Comments of Communicant to observations made by the Party Concerned on 16 June 2016, to the answers provided by the Communicant to the questions raised by the Committee.

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)

The Party Concerned has made of number of points which I consider need to be responded to in order to provide clarification of certain issues (I refer to paragraphs of its observations document):

Review Committee composition-

The Party Concerned is correct in pointing out that the Review Committee composes of 3 persons, and not 5 as I had mistakenly stated. Therefore, I correct my reference to *two of five* of the FCRT[1] being lawyers (*at the table*), whereas the correct position is that just one of three will be. This correction is without prejudice to my claims as otherwise made.

In paragraph (4) of the Party Concerned's observations, reference is made to the Complaints Committee. However, the complaints committee has no role in relation to excessive fees adjudication. It only deals with misconduct or inadequate services issues.[2]

The Authority is the only first instance body which adjudicates excessive fees complaints, as distinct from complaints that excessive fees constitute misconduct. - See S. 61(6) LSRA. The Authority as a first instance adjudicator of fees, can sit as a group comprising of its members, with a minimum quorum of five,[3] or it can delegate this function to a sub-committee of five (which can include other persons). The first instance adjudicative body therefore must include 2 lawyers of the 5 (or more) adjudicators.[4]

[The Review Committee [or FCRT] can then hear appeals from determinations of the Authority.]

[1] My reference to the FCRT (Fee complaints review tribunal) was not an error; it was an effort to distinguish the various "hats" to be worn by the Review Committee – one being related to "misconduct" (or inadequate services) reviews, and one being related to "excessive fees" reviews (S.62(1)).

[2] **Authority to refer complaints relating to misconduct to Complaints Committee**
[S] 68. The Authority shall refer a complaint under *section 51(2)* to the Complaints Committee where the client and legal practitioner concerned do not succeed in resolving a matter in accordance with *section 64*.

[3] 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**. (Implying lawyers).

[4] Ibid. (In fact, some of the 5 could also be members of the Complaints Committee, but don't have to be).

Objectively Impartial Tribunal?

The Party Concerned claims that the system of proposed regulation (under the LSRA) is similar to that provided for doctors under the Medical Practitioners Act 2007.[5] A number of features of this Act sets it apart from the LSRA (FCRT) system.-The default position of the Fitness to Practice hearings is open court[6] and it does not adjudicate fee complaints which can be challenged in a regular court applying normal contract law rules. As I stated in the footnotes of my reply (9/6/2016), there is a qualitative difference between determining misconduct issues and market-rate legal fees.[7]

The Party Concerned suggests that a claim of objective bias could be remedied via Judicial Review (para 2 of page 3). No such remedy would likely be available, as the applicant would be taken to have been on notice of the Review Tribunal's appointment system, from the published legislation, and to have thus conceded any right of challenge.

The Party Concerned (at para 9) contends that transparency and impartiality are assured by the formal requirements of the appointment process. While accepting that the persons who may be appointed will be of the highest integrity, formal requirements of independence will not undo the apprehension in the mind of an (not overly sensitive) objective observer, that practising lawyers adjudicating lawyers' fees raises questions of objective bias. Such apprehension can only be amplified by the anonymity and secrecy of the whole adjudicative process.

Costs borne equally-

The Party Concerned (at para 12) comments on the matter of sharing costs equally and states – "The equal sharing of the minimal costs at this informal stage is proper, as it facilitates access to a lawyer where required whilst avoiding the additional adjudicatory process of awards of costs."

To the contrary, if one side incurs representative costs[8], those costs need to be cable of being disputed (otherwise, no effective remedy exists). The goal claimed would have been achieved by applying the American rule, rather than this "experimental rule" which is inequitable.

The 25% Rule-

The Party Concerned (at para 16) refers to a recent judgement (*Sheehan v Corr*) of the Court of Appeal[9] where the court comments on the 25% margin of non-interference. The relevant paragraph is here-

> *75. I also am of the view that, although a 25% margin rule has the attraction of simplicity, the requirements of assessing whether the error amounts to an injustice, requires a more flexible approach based upon an examination of all the circumstances of each case. The larger the fee, the more a court needs to have consideration to all the circumstances of the case. In a case of an instruction fee of €500,000, an error of 10% amounts to €50,000 which could amount to an injustice in a particular case.*

[5] http://www.irishstatutebook.ie/eli/2007/act/25/enacted/en/html
[6] Ibid at Section 65.
[7] – (I did not allege any bias in relation to the complaint committee system as regard misconduct issues, but all details and outcomes should be published.)
[8] Note, that barristers traditionally rely on solicitors to collect their fees.
[9] *Sheehan v Corr* [2016] IECA 168

The court does not overrule the 25% rule, but suggests that a lower margin might be applicable in some cases, perhaps as low as about 10%. In my view, this is not an effective full review, as errors within this variable non-interference margin, will not be remedied, and the appellant risks significant costs in terms of her own lawyer's costs and adverse costs. The Party Concerned's claim that my fears that this non-interference margin will be applied in High Court Reviews of FCRT decisions, are premature, is not credible. The probability that this will happen could have been avoided by the amendment of the legislation, if this was a real concern.

Jurisdictional "Gerrymandering" -

The Party Concerned contends (para 19) that there is no basis to this claim, citing examples where statutory bodies often have appeal systems to the High Court. However, this does not rebut the claim. For example, appeals from the Data Protection Commissioner are by way of a statutory appeal to the Circuit Court.[10] Appeals to the High Court of own-lawyer costs outcomes in the range of say - €5,000 to €50,000 - will almost inevitably involve both disproportionate and prohibitive costs and if one factors in the 25%/10% Rule, the Review system will not equate to a practical remedy.

Vague Estimate-

The Party Concerned (para 20) states – "An estimate of likely fees is required to be provided under [the] section 151 of the Act." However, – S. 151 reads - (a)… **OR**- "(b) if it is not reasonably practicable for the notice to disclose the legal costs at that time, set out the basis on which the legal costs are to be calculated."

Hence, the only requirement is that a basis of how costs will be calculated be provided, which provides clients with insufficient protection (and does not equate to an estimate of likely fees). The penalty for a breach is simply a disciplinary matter. The LCA can still evaluate the appropriate bill "in the interest of justice". There is no requirement that a significant reduction in fees shall be imposed due to a failure to provide an estimate.

Court Access –

The Party Concerned states – (para 22). – "Nothing precludes parties to a legal costs dispute, including a dispute between a lawyer and his/her client, contesting that dispute in court." This comment misses the point which I had made. A legal costs dispute must first be contested via the Taxing Master system, before an appeal can be made to a court. It is evident from a number of cases, that even where clients apply to the court alleging "breach of contract", the courts will direct the matter for taxation in accordance with the 1849 statute.[11] See for example – *Doyle v Buckley* (2013)[12]

> *(Para 6.)- "Such a jurisdiction runs in parallel to the statutory jurisdiction that I have sought to detail as derived from the Act of 1849; running in parallel does not mean that the court should lightly disregard the restrictions or limitations imposed by the statutory code." .*

[10] See Section 26(1)(d) Data Protection Act, 1998.
[11] Solicitor (Ireland) Act, 1849 (This Act was supplied with my clarification of 17 December 2014; File no.21)
[12] *Doyle v Buckley* [2013] IEHC 292

Burden of Proof (in taxation cases of lawyer-own-client costs) – (See; paras 25-29 of observations)

I accept that the jurisprudence on this issue is not consistent; some cases suggest that the burden falls on the lawyer, others indicate otherwise. In other words, the burden can switch.

For example, in *Clarke v Stevens*[13] (Case-file No 15, in my reply of 2 November 2015) - the court said –

> "I should emphasise that there is not, in my view, anything wrong with counsel "putting their best foot forward" and nominating a fee which might go into a negotiation or taxation process which is at or towards the upper end of the range that might be considered reasonable on the understanding that there is likely to be some slippage whether by negotiation or deduction by the Taxing Master." (para 6.5).

This suggests that the burden reverts back to the client to pare down the level of fees sought, using the ubiquitous "comparators".[14]

The court further comments – (at para 7.2) –

> "*It is not for me to decide what, if any, account the Taxing Master should give to the earlier fee notes of counsel in the context of a solicitor and own client taxation*."

This suggests that there is no requirement currently that a quotation offered by a lawyer in advance of a case is evidence of a binding agreement. I understand that this will be remedied post the LSRA.

Non-Interference –

The Party Concerned says that I propose – (Para 43) -"that Article 9(4) must be interpreted to require signatory states to interfere in contractual relations between their citizens and, in effect, to provide legal aid, where required, in environmental cases." This misrepresents my claim. I have not claimed, at any point, that 9(4) requires legal aid. Rather, I contended that it is recognised state practice that litigants can deploy lawyers to represent them before courts or tribunals; in some cases, this will be out of necessity while in other cases, this will be out of convenience. The enforcement of contracts is recognised internationally as falling within the realm of state responsibility, and that where a state abandons its neutral referee role, as a facilitator of a necessary adjudicative system for legal fees disputes, by applying discriminatory and unfair rules to such a necessary adjudicative system, such states are failing to comply with their good faith obligations in international law, and will in certain cases[15] also be interfering in a person's right to an effective remedy related to an environmental claim.

Date: 17 June 2016 Kieran Fitzpatrick

[13] *Clarke v Stevens* [2008] IEHC 203

[14] In *Landers*, the court emphasised the crucial role of comparators – and citing earlier case-law said - " 'However, in the later case of Gallagher (minor) v Stanley (the High Court unreported Kearns J. 23rd March 2001) Kearns J. stated at p. 7 of the typescript of the judgment:- "If, however, the Taxing Master is rejecting comparator cases which have been opened to him as irrelevant, he must at le*a*st provide his reasons for so doing.' "; See- *Landers v Patwell* [2006] IEHC 248 (file enclosed with my clarification of 17 December 2014- file no. 26).

[15] For example, some persons with particular disabilities will need legal representation.