation and the futility of attempted amicable settlement is if complaints are determined to be frivolous or vexatious, then, inevitably, there is an incentive to adopt a broad interpretation of the term. But I am not convinced that is the case. Without in any way reducing the scope of an important jurisdiction both for courts and other decision makers, I nevertheless consider that it may be desirable to distinguish between cases which are bound to fail and those which are truly frivolous and vexatious. Furthermore, while some guidance may be obtained from the use of familiar legal terms, nevertheless I would be slow to slavishly read across the judicial elaborations of terms contained in rules of court into the provisions of a statute meant to be of general application, and moreover creating an important public right, and accordingly intended to be understood and applied by non-lawyers. There may be something to be said in this context, therefore, for limiting the term "frivolous and vexatious" to those types of cases which all parties in this Court agreed came squarely within that term. Some examples given by counsel for the respondent were cases where the complaint was plainly misdirected and was perhaps a complaint more properly addressed to raising issues of freedom of information, or Garda oversight, or circumstances where the complaint was a repetition of a matter which had been considered on perhaps more than one occasion by the Commissioner and the fresh complaint was either a simple restatement of an issue already determined, or an attempt to circumvent the ruling or decision already made. As the many cases on the "frivolous and vexatious" formula as used both in statute and in the Rules of the Superior Courts unfortunately demonstrate, there are many other examples of cases which are readily recognisable as fitting the test and meriting summary disposal. It may be desirable to apply the term, and more importantly, the power to summarily dismiss the complaint to such cases. It may often add insult to injury if an important legal point is raised and carefully considered (as in this case, and indeed in *Schrems*) but is then characterised as frivolous or vexatious. There should be nothing to stop the Commissioner from proceeding in a structured way and considering, for example, if a preliminary issue of law should be determined. On this approach, therefore, the determination in this case (that the exam script was not personal data) would be appealed to the Circuit Court, even if the Commissioner was correct that it is not possible to appeal decisions that a complaint is frivolous and vexatious in the narrower understanding of that term. It is, however, not necessary to decide this point definitively in light of the view I take of the larger issue of the scope of appeal under section 26. In approaching that issue, it is, however, useful to keep in mind the fact that the interpretation advanced by the Commissioner, and hitherto accepted, would apply not just to cases such as this which raise a point of law, (and which could without much difficulty be formulated in terms of judicial review) but would also apply to cases considered to be frivolous and vexatious on the facts.

End of *Nowak* extract.

5. What are the cases of "exceptional public importance" under Irish law for which unsuccessful applicants may be awarded costs?

In *Shillelagh Quarries v An Bord Pleanala & others (No.2).*[72] Hedigan J. said at para 6. - "I do not think that there is any convincing evidence before the Court that there is any exceptional public importance attached to this case. It is one of many cases involving quarries under recent legislation, all of which cases are of considerable public importance but something over and above the norm would be required in order to move the Court to make an order for costs on the basis of there being anything exceptional about this particular quarry case."

In *Sweetman v An Bord Pleanala* (2007)[73], the court awarded the applicant half of his costs, even though he had not prevailed in the hearing, because his case raised issued of "sufficient general public importance". Justice Clarke said at para 2.5 -"The true question was, therefore, as to whether the proceedings could properly be characterised as being of sufficient general public importance to warrant a departure from the ordinary rule as to costs." And at para 3.4 said -"The issues concerned are of wide public importance, in that they have the potential to affect very many court proceedings involving challenges in the environmental field."

It appears that the *English Rule* will only be set aside, in cases where there is a broader public interest at stake and where the case has implications for public rights generally.

6. Please clarify whether it is possible under Irish law to be represented before the courts by an environmental NGO or by a person who is not a solicitor or a barrister.

Generally no. Only a solicitor (or a Barrister together with a solicitor) can represent a litigant. The case of *Coffey v EPA* (2013)[74] and its related proceedings[75] best illustrates the practice.

The courts may allow an exception to this rule, but only in the most extreme circumstances, as in the case of In *Coffey v Tara Mines Limited* (2008)[76], where a litigant's wife was allowed to represent the litigant, where legal-aid was unavailable.

NGOs cannot be self-represented by members[77] or employees (nor can it be represented by any in-house barristers[78]), at least if it is a Limited Company.[79] NGOs (environmental or otherwise) cannot therefore represent a third party either.

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[72] *Shillelagh Quarries v An Bord Pleanala & others (No.2)* [2012] IEHC 402.
[73] *Sweetman v An Bord Pleanala & Ors* [2007] IEHC 361.
[74] *Coffey & ors v EPA* [2013] IESC 31 (para 3.).(Included with file in my reply of 17 December 2014)
[75] *Re: Applications for Orders in Relation to Costs in Intended Proceedings: Coffey & ors* [2013] IESC 11- Para 40. –"Thus Mr Podger's application to be allowed to represent the appellants at the hearing of their appeals must be rejected."
[76] *Coffey v Tara Mines Limited* [2008] 1 IR 436.
[77] *Coffey & ors* [2013] IESC 11
[78] S. 212(1)(b), if it is signed into law would repeal this restriction, though it is unclear if a solicitor will still have to act in tandem with an in-house barrister.
[79] See reference to No2GM Ltd in *Coffey* (2013) IESC 11. – Para 38. - "Nor do I think that the attempt to represent the company No2GM Ltd gives rise to any exception. Mr. Podger has not demonstrated any exceptional circumstance which would justify permitting him to speak as the representative of the company. It was patent that Mr. Podger availed of the opportunity provided by the Court's brief adjournment of the hearing to defeat the effect of its ruling by devising the stratagem of making himself a member of the company. It was a device and was without merit."

7. Please explain how the burden of proof is distributed between the parties within the costs adjudication procedure both before the Taxing master and the Law Society.

(a) The lawyer must forward a Bill of Costs to the client, before a case is presented to the Taxing Master. It appears that the challenger must then dispute the itemised details of the bill, item by item. The professional fee will inevitably make up the bulk of the bill, but usually very little detail is presented - often just a lump sum (usually with no details of hours worked or hourly rate).[80] The challenger must try to introduce comparators (which are generally inaccessible, due to the government's apparent continued reliance on the *Lord*[81] judgement) to contest the bill, and hence the challenger must try to establish that the fees sought are out of step with fees awarded in comparable cases.

The following extract may give some indication of the difficulty faced by one client in challenging a lawyer's bill of costs, due to the lack of any requirement upon the lawyers to provide a written breakdown as to how the "professional fee" is calculated. – In *C(D) v The Minister for Health & Anor.* [2008] IEHC 299 the judge stated:-

> *"The learned Taxing Master had an altogether excessive and unacceptably uncritical regard to the assertions made by the legal costs accountant for the solicitors for the costs in his oral submissions. He had insufficient regard to the task of objectively assessing and forming an independent judgement as to what work was in fact done by the solicitors for the costs and whether it was properly allowable, in whole or in part, on a party and party taxation. By reason of this failure there is no sufficient material available to this Court to enable it to arrive at a figure which it would consider to be proper to allow to the solicitors for the costs as a general instructions fee."*

The court further comments that –

> *"…in my judgment the Paying Party has made out a prima facie case that the General Instruction Fee allowed by the learned Taxing Master was outside the range of figures at which it was reasonably open to him to have arrived and that his decision was consequently unjust."*

This indicates that the burden of proof lies on the challenger to establish that the "instruction fee" is "outside the range" (by using (difficult to obtain) comparators).

Another problem is that solicitors are allowed to present their claims, without being required to take an oath, which is normal in most court cases. This is important, as no penalty exists for any mis-representations before Taxing Masters made by lawyers.[82]

(b) The Law Society procedure is based on written submissions, and no rules of procedure are published, as far as I'm aware.

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[80] See Order 99, subsection 29.(5), of SRC Rules. (Supplied with my reply of 17 December 2014).
[81] The *Lord* case is included with Ireland's reply of 29/9/2015.
[82] Contrast this with the penalties which can be imposed on clients who give false evidence before a disciplinary tribunal. See- S. 80 (7)(c) and S. 80 (9).

8. Is it your view that the issue of costs between a client and their own solicitor/barrister is within the scope of article 9, paragraph 4 of the Convention?

Introduction-

The right to legal representation by one's own lawyer should be viewed in light of international law and practice, and the requirement within A9.4 to "provide adequate and effective remedies". I contend that non-interference in the right to legal representation is better characterised as a *negative* obligation[83], as opposed to the right to legal-aid, which is a *positive* obligation. A9.4 refers to "…procedures referred to in paragraphs 1, 2 and 3 above[84] shall provide adequate and effective remedies,…", and these procedures must be "fair…and not prohibitively expensive". Do these "procedures" encompass the employment of a lawyer in order to be effective, at least in regard to a certain cohort of litigants, if not all litigants?

In answering this question, one needs to tap into international state practice, and also look to the object and purpose of the convention, ACCC case-law and by analogy, the case-law of the CJEU relating to implementation of Article 10a of the EIA Directive and Article 15a of the IPPC Directive.

Most countries and also most signatory states of Aarhus envisage the employment of lawyers in legal actions related to the environment. In fact, in some countries, legal representation before certain courts is mandatory (See for example, Spain (C36)[85] and Germany). In Ireland, NGOs which are established as public companies[86], **must** engage a lawyer to represent them before Irish courts.[87] This is a common law principle which has not been abrogated by any legislation.[88] Further, NGOs in Ireland are excluded for consideration for legal aid, under the 1995 Civil Legal Aid Act.[89] Third party funding of legal representation is also prohibited, if it can be construed as maintenance or champerty.[90]

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[83] The drafting of discriminatory rules regarding fee disputes, and unwarranted interference in normal competitive forces in the provision of legal services, should be seen as a violation of the state's negative obligations to not interfere in the right to obtain legal representation, in a capitalist system.

[84] The procedures include -- administrative or judicial procedures (A9.3), review procedure before a court of law and/or another independent and impartial body (A9.2), AND a review procedure before a court of law or another independent and impartial body (A9.1).

[85] See C36 (Spain) Additional remark by the Party concerned 03.03.2010 -
"…it is clear from the Act (Law 29/1998, art. 23), the dual representation (attorney and lawyer) is only mandatory before associated bodies (Supreme Court and High Regional Courts), while the general rule is that before first instance courts (single judges) it is mandatory to be assisted only by a lawyer."

[86] No2GM Limited may be an example of same, which was one of the parties in the case of *Coffey v EPA* 2013 IESC (Included in file, with 18 December 2014 submission).

[87] See *Battle v Irish Art Promotion Centre Ltd.* [1968] I.R. 252, see also- *Charles P Kinnel & Co Ltd v Harding Wace & Co* [1918] 1 KB 405. See (Podger, n79 above) reference to No2GM Ltd in *Coffey* (2013) IESC 11.

[88] This restriction has been modified in the UK, and permission can now be given by the court for a company employee to represent the company in court. See the [UK] Legal Services Act 2007- Schedule 3, paras 1 and 2.

[89] S. 28 (9) (a) of CLA Act – '… legal aid shall not be granted by the Board in respect of any of the following matters (ix) any other matter as respects which the application for legal aid is made by or on behalf of a person who is a member, and acting on behalf, of a group of persons having the same interest in the proceedings concerned'. - http://www.irishstatutebook.ie/eli/1995/act/32/section/28/enacted/en/html#sec28

[90] *Persona Digital Telephony Ltd v Min. for Public Enterprise* [2016] IEHC 187- Para 85- "There is no doubt about the interpretation or ingredients of the torts or offence of maintenance and champerty on the basis of the existing Irish authorities. It has been defined in such a manner as to prohibit professional third party funding."

A. 9(1) requires access to a procedure "other than a court of law", in order to minimise the likely legal costs, again impliedly encompassing legal costs. Clearly, the convention, as a whole, seeks to address the issue of legal costs of whatever source, within its provisions. Both the ACCC and the CJEU have made several findings that opposite party costs are included under the requirement that procedures shall not be prohibitively expensive.[91]

International law requires that convention law be interpreted in light of its object and purpose.[92] In this context, **it is submitted that, in those cases where legal representation is required to ensure an effective remedy, due to the complexity of proceedings, or to ensure some equality of arms for litigants who lack legal knowledge, or where legal representation is compulsory, the issue of own lawyer costs must fall within the scope of the Aarhus convention in order to meet its object and purpose.** For example, though Article 6(1) of the ECHR fails to include either the right to legal representation in civil matters, or the right to have such legal representation subsidised by the state, and even though it specifically articulates the right to legal representation in criminal matters,[93] the ECHR has nonetheless found such a right (in order for the right of access to justice to be effective) within Article 6(1) (ECHR) under the requirement to have a fair hearing (*Airey v Ireland*)[94].

Case-Law of ACCC-

In C36 (Spain), the ACCC recognised that requiring a litigant to employ two lawyers could unnecessarily add to the expense of litigation.[95] Here the ACCC found "The Committee observes that the Spanish system of compulsory dual representation may potentially entail prohibitive expenses for the public." It further held that should it transpire that dual-representation caused legal fees to be prohibitively expensive, then that would constitute a violation of A.9 (4). In referencing the potential obligation of an applicant to pay the dual-lawyer costs of winning respondents or for their own dual-lawyer costs, the ACCC appears to have implied that own lawyer costs fall within the scope of A9(4), at least as it applies to the engagement of the requirement that costs should not be prohibitive.[96]

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http://www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/c29d05c1ce68d3a880257f9c0030e010?OpenDocument

[91] See ACCC findings in C33, C27, and CJEU findings in C427/09 (EC v IRL, 2009) and C 530/11 (EC v UK, 2014).

[92] See - Vienna Law of Treaties 1966 - Article 31, General Rule of Interpretation; 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. : Which "*requires a process of interpretation that oscillates between a treaty's individual provisions and the logic of all its provisions as a whole.*"- See - David S. Jonas and Thomas N. Saunders 'The Object and Purpose of a Treaty: Three Interpretive Methods' (May 2010) 43(3) *Vanderbilt Journal Of Transnational Law* 565

[93] See ECHR Article 6(3) (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

[94] *Airey v Ireland* (1979) Application no. 6289/73 (ECHR, 09/10/1979); See also - *Steel and Morris v UK*, App No. *68416/01 (14 February 2005)*; See also (regarding effective access to court) - *Golder v United Kingdom* ECHR (21 February 1975).

[95] Spain ACCC/C/2009/36; ECE/MP.PP/C.1/2010/4/Add.2 08 February 2011, para 67 - http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC-28/ece_mp.pp_c.1_2010_4_add.2_eng.pdf

[96] Ibid (Spain) para 67.

The ACCC found that the manner of awarding costs against an applicant (C27), where the public interest in taking the case is not considered, equates to an unfair procedure.[97] In C33, the ACCC found, at para 128.- "When assessing the costs related to procedures for access to justice in the light of the standard set by article 9, paragraph 4, of the Convention, the Committee considers the cost system as a whole and in a systemic manner."

The ACCC has suggested that limiting the recovery of costs of one' own lawyer could violate 9(4) – "The Committee in this respect finds that it is essential that, where costs are concerned, the equality of arms between parties to a case should be secured, entailing that claimants should in practice not have to rely on pro bono or junior legal counsel."[98] Equality of arms will be undermined more significantly[99], if some persons are coerced to self-represent in order to avoid being subjected to a lawyer-own-client adjudicative system which applies unfair procedures.

Case-Law of CJEU-

In the CJEU case of *Commission v UK* (2014)[100], at para 15. – the court commented that - "The Commission submits next that the requirement that proceedings not be prohibitively expensive covers both the court fees and the fees of the claimant's lawyers, the other costs to which the claimant may be exposed and all the costs arising from any earlier proceedings before lower courts,…". In contrast, Denmark maintained at para 32. - "Moreover, only costs directly linked to the handling of the case are concerned, which excludes the fees of the lawyer whom the claimant decides to consult."

Though the court failed to rule on the specific inclusion of one's own lawyers costs, due to a lack of information (see paras 60/61/62), it said at para 64 that "the prohibitive expense of proceedings, within the meaning of Articles 3(7) and 4(4) of Directive 2003/35, concerns all the financial costs resulting from participation in the judicial proceedings, so that their prohibitiveness must be assessed as a whole, taking into account all the costs borne by the party concerned...".[101] However, AG Kokott included own lawyers' costs in her earlier opinion, at para 70 saying – "Consequently, reciprocal protective costs orders have the potential to undermine the objective of costs protection."[102] AG Kokott said that a comprehensive approach was necessary–"…because Article 9(4) of the Convention – just like the provisions of the directives – does not contain any specific criteria." (Para 36).

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[97] United Kingdom ACCC/C/2008/27; ECE/MP.PP/C.1/2010/6/Add.2, November 2010, para. 45
[98] United Kingdom ACCC/C/2008/33; ECE/MP.PP/C.1/2010/6/Add.3, December 2010, para. 132
[99] In a tenant and landlord disputes study - "Only 22% of the represented tenants in this study received an adverse final judgment, compared with 51% of the self-represented tenants." – See: C.Seron, G Ryzin and M Frankel, 'The Impact of LegalCounsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment' (2001) 35 (2) Law and Society Review 419. - http://www.jstor.org/pss/3185408
[100] *Commission v UK* (2014) CJEU C 530/11 (13 February 2014).
[101] See also para 27 (CJEU) of Edwards Case C-260/11 (11 April 2013).
[102] Para 70 (AG Opinion) Edwards Case C-260/11 (18 October 2012).

The case-law of the ACCC and the CJEU considers the costs as a whole, and both have averted to one's own lawyers' fees being encompassed within this context.[103] The principle of effectiveness in EU law, mirrored in A9(4) in the requirement for effective remedies, demands the inclusion of own lawyers' costs within the term "procedures", at least where it can be claimed that a litigant requires legal representation in order to pursue a claim "effectively".

So, can it be claimed, that for litigants who might possess the capacity to litigate effectively without legal representation, the requirement that fair procedures apply to own lawyer fee disputes, should not apply to them? Could the right to such fair procedures be sub-divided? - If this approach was adopted, then a further legal procedure would be required to determine which litigants required legal representation in order to pursue their case effectively, and which didn't.[104] This is not practical and would render rights "excessively difficult" to access, thus undermining the requirement in 9(4) to "provide adequate and effective remedies" and would also fail to meet the EU principle of effectiveness.[105]

Conclusion-

An approach of encapsulating the assessment of one's own lawyer's fees within the scope of 9(4) is required to ensure effective remedies for litigants who cannot self-represent (Due to personal skill level or the complexity of proceedings) or are precluded from self-representing (by law), and sits harmoniously with all existing case-law of the ACCC (and the CJEU) and with the goals of Aarhus to ensure that all members of the public have the best opportunity to play their role in the protection of the environment.

[103] The ECHR court also adopts an holistic approach to legal representation costs- See *Stankiewicz v Poland (Application no. 46917/99) 6 April 2006,* Para 74 – "…the applicants' decision to have professional legal representation cannot be said to have been unwarranted" And Para 76. - "Having regard to the foregoing considerations and to the circumstances of the case as a whole, the Court concludes that there has been a violation of Article 6 § 1 of the Convention."

[104] The right to enjoy legal representation (at one's own expense, where the state adopts a neutral referee role in the regulation of lawyers) should be seen as a freestanding right; once a state asserts that only those who need representation (as opposed to those who seek representation out of convenience), are entitled to fair procedures related to fee disputes, the state is immediately revealing its bad faith, and thus its contravention of its *pacta sunt servanda* obligations under Article 26 of the Vienna convention (n92 above). – It has no conceivable good faith defence.

[105] C-147/01 *Weber's Wine World v Austria* CJEU (2 October 2004) at para 44.

9. [To the communicant:] Please describe in more detail the asymmetry you mentioned during the hearing of the communication with regard to appealing decisions of the Law Society.

In making this point I was referring specifically to the right of lawyers to appeal (by way of a statutory appeal process) any decision of the law society where the society makes findings in relation to misconduct for overcharging or demands that fees or a part of fees paid be refunded to a solicitor's client. Solicitors have a statutory right of appeal, while clients enjoy no such right.

Following a complaint in relation to excessive fees (or misconduct), the Society can direct (under Section 9(1) of the Solicitor (Amendment) Act[106]) a bill to be reduced, or can direct the solicitor to refund all or part of any fees already received.

Under, the Solicitor (Amendment) Act[107] (1994);

> Section - 11.—(1) A solicitor in respect of whom a determination or direction has been made or given by the Society under section 8 (1), **9 (1)** or 12 (1) of this Act or who has received a notice for production or delivery of documents from the Society under section 10 (1) of this Act may, within a period of 21 days of the notification of such determination or direction to him, or the receipt of such notice by him, apply to the High Court for an order directing the Society to rescind or to vary such determination or direction, or to vary or withdraw such notice, and on hearing such application the Court may make such order as it thinks fit.

However, **there is no corresponding right of appeal for clients**; there is an *asymmetry* of process.

Further, under Section 9(7) of the Solicitors (Amendment) Act, 1994– "*The Society, with the concurrence of the President of the High Court, may make rules of procedure in relation to complaints received by the Society under this section*." I do not have access to any further information on its guidelines. Having checked the Law Society website (www.lawsociety.ie) (in December 2014), I did not find any guidelines.

If this is still the case, then this represents another imbalance of process; solicitors are more likely to be repeat participants of the complaint process, and will therefore become more familiar with the rules, allowing them to tailor their responses more effectively, than clients lodging complaints.

Under the latest draft of the LSRA, the Bill has now created two separate complaint routes, one for misconduct complaints (S. 60), and one for excessive-fees complaints (S. 61). S. 63 (1) will allow either the lawyer or the client to appeal a misconduct decision or an excessive fees decision.

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[106] S. 9.—(1) Where the Society receive a complaint from a client of a solicitor, or from any person on behalf of such client, that a solicitor has issued a bill of costs that is excessive, in respect of legal services provided or purported to have been provided by that solicitor, the Society, unless they are satisfied that the complaint is frivolous or vexatious, shall investigate the complaint and shall take all appropriate steps to resolve the matter by agreement between the parties concerned and may, if they are satisfied that the bill of costs is excessive, direct the solicitor to comply or to secure compliance with one or both of the following requirements, namely—
(a) a requirement to refund without delay, whether wholly or to any specified extent, any amount already paid by or on behalf of the client in respect of the solicitor's costs in connection with the said legal services;
(b) a requirement to waive, whether wholly or to any specified extent, the right to recover those costs.

[107] This Act is included in case file, as file No 37, in documents supplied with my reply of 17 December 2014.