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2nd November 2015

To:
Ms Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
ACCC
Geneva

Your reference: ACCC/2014/C/113

Dear Ms Marshall,

I enclose below my response to Ireland's reply of 29th September 2015.

Yours sincerely,

Kieran Fitzpatrick

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Response to Ireland's reply of 29th September 2015 (to C113)

Date submitted – 2nd November 2015.

I plan to structure my reply under the following six headings (with some subheadings):

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Note- Some web-links are embedded in the footnotes; these are detailed at the end of my reply.

Abbreviations- **SCP**= Special Costs Procedure. **Section 7**= s.7 of Enviro.(Misc.Provisions) Act (2011)

My submission= My communication of 25 /8/2014. **My clarification** = My submission of 17/12/2014.

1. Exhaustion of national remedy –

Ireland relies on this issue in seeking to dismiss my communication. It refers to an ECHR judgement (*LL v UK*) which outlines that a mere suspicion that a remedy may not be effective does not meet the requirement of exhaustion.

The concept of "exhaustion of domestic remedies" originally arose in the context of diplomatic protection, and helped ensure that states were not drawn in to unnecessary international level litigation to resolve private disputes. However, the requirement was always dependent on there being an effective remedy[1]. Prof Duruigbo states[2] – "Undue delay also constitutes a valid ground for exempting a claimant from the duty to exhaust domestic remedies".[3] The barrier that prohibitive costs might present to nationals could well be presented as an obstacle to an "effective remedy". International norms need to be constantly probed for defects, particularly in the field of human rights protection, to ensure that rights don't become "theoretical and illusory".[4] Theodor Meron said [of the rule] that "both its basis and the limits of its applicability are rather vague" and that "The rule must be applied with caution, and only after all the facts of the case have been adequately considered."[5] Environmental protection needs to avoid being excessively constricted by old world concepts of sovereignty and its associated deference to the comity of nations, which the exhaustion requirement, in part, represents, if it is to embrace the fact that there is only one environment which must be shared by all.

The Aarhus convention has identified the issue of prohibitive costs as a defect in environmental rights protection. Applying the requirement of exhaustion of domestic remedies as a filtering mechanism of admissibility (if applied in anything other than a most cautious manner), could establish a "catch 22" on the international stage. The standing of the rule of exhaustion of domestic remedies, as a feature of international law, needs to be challenged, if equal protection of the law, which is another evolving international norm[6] (and to which a higher priority should be attached), is to be given a solid footing. Its continued use as a filtering mechanism, in the face of mounting evidence of prohibitive legal costs in a number of countries (Ireland and the UK, for example), needs to be questioned, particularly in the absence of monitoring mechanisms, or compensatory admittance procedures, to ensure that citizens in various countries (who contribute, via taxes, to the operation of international legal systems) are afforded some parity of protection by international legal instruments.

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[1] See EU Commission's submission regarding the *Sosa* case (*Sosa v Alvarez-Machain*, 542 U.S. 692 (2004)) - " At the same time, to protect against a denial of justice and prevent wasteful resort to ineffective remedies, the doctrine excuses an attempt to exhaust when local redress is unavailable or obviously futile." [Sourced from - Emeka Duruigbo's article – fn.2)]

[2] Emeka Duruigbo , "Exhaustion of Local Remedies in Alien Tort Litigation: Implications for International Human Rights Protection", Fordham International Law Journal [Vol. 29:1245] 1265

[3] Ibid – See: *El Oro Mining and Railway Co*. (Great Britain) v. Mexico, 5 International Arbitration Awards (Perm. Ct. Arb. 1931) 191- (where a court said -"…the holding of a case for nine years without any action whatever *held* undue delay.)

[4] See *Airey v Ireland* (1979) Application no. 6289/73 (ECHR, 09/10/1979), at para 24.

[5] Theodor Meron "The Incidence Of The Rule Of Exhaustion Of Local Remedies' M.J., LI.M., S.J.D., British Year Book of International Law 35 (1959) 83-101

[6] See Article 7 of the UDHR – "All are equal before the law and are entitled without any discrimination to equal protection of the law."

What is the practicality of pursuing a national remedy? –

In my communication, I have alleged several violations of the convention, regarding ineffective implementation, unfair procedures, and non-adherence to open justice principles. This set of challenges would be extremely complex, raising issues of *locus standi*, involving costs protection hearings, and would require that procedures be challenged as to their unconstitutionality before seeking a declaration of non-compliance with the ECHR. Such an approach would burden the Irish courts, which are already under-resourced, and involve a process that was never designed to conduct an audit of systemic compliance with a particular aspect of an international convention (which has not been domesticated). The case of *DMPT v Master Moran* (2015)[7] involved a challenge to a single procedure of the legal costs adjudication system in Ireland. The ten year period between the High Court *leave application* hearing and the Supreme Court hearing in *DMPT* does not give encouragement to a litigant that a multiple challenge of a similar nature would be completed in a timely manner.[8]

Effectiveness of national remedy?

Ireland suggests that EU directives provide a grounding for challenging Ireland's non-compliance with the Aarhus convention. The CJEU held that Article 9(3) of Aarhus does not have direct effect on member states.[9] A 2012 EU booklet on the Aarhus convention states –

"Therefore EU's adherence to the Convention accompanied by a declaration whereby it indicated that "the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9(3) other than the institutions of the EU [...]. Consequently, its MS are responsible for the performance of these obligations at the time of approval of the Convention […]." [10]

This has facilitated a less than comprehensive implementation of the provisions of Aarhus, via EU directives. The relevant EU directives have not transposed the publication requirements of Article 9(4) of Aarhus, which is a significant part of my communication.[11] Also, no provision is made for the implementation of Aarhus costs protection measures in relation to private tort actions which relate to the environment, in EU law - These issues were discussed in the UK Aarhus related case of *Road Sense*.[12]

[7] *DMPT v Master Moran* [2015] IEHC

[8] See also (regarding time delays) - *Doran v Ireland (App. no. 50389/99)* (2003) ECHR 417, 31st October 2003, *McFarlane v Ireland* (App. No 31333/06) (2011) 52 EHRR 20, and *Superwood v Ireland* ECHR (App. no. 7812/04) (2011).

[9] See CJEU case - C-240/09 (preliminary ruling, case from Slovakia) – *"In the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law,…"*

[10] Access to Justice in environmental matters – Aarhus Convention and EU Legislation (see page 6)

[11] Efforts at implementing an EU directive on the costs provisions of Aarhus have run into the sand, though I understand new efforts are being attempted. The EU's efforts have apparently been thwarted, in the past, by the blocking manoeuvres of some unidentified member states.

[12] See extract from *Road Sense* – "Findings of Aarhus Convention Compliance Committee, ACCC/C/2008/33, 24 Sep communicated on 18 Oct 2010, §§ 72-79, 110, 137. The Convention Article 9 (4) 'not prohibitively expensive' condition applies equally to private-on-private proceedings as referred to in Convention Article 9 (3)." - *Road Sense v Scottish Ministers* [2011] CSOH 10

Hence, absent of EU law fully implementing the Aarhus convention, any challenge at a national level would be significantly constrained in its scope.

Exceptions to the local remedies requirement-

Ireland's reliance on ECHR case-law (to dismiss my communication) falters further, if one considers the issue of prohibitive legal costs to be systemic in nature, which I submit, it is.[13] Rainey, Wicks and Ovey argue that an administrative practice can exempt the need to exhaust a national remedy as "proceedings to exhaust national remedies run the risk of tackling only a single instance of a Convention problem, whereas there is a systemic problem."[14] Some of my alleged violations of the Aarhus convention, could be construed as administrative practices, such as the non-publication of court orders in relation to costs in published judgements, as well as the outcomes of legal costs adjudications.

In *Ireland v UK* (1978)[15] the ECHR exempted Ireland from demonstrating that the victims of an administrative practice had exhausted their national remedy. The court at para 9 said- "*In the present case the Commission found, and the Court has endorsed that finding, that the normal domestic remedies rule does not apply to the "existence of a practice". This was crucial to the admissibility of the case because (or so it must be assumed) in many of the concrete instances or examples put forward, those concerned had not, or would turn out not to have, exhausted the legal or administrative remedies available to them in Northern Ireland or elsewhere in the United Kingdom; and therefore, had the claim rested on that basis, the Commission would, under paragraph 3 of Article 27 (art. 27-3) of the Convention, have been obliged to reject it as inadmissible, with the further consequence, that under the Convention as it now stands, it could not have come before the Court."* In light of Ireland's current efforts to reopen that case[16], its claim that my communication regarding Ireland's alleged systemic non-compliance with the Aarhus convention, seems inharmonious. *Burden v UK*[17] is another ECHR case involving an alleged systemic policy of discrimination, where the exhaustion of local remedies was exempted.

Ireland's repeated reference to me not being personally affected by Ireland's non-compliance with the Aarhus convention is not in keeping with the spirit of the convention, which, in its preamble, ascribes to each person a "right" and a "duty" to protect the environment for everyone. [18] I therefore submit that Ireland's request that my communication should be dismissed for non-exhaustion of domestic remedies should not be granted.

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[13] See article by Paul Cullen in *The Irish Times* – 'Legal costs in Ireland are now highest in Western World' -- *"The UK-based Medical Protection Society (MPS), which provides indemnity cover for most Irish consultants, says Irish legal costs are far higher than anywhere else in the western world."*, *3rd January 2015.*

[14] See, Bernadette Rainey, Elizabeth Wicks, and Clare Ovey, *The European Convention On Human Rights,* (Oxford University Press 2014, 6th Edn.) 37

[15] *Ireland v The United Kingdom* (1978) Application no. 5310/71 (ECHR, 18th January 1978)

[16] 'Ireland to clash with UK at human rights court over hooded men judgment' – *The Guardian* (article), 2nd December 2014.

[17] See paras 36 & 44 of *Burden v UK* ECHR, (Appl. No. 13378/05)

[18] "Recognizing also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations…"

2. The "catch 22" , balance of proof and the various uncertainties-

Prohibitive costs - *Commission v Ireland* [2009] (C 427/07)

Firstly, Ireland claims that C 427/07[19] did not establish that costs in relation to environmental actions (under the EU directive) were prohibitively expensive.[20] This must be disputed. The UNECE task force appeared to interpret the judgement as a failure of Ireland to assure litigants that costs are not prohibitive. Its summary stated - "However, on the requirement that the procedures must not be prohibitively expensive, the court found that mere judicial discretion to decline to order the unsuccessful party to pay the costs of the procedure cannot be regarded as valid implementation of the directive."[21] The CJEU in its later commentary in its decision in *Commission v UK* (2014), referred to its prohibitive costs finding in *Commission v Ireland* (2009) in clearer terms.[22]

Ireland's suggestion that the labelling of a Section 7 hearing, as *a motion*, in some way limits the costs that may be awarded, has no basis in law.

"Catch 22" ? –

Secondly, Ireland claims that even if the costs of a Section 7 hearing are prohibitive, this should not be seen to be problematic, as any litigants so burdened could not be construed as being Aarhus convention encompassed litigants.[23] This argument is flawed as it presupposes that a litigant can easily determine that Section 3, of the 2011 Act, applies to her case. This approach ignores the object and purpose of Aarhus to assure litigants (who seek to protect the environment), that they will not be burdened with prohibitive costs.[24] The implied argument that a litigant, who is unsure whether her claim is entitled to an SCP will prevail (under Section 7), is less entitled to costs protection, than a litigant, who is unsure if her main substantive environmental legal action will prevail, is not valid, as the effect on potential litigants is the same – Potential Aarhus encompassed litigants will be deterred. It should also be observed that Article 1 of Aarhus requires that "…each Party shall **guarantee** the rights of … access to justice", and not just hold them out in an illusory fashion.[25]

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[19] *Commission v Ireland* (C-427/07), CJEU, 16th July 2009

[20] See footnote 18 of Ireland's reply – Ireland's claim that it was only the "discretionary practice" which was problematic, is misconceived, as the discretionary practice could not violate the directive except where that discretion could burden an applicant with prohibitive costs. The CJEU clearly found that an applicant could be so burdened.

[21] See commentary of UNECE Task Force on Access to Justice.

[22] *Commission v UK* (C-530/11) CJEU, 13 February 2014

35 *"The Court has thus ruled that a judicial practice under which the courts simply have the power to decline to order an unsuccessful party to pay the costs and can order expenditure incurred by the unsuccessful party to be borne by the other party is, by definition, uncertain and cannot meet the requirements of clarity and precision necessary in order to be regarded as valid implementation of the obligations arising from Articles 3(7) and 4(4) of Directive 2003/35 (see, to this effect, Commission v Ireland, paragraph 94".*

[23] See para 123 of Ireland's reply. - "In the exceptional case hypothesised by the Communicant where a case is determined by the High Court as an Aarhus case, but subsequently determined by the Supreme Court not to be an Aarhus case, the Supreme Court would have determined that the matter was not an environmental matter and thus special costs rules did not apply, neither would Article 9(4) of the Aarhus Convention."

[24] It would defeat the object and purpose of Article 9(4) of Aarhus. See - *Belilos v Switzerland* (Application no. *10328/83*), 29th April 1988.

[25] Supra (*Airey)* fn. 4 - Access to justice needs to be "practical and effective", not "theoretical and illusory" (para 24).

Burden of Proof –

Thirdly, Ireland contends that I have not proven that the costs (that might be imposed on an applicant in a failed Section 7 application) are prohibitively expensive. This argument can be rebutted on a number of grounds: The *McCoy* case at the High Court and its appeal to the Court of Appeal[26], indicates the complexity of issues that a Section 7 hearing can encompass. It is hard to imagine that the costs in such a case would fall below €10,000, which would prove prohibitive for most persons.

However, equally important questions are - what burden should apply and upon whom should the burden of proof lie? I contend that the threshold for establishing that costs are prohibitive should not be based on the usual standard of *beyond the balance of probability*.

A reasonable and well-grounded fear that costs may be prohibitive, should be the maximum threshold of proof demanded to be met, to hold that Article 9(4), is not complied with, particularly in the absence of evidence to the contrary. To suggest that a communicant must prove beyond probability that the costs of a Section 7 hearing would be, in fact, prohibitive, is setting the bar too high. Such a threshold would be difficult to meet, given the secrecy that surrounds legal costs outcomes.

A higher threshold is not in keeping with the CJEU approach, in *Commission v UK* (2014)[27], where it held that the *Corner House* principles, which included measures to circumvent the "catch 22" problem, were insufficient to assure litigants that costs would not be prohibitive with the "requisite clarity and precision". A pattern of supportive case-law could not demonstrate transposition of the directive with sufficient certainty.[28]

In any event, where the state holds the relevant information, and violates open justice principles by failing to publish that information, the burden of proof should be reversed. The reversal of the burden of proof is recognised in many circumstances, where the state has exclusive access to the relevant proof. For example, the UN Human Rights Committee said - "With respect to the question of burden of proof, the Committee has established that such burden cannot rest alone on the author of a communication, especially in view of the fact that the author and the State party do not always have equal access to the evidence and that the State party frequently has sole possession of the relevant information."[29]

In *Altrip v Germany* (2013)[30], the CJEU held that where a procedural violation was found, an applicant should not be burdened with establishing that a different decision would have been made,

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

[27] *Commission v UK* [2014] Case CJEU, on 13th February 2014.

[28] Ibid see para 55 "*In that regard, the mere fact that, in order to determine whether national law meets the objectives of Directive 2003/35,* the Court is obliged to analyse and assess the effect – which is moreover subject to debate – of various decisions of the national courts, and therefore of a body of case-law, whereas European Union law confers on individuals specific rights which would need unequivocal rules in order to be effective, leads to the view that the transposition relied upon by the United Kingdom is in any event not sufficiently clear and precise."

[29] See para 6 of the Report of the OHCHR - 'International Covenant on Civil and Political Rights - Selected Decisions of the Human Rights Committee under the Optional Protocol'.

[30] *Altrip v Germany* CJEU (C-72/12), 7th November 2013 - See para 52 - *"That **shifting of the burden of proof** onto the person bringing the action, for the application of the condition of causality, is capable of making the exercise of the rights conferred on that person by Directive 85/337 **excessively difficult**…".*

had the procedural violation not occurred. A state should not be allowed to escape sanction under one article of a convention, by violating another article of the convention. In *Foster v British Gas* the court held that a state should not be able to rely on its own violation of a directive, to be employed as a defence to another alleged violation of EU law.[31]

If it is found that Ireland's failure to publish (in an accessible form) the outcomes of all adverse legal costs disputes related to environmental cases, is a violation of Article 9(4), then such a finding should reverse the burden of proof, in establishing that costs are prohibitive (or, at least, significantly lower the level of proof required).

Frivolous or Vexatious - A term of art?

Ireland has sought to rely on the commentary of one judge in one case to ground its claim that this term is defined clearly. This analysis is flawed. Before reviewing different decisions, I think it is appropriate to reference the commentary of the CJEU in *Commission v UK* (2014), where the court made clear, that a pattern of case-law was *not sufficiently clear and precise* to assure litigants of the effectiveness of a Cost Protection System.[32] But let's look more closely, in any event:

In the case cited by Ireland, in its reply, the term is used as though the term has a single meaning. This is not usually the case. The term frivolous means only that a case is not of great importance - it does not mean that a case is not well grounded. In fact, a case could be very convincing, yet still be frivolous. The "leave" hearing, for a judicial review, requires that an applicant have "substantial grounds for contending", and the Aarhus convention requires that an applicant has "sufficient interest". Hence, the term "Frivolous" is superfluous.

With regard to "vexatious", Ireland contends that the Aarhus convention should not demand that "vexatious" cases should be entitled to costs protection. Firstly, it is not clear that the term - "sufficient interest" [under Article 9(2) of Aarhus] does not exclude cases that are "insufficiently grounded", which would therefore exclude vexatious cases. Secondly, Ireland should take up such a concern with the MOP, in any event.

It is interesting to note that the case of *Max Schrems v Data Protection Commissioner*[33], was originally dismissed as "frivolous or vexation", by the Office of the DPC. Later, in the High court, It was held, by Hogan J., at para 74.- "*First, while it is clear that Mr. Schrems' complaints are not "frivolous or vexatious" in the ordinary sense of these words, these words* ***bear a different connotation*** *in the context of s. 10(1)(b)(i) of the 1988 Act, at least so far as the present complaint is concerned. Used in this fashion and in this context, these term mean no more than that the Commissioner had concluded that this complaint was unsustainable in law."*

Hence, according to Justice Hogan, the term can mean different things in different contexts. This is why, the term needs to be defined in the 2011 Act, in clear terms. In *McCoy*, the court said that the

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[31] "My Lords, the principle laid down by the European Court of Justice is that the state must not be allowed to take advantage of its own failure to comply with Community law." - *Foster v British Gas* (18 April 1991) [1991] 2 A.C. 306, See also - CJEU related decision - at para 17 –"The Court further held in its judgment in Case 152/84 Marshall, paragraph 49, that where a person is able to rely on a directive as against the State he may do so regardless of the capacity in which the latter is acting, whether as employer or as public authority. In either case **it is necessary to prevent the State from taking advantage of its own failure to comply with Community law**".

[32] Supra (C-530/11) fn. 27 and 28 above.

[33] *Maximilian Schrems v Data Protection Commissioner* [2014] IEHC 310, 18th June 2014.

determination as to whether a case is frivolous or vexatious would appear to lie at the end of proceedings.[34] Ireland has failed to respond to this issue, in its reply, other than to concede that this would be highly unlikely.[35] This is problematic. "Highly unlikely" means "possible"; this fails to assure litigants with *the requisite clarity and precision*, that an SCP will shield them from adverse costs, which would most likely be prohibitive.

A costs "shield" needs to be just that – an impenetrable shield, in order for it to be an effective SCP - otherwise applicants will not be assured with the "requisite clarity and precision".[36]

Any removal of the "shield" needs to be done only by way of a special motion (initiated by the other party) whereby, if a decision (at such a motion hearing) is taken that the removal of the shield is warranted, the protected litigant is allowed to withdraw the case without any adverse costs being awarded against them up to the end of (and inclusive of) such a motion hearing. This system would operate similarly to a "sanctions motion" hearing, which operates in the US under "Rule 11". (Under Rule 11, the litigant is given up to 21 days to withdraw a case, under "safe passage").[37]

Thus, Ireland's *antidote* (the Section 7 – SCP) to the *chilling effect* of prohibitive costs, which most litigants fear, is rendered ineffective by the threat that the court can potentially assess the strength of an applicant's case at the end of proceedings (of the substantive action).

3. Unfair rules regarding lawyer costs disputes

Private Contractual disputes-

Ireland suggests that it has limited obligations to ensure that private contractual disputes between clients and their lawyers should be litigated using fair and equitable procedures.[38] This proposition ignores its constitutional and human rights obligations to ensure that everyone is entitled to a "fair and independent tribunal" to resolve disputes in relation to "civil obligations". This "nothing to do with us" approach harks back to the discredited defence which was proffered by various parties and upheld by some state courts ,in the 1930's civil rights cases, related to restrictive covenants, which allowed private contract discrimination against African-Americans. The US Supreme Court later overruled earlier court decisions in the landmark case of *Shelley v Kraemer*[39], holding that such covenants (which restricted the sale of properties to certain groups, and could be enforced via the

[34] See para 17 of *McCoy* – "*would appear to lie at the conclusion of the case".*
[35] See footnote (42) of Ireland's response.
[36] In this sense, an SCP is an interference in judicial discretion (in relation to legal costs), and a necessary one to assure litigants - Any process of "shield removal" that allows retrospective imposition of costs effectively re-introduces judicial discretion, and must be avoided, even if this sometimes may occasion some injustice to a particular party.
[37] See (2013) letter of the American Bar Association, objecting to proposed changes to Rule11. -
[38] See para 110 of its reply—"This system provides a reasonable regulation of a dispute resolution system provided by the State in respect of private contracts." See also para 54 - "The Communication makes no reference to the nature of this private contractual arrangement…" see para 110 "…the Taxing Master is a limited State service." See also para 5(c) of Ireland's reply.
[39] *Shelley v Kraemer* [1948] 334 US 1 – "It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint."

courts), engaged the state in the enforcement of unfair and discriminatory contracts – The state could not enforce inequalities.

Contrary to Ireland's claim, I submit that that the term "costs" in Article 9(4) encompasses all costs that are inescapable, in the conduct of environmental proceedings. For example, if the state imposed court costs of €20,000, then these costs would be encompassed by the term "procedures" under Article 9(4). Why should any distinction be made between adverse costs and own-lawyer costs, in situations where, the complexity of the proceedings requires that a lawyer be hired to represent an applicant? Such a distinction is not made within the Aarhus convention, or its implementation guide, and would, in any event, defeat the object and purpose of the convention.[40] I submit that the exclusion of own-lawyer costs, from the ambit of Article 9(4), could only apply in cases where an applicant had ample legal knowledge such that a lawyer was a clear luxury.[41] However, as such a scenario is more likely to be the exception, than the rule, Ireland needs to ensure that the procedures involved in the hiring of a lawyer are fair and equitable, and thus that a fees dispute adjudication system is available that applies fair and equitable procedures.[42]

Stamp duty imposition-

Ireland claims that the 8% duty is within its powers, and should not be assessed as to its fairness. This must be disputed. In the US case of *Grosjean v American Press Co*. (1936), the court found a tax to be both discriminatory and a penalization--- "*It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press. The manner of its use in this case is, in itself, suspicious; it is not measured or limited by the volume of advertisements, but by the extent of the circulation of the publication in which the advertisements are carried, with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers*."[43]

The manner in which the stamp duty is imposed is discriminatory. This tax is not imposed in challenges to the fees of any other professionals such as doctors or dentists. It is objectively aimed at deterring clients/litigants from challenging lawyers' excessive fee demands. It is entirely unjust in its effects.[44] If it were aimed at deterring litigation over lawyers' fees alone (which itself, would be constitutionally questionable), then it would apply to the loser of a legal costs dispute, regardless as to whether the loser was a lawyer or a client.

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[40] See findings in C33- 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."

[41] Ibid – See reference to reciprocal costs caps being considered at para 132 – implying own-lawyer costs can be considered in the context of 9(4). – "The Committee also notes the limiting effect of reciprocal cost caps…"

[42] Supra (*Airey*) fn.4 - The ECHR held that Ireland had "positive obligations" to assist litigants in particular circumstances. This implies that the state cannot wash its hands of unfair procedures, applicable to the costs disputes related to necessary legal representation. See para 25 – "*The obligation to secure an effective right of access to the courts falls into this category of duty."* Also, it is not always practical for persons to take time off work to litigate a case, without a lawyer.

[43] *Grosjean v American Press Co*., Inc., (1936) 297 U.S. 233

[44] Irish courts have held statutes to be unconstitutional where it arbitrarily deprives one group of claimants of a benefit, and has referred to such discrimination as a "punishment". – See case- *State (Kenny) v Minister for Social Welfare* [1986] IR 693,696 - Egan J. held – *"… it would be oppressive and unfair".*

The one-sixth rule operates equally unfairly and helps to push challengers into the Alternative Dispute Resolution (ADR) systems run by the Law Society and the Bar Council. These systems operate largely outside of public view, with most outcomes being unpublished. This restricts the ability of the press to conduct its watchdog role in relation to the adjudicative process relating to fees. Democracy in undermined as the public, being deprived of the benefits of open justice, are not empowered with the knowledge which might encourage it to demand reform of the legal costs system.[45]

Ireland claims not to understand why the 8% stamp duty allows lawyers to overcharge by up to 8%, with impunity [See footnote 58 of its reply]. Lest there be any uncertainty, I will clarify why: Let's suppose that a fair fee for a lawyer in a particular case would be deemed to be €100, if determined by a tribunal with fair rules. Let's suppose that both the lawyer and the litigant are omniscient, and hence know in advance what fee a fair tribunal would allow (i.e. €100). In this situation, the lawyer seeking to maximise her self-interest can charge €107. The lawyer will know that she will likely get away with this overcharge. The lawyer will know, that in order for the client to prevent the lawyer from keeping the extra €7, the client will have to pay €8, and that the client will probably not want to pay this penalty. This knowledge can and often is exploited by lawyers to regularly overcharge with impunity. The general non-publication of outcomes also prevents public scrutiny reining in this activity, as lawyers who regularly overcharge, suffer no negative public relations consequences from their unfairness.

Ireland claimed that I provided no evidence to show that the legal costs associated with legal costs adjudication hearings usually amount to about 9% of the costs allowed in the determinations of those hearings [See footnote 57 of its reply]. This was true, but fortuitously, Ireland referenced the proof in its own reply. -The Legal Costs Working Group report of 2005[46] stated that such costs usually come to between 7% and 10% of the legal costs awarded at taxation hearings.[47]

Lawyer-own-client overcharging-

The ability of lawyers to overcharge their own clients is enhanced by the one-way cost shifting system[48] that applies at these hearings[49]: If we refer to the earlier exampled "fair fee" of €100, then it becomes apparent that a lawyer can overcharge by up to, say 18%, with impunity; the lawyer can charge his client €118, with a high degree of probability that the client will not litigate the matter (Due to the one sixth rule (or 18.6%)). If the fee is reduced to €100 at a legal costs adjudication hearing, the client will still have to pay the "costs of the hearing" (i.e. 7 to 10% fees, plus an

[45] As ex-president (US) James Madison wrote: "Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."
[46] See para 55 of Ireland's reply.
[47] See page 45 of the LCWG report – at para 7.11 – "*Taxation is an expensive process…. No reference to the legal costs accountant appears in the legislation or rules relating to taxation, and he or she attends the taxation as agent of the solicitor concerned. A percentage commission — in the range of 7-10% of the solicitor's profit costs (generally, the solicitor's instructions fee) — will, generally, be charged by the legal costs accountant."*
[48] In *Gandee v Freedom* ,7th February (2013) , the SC of Washington State held that an arbitration clause to be unconscionable – "*Because the "loser pays" provision serves to benefit only Freedom and, contrary to the legislature's intent, effectively chills Gandee's ability to bring suit under the CPA, it is one-sided and overly harsh. Therefore, we hold it to be substantively unconscionable."*
[49] One way cost shifting, is mandated by the 1849 Solicitors (Ireland) Act (see footnote 61 of my clarification). Primary legislation prevails over any delegated legislation (or any alleged discretion therein).

application fee, plus the lawyer's travelling expenses), plus the 8% stamp duty. This will (at least) cost the client between €15 and €18. But, one must also bear in mind that the client may well have to hire a legal costs accountant to represent her at the hearing – this will potentially raise the cost by another, say €7, giving a total cost of €22 to €25. Hence, in practice, as lawyers know that clients have no effective remedy to the lawyer's overcharging of up to 18% (approximately) – lawyers can regularly exploit this loophole with impunity.[50] It has to be questioned if the one-sixth rule and the unfair 8% levy (and the general secrecy of the outcomes) would meet with community-wide approval?[51]

4. Open justice issues - Aarhus 9(4) publication requirements-

Legal Professional Privilege:

Ireland seeks to rely on this concept to maintain a cloak of secrecy over documents submitted to legal costs adjudications. It also appears to rely on this misconceived concept to justify non-publication of litigants' names in lawyer-own-client disputes (as proposed in the LSRB 2011). It also refers to the decision of *Lord v Flynn and Moran* (1999).[52] Ireland's defence is flawed on a number of grounds:

The constitution requires that justice be administered in public (Article 34 of Irish Constitution). Any exceptions to this rule must be prescribed by law and must be of a special and limited nature. For example, in *Roe v The Blood Transfusion Service*[53], the court refused anonymity to a person with *Hepatitis C*, in seeking to pursue a tort claim. As I outlined in my clarification, for public scrutiny to be effective (and not just tokenistic), the public need to have access to documents (the bill of costs) before, during and after hearings and must also be able to access the outcomes. Bearing in mind that the public rarely attend legal costs adjudication hearings, in part, because they are separated from the substantive hearings, the mere right of the public to attend such hearings, particularly in the context of the non-accessibility of the bill of costs, does not meet open justice principles, in anything other than a tokenistic manner.

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[50] See the comments of Charles Lysaght in a recent article in *The Irish Times* – 'New legal regulations will not hurt lawyers' fees' - "*To dispute a bill effectively, a legal costs accountant must be employed; that does not come cheap. Unless the bill is reduced by at least 15 per cent, the client is liable also to pay the court fees and the costs incurred by the lawyer defending the bill. This is unjustifiable and has the effect that few clients refer the charges of their lawyers to this adjudication…..Our system protects lawyers who overcharge and, by so doing, inflates the going rate for legal fees.*"

[51] Prof Philip Pettit says: "If policies and processes that breach community-wide standards are not filtered out effectively in a purportedly democratic society, then that is a sign that the system of popular influence is not well designed or is not working effectively. The system may be heavily influenced by special lobbies or by elected representatives serving their own interests. Or it may be warped by restrictions on rights of people to challenge their lawmakers, by unconstrained powers enjoyed by those authorities, or by the absence of an effective and impartial media." – Philip Pettit, *Just Freedom: A moral compass for a complex world* (New York, W.W. Norton & Company, 2014) p.138.

[52] *Patricia Lord v Master Flynn & Master Moran* [1999] 5 JIC 1405. [Case-file is attached to Ireland's reply].

[53] *Roe v The Blood Transfusion Service* [1996] 3 IR 67

AIB v Treacy[54] outlined that documents opened in open court, should be accessible to the public.[55] Any documents which are advanced as evidence in civil proceedings lose their privilege, once disclosed in open court. In *Hannigan v DPP* (2001)[56], Hardiman J. said- "*The general rule is that where privileged material is deployed in court in an interlocutory application, privilege in that and any associated material is waived."*[57] So, only some documents that relate to family law cases or other exceptional *in camera* hearings should be kept secret, at related legal costs hearings.[58] The *AIB* and *Hannigan* decisions, read together, overrule the *ratio* of *Lord*.[59]

The government holds that there is no need to publish outcomes of legal costs adjudications. It maintains that the occasional "precedent setting" publication of outcomes of the Taxation process is sufficient. Ireland admits that only occasional judgements are published by the Courts Service.

The Legal Professions ADR systems relating to own-lawyer fee disputes -

The key issue in relation to my communication, is whether these ADR systems can be construed as "tribunals" in the context of the Aarhus convention which meet the "fair procedures" requirement of Article 9(4) of Aarhus, which can thus be substituted for the state's legal costs adjudication system if it is found that the state's system fails to meet the "fair procedures" requirement of Aarhus 9(4). Ireland's reference to disciplinary procedures has no relevance to this enquiry.

The Bar Council clarifies in its submission, that there is no requirement within its code to publish all outcomes. It appears that only decision of findings of serious misconduct are required to be published. It would be appear to be the case that most fee-complaints to either the Bar Council or the Law Society do not fall into the category of misconduct. I think it is fair to conclude that no public hearings apply to fee dispute hearings, unless misconduct is also involved, in relation to the ADR systems offered by the Legal Professions.

It should also be noted that under the 1994 Solicitors (Amendment) Act, solicitors can appeal to the High Court, but there is no route of appeal for clients.[60] Whereas, clients can withdraw complaints, and lodge for taxation, this cannot be done once the 12 months Statute of Limitations is exhausted.

Hence, neither the BC nor the Law Society excessive fees complaint systems operates in public, nor is there is a requirement to publish the outcomes. These systems do not meet Article 6(1) ECHR open justice requirements, and of course, there is no obligation for ADR systems to operate in public, as long as they are alternative systems.[61] In fairness to the Bar Council, it did protest the

[54] *AIB v Treacy* (No.2)[2013] IEHC 242
[55] According to a newspaper article, the appeal of this case to the Supreme Court was settled/withdrawn.
[56] *Hannigan v DPP* [2001] IESC 10 - See paras 19 and 20.
[57] Ibid
[58] Ireland's reliance on Article 8 ECHR (in para 187 of its reply) is baseless, and it has no application to legal costs between a lawyer and her client in environmental cases. Ireland fails to cite any case in its support.
[59] *Lord* is also out of step with evolving norms in relation to the role of open justice. See- SANRAL v City of Cape Town (20786/14) [2015] ZASCA 58 (30 March 2015)
[60] See - Section 11 (1) of The Solicitors (Amendment) Act, 1994
[61] My critique of the ADR systems is focused on establishing that they do not meet the standard of "tribunal", within the meaning of Article 9(3) of Aarhus, in the context of where the Committee has held previously that where tribunals are substituted for courts – compensatory measures are required.

proposal to "secretise" all legal costs adjudications in the original draft of the LSRB [2011].[62] There is no appeal system, regarding costs alone, from these ADR decisions to the courts, for clients.

Do "fair procedures" require either public hearings or published outcomes or both?

It is interesting to recall the commentary of the ECHR in the case of *Hurter v Switzerland.*[63] - In *Hurter*, the court held that a lawyer was entitled to a public hearing---

31. On the contrary, the "interests of justice "within the meaning of that provision include, in the opinion of the Court, the right of individuals, potential future customers of the applicant to be able to learn both about the veracity of allegations against him, and the merits of the charges by the applicant against the higher court.

32. Such a solution fits perfectly with the main objective of the right to a public hearing which is the protection of individuals against justice in secret, outside of public scrutiny, which is a means for maintaining confidence in the courts.[64]

So, if lawyers are entitled to open justice, surely the public is equally entitled? The ADR systems operated by the self-regulated legal professions, cannot be seen as acceptable alternative systems of justice, which somehow can be substituted for the state's legal costs adjudication system. The lack of open justice applicable to the ADR systems, should be construed as an "unfair procedure", under Article 9(4) of Aarhus, as it does not accord with the constitutional demands of most countries in the world for public hearings, in relation to contractual dispute adjudication.[65]

The requirement for open justice is particularly needed in the area of legal costs as unlike most laws, the outcomes of legal costs rules are not predictable due to the complexity of factors to be considered.

I submit that the "fair procedures" requirement of 9(4), particularly in relation to the use of "tribunals" (which normally require compensatory measures), where such (ADR) tribunal systems neither holds public hearings, nor are required to publish all the outcomes of such hearings, is not met.

[62] See 2011 submission of the BC to government (on LSRB), at para 46 – "T*here does not appear to be any good reason why costs adjudications should not continue to be heard in public."*
[63] See case of *Hurter v Switzerland* (Application no *53146/99*) ECHR, 15 March 2006.
[64] Ib*id* -This is my translation from published version in French language.
[65] In *Mexico v USA*, ICJ (31 March 2004) - Mexico referred to a review process available in the US as - "… standardless, secretive, and immune from judicial oversight".

Why lawyer fee disputes should be in public-

In 1992, a commission set up by the American Bar Association (ABA) produced a report on complaint systems for lawyer services.[66] The commission found--

"The Commission is convinced that secrecy in discipline proceedings continues to be the greatest single source of public distrust of lawyer disciplinary systems. Because it engenders such distrust, secrecy does great harm to the reputation of the profession. The public's expectation of government and especially of judicial proceedings is that they will be open to the public, on the public record, and that the public and media will be able to freely comment on the proceedings. The public does not accept the profession's claims that lawyers' reputations are so fragile that they must be shielded from false complaints by special secret proceedings. The irony that lawyers are protected by secret proceedings while earning their livelihoods in an open system of justice is not lost on the public.[67] On the contrary it is a source of great antipathy toward the profession."[68]

These same principles applicable to disciplinary hearings should be applied to legal costs disputes. Ireland's proposal to "secretise" the outcomes of complainants' names in lawyer-own-client legal costs disputes[69] is an unjustified and unconstitutional restriction of open justice.[70] Even if the publication (of lawyer-own-client costs) is not encompassed under 9(4) of Aarhus (which I do not concede), non-publication defeats the requirement to maintain a transparent framework, under Article 3(1) of Aarhus. It takes an important set of data outside the purview of both the public and the ACCC. Any prohibitive costs that may arise in relation to lawyer-own-client disputes will be kept secret, in relation to environmental legal actions. This defeats the "object and purpose" of the Aarhus convention to insure that the costs of litigation are reviewable and not prohibitive. The public is uneasy with secretive justice systems, which defeats two of the goals of open justice - (a) public scrutiny of decision makers,[71] and (b) the assistance of reform of unfair laws.[72]

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[66] ABA commission report (1992)

[67] Ibid – On the issue of professional legal privilege, the commission stated- "The respondent has no right to assert the complaining client's privilege if the complaining client does not assert it."

[68] The Commission further found - "The arguments in favour of fully open disciplinary systems are supported by hard evidence [from] the years of experience of those states that have them: Oregon, West Virginia and Florida. There is no evidence from those states of any harm to lawyers from making disciplinary records public. The arguments against open disciplinary systems are based on conjecture and emotion, not experience."

[69] Redaction of client's name - See Section 113 (5) c. in the latest draft of the LSRB [2011], as supplied in Ireland's reply.

[70] As I pointed out previously, this redaction will prevent journalists/academics from linking a lawyer-own-client dispute to an environmental related case (as identification of the case would reveal the litigants names), and excludes any analysis as to whether, costs from one's own lawyer, may be prohibitive. It also violates Article 10 ECHR (free speech) rights, as it cannot be justified as "necessary in a democratic society".

[71] Courts have frequently referred to open justice as promoting the confidence of the public in the administration of justice (See para 32 of *Hurter*, for example).The corollary of this principle is that secret justice undermines public confidence.

[72] "Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government." *Thornhill v Alabama* (1940) 310 US 88, 95.

Decisions under Article 9(4) – autonomous interpretation-

Costs claims are usually an integral part of the pleadings – see CJEU cases (e.g. C-530/11). The splicing of the outcome of a decision, into two separate hearings, should not be decisive, as this would be inconsistent with the principle of autonomous interpretation - It would perversely incentivise states (such as the US) who operate a single hearing to determine the substantive matter of a dispute and any legal costs matters, including the quantum of costs, to split hearings, solely to escape the open justice requirement of Article 9(4). This should not be the preferred approach. It would be out of step with the *raison d'être* of the convention, to bring the issue of legal costs, as a barrier to access to justice, among other issues, to public attention. The inclusion of adverse costs within the term "decisions" is also consistent with a legal definition analysis:

Firstly, "decisions", in the context of Article 9.4—(see "decisions under this article") – refers to decisions of courts and independent tribunals –

Dictionary definition - **Decision** = *n.* ***judgment****, decree, or determination of findings of fact and/or of law by a judge, arbitrator, court, governmental agency, or other official tribunal (court). (See: judgment, decree, findings of fact)*[73]

AND secondly, the definition of **judgement** is =
"A *decision by a court or other tribunal that resolves a controversy and* ***determines the rights and obligations of the parties****".*[74]

Thus, a reading of these two terms clarifies that, decisions, where it applies to courts includes the "obligations of the parties". Clearly, adverse legal costs is one of the obligations of the parties, and thus this brings the publication of adverse legal costs within the ambit of 9(4) of the Aarhus convention. Article 9(4) also requires that decisions be in writing and be "publically accessible". The mere announcement of decisions in public does not meet the requirement of publication under Article 9(4), [even though this is sufficient for the ECHR]. The requirement that decisions of courts be publically accessible is not met, as Ireland appears to claim, by the making of court orders available to the parties to the case, on request.

In summary, Article 9(4) requires publication, in an accessible and written form, of adverse legal costs related to environmental litigation, because this fits within a legal definition of the term "decisions", and allowing the splitting of hearings to act as a conduit to bring legal costs outcomes outside of the ambit of 9(4) would defeat the principle of autonomous interpretation applicable to international conventions. The term "decisions under this article" can also be applied to all the related procedures – This encompasses (within the publication requirement of 9(4)) the outcomes of related legal costs disputes between lawyers and their own clients, as this is a necessary purposeful inclusion. Even Ireland appears to concede that *court fees* are included (within the term "procedures"), by putting emphasis on its purported reduction of same.

[73] http://legal-dictionary.thefreedictionary.com/decision
[74] http://legal-dictionary.thefreedictionary.com/judgement

5. Response to Bar Council's submission-

The Bar Council (BC), claims that advertising restrictions do not interfere with price competition, in relation to barristers' fees.[75] This contention is somewhat distracting, in any event, as it ignores that it is the combined effect of *advertising restrictions* and *the prohibition of direct access* which is most undermining of competition. The BC's contention is contradicted by the BC's submission to the 2005 Working Group on Legal Costs. In the BCs submission, at para 2.12, it said:

"2.12 Every client is also in a position to instruct their solicitor to ask any number of barristers to quote for the same work. There is no provision in the Code of Conduct (nor is there any practice) which prevents clients from taking this course. **Surprisingly, it is not a course which has been frequently adopted to date.** However, there is no reason why it could not be adopted and it should be encouraged. It is a sensible and obvious step to take." [76]

David Reynolds, in his article, **explains why it is not surprising** that clients do not invite solicitors to seek multiple quotes ---"Theoretically the solicitor can do this 'shopping around' for the client. But there are three major problems with this. Firstly, the solicitor is not necessarily going to take this 'shopping' seriously enough as her own money is not on the line. Secondly, as this shopping takes the solicitor's time, the solicitor can bill for it; if she does not, she is not incentivised to work thoroughly on it. Thirdly, there can be a fee-splitting practice where solicitor and barrister, while having actually billed the client distinctly, aggregate their actual received fees and split them. Fee-splitting is a form of kickback to the solicitor on the barrister's fees, and actually puts price competition in reverse by perversely incentivising the solicitor to use a more expensive barrister. The barrister's code of practice is totally silent on any such kickbacks; it does not prohibit them or even require that the client be notified of them, indeed it does not mention them at all."[77]

In fact, it appears to have been acknowledged by the BC that advertising cannot enhance competition, without direct access. In an *Irish Times* article, Erin McGuire writes—"With regard to further changes, Bar Council chairman David Barniville does not believe large-scale advertising would increase competition among barristers, as barristers are usually obtained through a solicitor rather than directly by members of the public."[78]

Further, in its 2005 submission to the Competition Authority, the BC conceded the price inflationary effect of the prohibition of direct access- "The Bar Council recognises the potential cost savings and efficiencies which may arise by the provision of advice directly."[79]

The claim at para 7.1 of its reply that I have provided no evidence to back-up my claim (that price competition is hampered by the prohibitions on both *fees advertising* and *direct access)* requires that the whole corpus of competition law and its underpinning principles to be ignored. In fact, the BC's admission that fee competition would facilitate a "race to the bottom" (See para 6.6), emphasises the effectiveness of fee advertising on price competition. However, the supposition that the public would only evaluate the price of a barrister's service in deciding to hire a barrister implies

[75] See para 5.2 of BC reply –"inability to advertise does not have anti-competitive effect…".
[76] Report of BC to the Legal Costs Working Group 2005 -See also para 2.2-- The BC also admits that new barristers have to pay more in fees than they can earn-"During this period, a pupil is unlikely through their work to receive sufficient payment to cover their entry expenses of approximately €1,500 per annum."
[77] David Reynolds, 'Dail and its legal reform bill is still pro-lawyer', Village Magazine, August 2014.
[78] Erin McGuire, 'Is it time to ease the rules and allow lawyers advertise freely', *The Irish Times, 13th October 2014.*
[79] Para 6.2 – BC's submission to the Competition Authority (2006) Report.

that the public is totally gullible and lacks the sophistication to choose a legal adviser wisely.[80] This contention reflects the "we know best" approach of the BC, which I contend is not in keeping with a deliberative democracy.

The BC's claim that advertising restrictions are of a relatively limited nature is not supported by the fact that the EU Commission initiated infringement proceedings against Ireland for alleged violation of the Services Directive in relation to barristers' advertising restrictions, as reported in *The Sunday Times.*[81]

The BC's claim (in para 7.5) that clients can "negotiate on price" and Ireland's contention (at para 40 of its reply) that clients are empowered to negotiate fixed fees is not supported by the analysis of the Competition Authority where it said—at para 2.104 –"The amount of legal services work required in a particular case is often not ascertainable at the outset, and so solicitors and barristers generally don't quote a fixed price."[82]

Further the Competition Authority said – at para 6.51- "Taxation, as it currently operates, does not ensure that the bill the unsuccessful party pays to the other side is fair and reasonable. Furthermore, the system of taxation reinforces anti-competitive behaviour by lawyers."[83]

The anti-competitive effects of the restrictive practices is also evidenced by the abnormally high percentage of barristers who earn above €200,000, compared to other skilled professions, in Ireland. The percentage of lawyers earning more than €200,000 was, at 14%, proportionally greater than the percentage of pharmacists (6%), dentists (11%), medical practitioners (7%) and accountants (1.3%).[84] This contrasts with the US (where lawyers are given broad scope to advertise[85]), where lawyers only feature at number 5 of the top professions, in terms of average earnings, earning just 70% of doctors' average salaries.[86]

In light of the rights quashing effects of prohibitive legal costs in Ireland generally, and the interference that the *prohibition of direct access* has on two persons' right to freely associate, it is difficult to see how such a restriction can reach a threshold of being "necessary in a democratic society".[87] The BC has advanced no evidence to rebut my claim that - its restrictive practices hamper challengers' ability to contest the often excessive fees claimed by some barristers at legal costs adjudications. Fee reductions payable by the government in criminal legal aid has no effect on the fees claimed by barristers at adjudication hearings, and those who regularly pay adverse costs appear to have not noticed any reduction in same.[88]

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[80] See page 378 of *Bates v State Bar Arizona* (1977) 433 US 350, rejecting the idea that fee advertising would reduce the quality of work- "Restraints on advertising, however, are an ineffective way of deterring shoddy work".

[81] Mark Tighe, 'EC proceeds against Ireland over advert restrictions on barristers', 10th August 2014, page 4 of *The Sunday Times* (Irish edition).

[82] See page 28 of the CA report as supplied with my clarification. This also contradicts the claim at para 97 of Ireland's reply that litigants have control over the costs.

[83] Ibid – p139

[84] Ibid – p27, footnote 82.

[85] See - *Bates v State Bar Arizona* (1977) 433 US 350

[86] See money.usnews.com – 'Best paying Jobs'

[87] See Article 22 ICCPR—" No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society…" See also *Shelton v Tucker* (1960) 364 US 479, 487 – "*…right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society*."

[88] Supra (Cullen) fn. 13

6. Other issues raised by Ireland

Scope of Ireland's SCP:

Ireland claims that my reference to deficiencies in the scope of Ireland's SCP was an "aside" that should not be entertained. Of course, the question of scope arose as a result of a question raised by the Committee, to me. I mentioned the [then recent] case of *Waterville*, in my reply. I'll defer to the Committee as to whether it wishes to examine whether the issuance of licences by the ALAB board, is in compliance with Article 9(4). I understand that the Committee can, under its own initiative, if it assesses that there is an issue of systemic non-compliance, decide to analyse a state's compliance in relation to any aspect of the Convention. It is clear from the decision in *Waterville* that Ireland has not provided an SCP for Judicial Review of the ALAB board's decisions. These decisions clearly involve matters that relate to the environment, and also relate to an issue that is prescribed in national law, in the Fisheries (Amendment) Act (1997).[89] A key question which arises is whether the ALAB appeal process applies fair procedures, in compliance with Article 9(4)? [90] I understand that a clarification (pre-admittance) is an integral part of a communication, and a party is not prejudiced by any additional claims, as it has five months to reply.

My response to various points raised by Ireland (in specific paragraphs) -

Re para 3 of Ireland's response – I did not claim that Article 3(3) was breached, at any point.

Re para 4(2) (a) – Ireland claims that I complained of Order 99, subsection 29(13).[91] This is not (exactly) correct. I had complained of a somewhat similar rule in primary legislation, in the 1849 Solicitors (Amendment) Act. The difference between the two rules does not mitigate any unfairness which I had referenced. In fact, the SRC rule is even more unfair. - It allows the Taxing Master to not burden a lawyer with the costs of the hearing, even where the bill is reduced by one sixth. I would also make the point that the SRC rule should be deemed to be voided, as secondary legislation cannot overrule primary legislation.[92]

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[89] Fisheries (Amendment) Act (1997)

[90] At least one procedure of the ALAB appeal process does not comply with fair procedures. The appellant is not allowed (by right) to rebut any submissions made by the licence applicant or third parties (See Section 44(4) of the Fisheries (Amendment) Act, 1997). - A right of rebuttal is a necessary part of fair procedures - See para 202 of - *Fraport v The Philippines* (International Centre for Settlement of Investment Disputes Washington D.C. - Case No. ARB/03/25), Decision issued-23rd December 2010. – "The right to present one's case is also accepted as an essential element of the requirement to afford a fair hearing accorded in the principal human rights instruments. This principle requires both equality of arms and the proper participation of the contending parties in the procedure, these being separate but related fundamental elements of a fair trial. The principle will require the tribunal to afford both parties the opportunity to make submissions where new evidence is received and considered by the tribunal to be relevant to its final deliberations. It is no answer to a failure to accord such a right that both parties were equally disadvantaged."

[91] See SRC rule -"(13) In cases of the taxation of a bill of costs payable out of a fund or estate, or out of the assets of a company in liquidation, or as between solicitor and client, the costs of taxation and the Court fees on the bill of costs and on the certificate of taxation shall be disallowed in case one-sixth of the bill is taxed off unless the Taxing Master shall in his discretion allow the items on special grounds to be stated in his order."

[92] For an example of where secondary legislation could not interfere with primary legislation - see decision in - *Kiernan v Brunkard Electrical* [2011] IEHC 448 – "In construing when the claim was made the Court must have regard to the Act in preference to the Rules made pursuant to the Act."

Re para 5 (b) of Ireland's response - Ireland claims that I claimed that "applicants…. enjoy a right under Article 9(4) never to be exposed to any risk…" This is not substantiated and is incorrect. I accept, that I implied that the costs of a Section 7 hearing (including all appeals of same), needs to fall below €10,000 (at a minimum) in order to be "not prohibitive".

Re para 16 (1) – and the Section 8 requirement to take "judicial notice". - It should be noted that this only applies in interpreting an ambiguity in legislation, and is rarely operable.

Re para 24 – reference is made to CPO's - It should be noted that the two cases cited involved groups of litigants, who could spread the risks of adverse costs, in seeking a CPO.

Re para 25 – I accept that Ireland, by applying the *American Rule* to certain environmental cases, which obtain a Section 7 SCP, provides a level of protection above that which Aarhus requires, provided the various *uncertainties* are not engaged. However, being over-generous in one aspect of implementation does not compensate for the shortcomings in the SCP overall.

Re footnote 16 of Ireland's reply – Ireland failed to elaborate why it believes my use of the terms *American Rule* or *English Rule* is not accurate. Its preferred term- "the costs follow the event" is entirely misleading and camouflages its inherent injustice:

In reality, the costs don't really follow *the event*, because there usually isn't just one *event*. A more accurate representation of the rule could be stated as follows - *The costs follow the last event, where any appeal hearings are involved, unless the last event is an adverse legal costs dispute, in which case, the costs follow the substantive event (i.e. the penultimate event).*

This formulation better exposes the unfairness of the rule. This was referenced by the Legal Costs Working Group report of 2005.[93] Why should a winner of an action at the Circuit Court pay the costs of that hearing, in the event that the other party appeals to the High Court and prevails? This is an unfair and arbitrary punishment, for having prevailed at the 1st instance hearing.[94] Further, Ireland's claim that an indemnity principle applies to legal costs, is not substantiated by any reference to any enactment or any case-law.

Re para 38 – Ireland states - "…Ireland's legal system is a purely internal matter, not itself subject to the Aarhus Convention…". **This is the problem**. Ireland, by failing to domesticate the convention, circumscribes its effectiveness.

Re paras 56 to 60 – Ireland relies on the "no foal no fee" arrangement offered by some lawyers to promote access to justice. It cites a comment of the Legal Costs Working Group where it noted the "absence of a convincing case of change" (para 59 LCWG report).

However, the context of that comment should be looked at more closely. – In para 2.1 of the Report the LCWG, stated - "The Group noted that while most common law jurisdictions operate similarly, some, such as the United States, do not. However, in the absence of a convincing case for change and *given the paucity of research on this topic*, the Group does not recommend abandoning the

[93] See para 8.18 of the report - "Where more than one issue has fallen to be determined at trial, or where a particular issue is no longer pursued or disputed, the matter of liability for costs is rarely split and separately determined in relation to each issue. Similarly, liability for the costs of pre-trial applications reserved for determination following the trial is seldom separately examined and determined from that of liability for the main trial costs."

[94] If the government contends that it would be unfair to burden the successful appellant with the costs, this does not entitle it to attach the costs on the other party. It would be fairer to burden the state with such a levy, as any error would be that of the Circuit Court, for incorrectly deciding the case.

principles underpinning our system of costs recovery." Thus the report acknowledged the lack of research, and presumably was not resourced to conduct its own research on that issue. The presumption it made in favour of the status quo needs to be challenged. I submit that there is now considerable evidence pointing towards the *English Rule* and its associated "no foal no fee" system, as being a barrier to access to justice. Ireland's introduction of the *American Rule* (in the 2011 Act) is an indirect acknowledgement of that proposition.

In general, the "no foal no fee" system allows "judgement proof" litigants to sue middle income litigants (as well as wealthy litigants) with impunity, and allows lawyers to "fee gamble" (with the assistance of the unfair rules which apply to costs disputes) at middle income persons' expense, who stand no chance of recovering any costs from the litigant or the lawyer, in the event that they parry off the suit.[95] The reality is that this system crushes middle income persons' rights of access to courts.[96] The small number of litigants who benefit from the system, in the absence of any legal-aid system for civil actions (outside of family law cases), gives the appearance of assisting *access to justice*. Meanwhile, those disenfranchised by this system stand invisibly outside the doors of the courts and conveniently go ignored, and uncounted in number.

The "no foal no fee" system can only fairly facilitate access to justice, where it is employed as a one-way-cost shifting system in favour of litigants and against state emanations.[97]

Re para 66 – Ireland contends that as the LSRB has not been enacted, the proposed changes therein should not be considered by the Committee. I contend that it forms the general background of Ireland's compliance and it should colour an assessment of Ireland's *bone fides* in relation to its compliance efforts.

Re para 74 - Ireland's claim that an accounting convenience mitigates the obvious unfairness of this rule is bizarre.

Re para 79 – Ireland claims that the adverse legal costs related to Section 7 hearings do not need to be published, where the applicant loses. Ireland's contention here reflects an effort to apply an interpretation of 9(4) which is not in keeping with a *bone fides* implementation of the convention.[98] However, even if one adopted Ireland's interpretation, it should be noted that Ireland has not passed any law mandating publication of the outcomes of costs disputes relating to the winners of Section 7 hearings.

Re para 81 and para 92 (similar points) – Ireland claims that if any of the three uncertainties is engaged, then the court will still have to limit the adverse costs to below a prohibitive level. This argument is not supported by any case-law and, in fact, it is contradicted by the case of *Indaver v ABP*[99] which was referenced in Ireland's clarification of 9/10/2015. Moreover, EU directives only have *direct effect* on state emanations (See *Foster* (C-188/89)), undermining Ireland's defence. In

[95] The fact that this system totally undermines the supposed justification of the *English Rule*, seems to be lost on its advocates.
[96] Some wealthy litigants can gain some compensatory effects from the *English Rule*. As they are generally more frequently engaged in legal actions, "the big stick" which the rules create allows the more financially secure to bounce less financially secure litigants "out of the ring", in close-call disputes.
[97] *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (Biowatch)
[98] Vienna Convention on the Law of Treaties - Article 26 –"Every treaty in force is binding upon the parties to it and must be performed by them in good faith."
[99] *Indaver v ABP (& CHASE)* [2013] IEHC 11

fact, the UK court in *Edwards* refers to an earlier case (Morgan[100]), where the Directive was held not to have had direct effect. A respondent (who is not a state emanation) cannot be adversely affected by a directive which is not transposed into national law. The fact that an applicant is well off, does not undo the need for costs to be not prohibitive, from an objective perspective (as outlined in *Edwards*). *Indaver* shows that an NGO could be burdened with prohibitive costs, if the roles were swopped regarding being an applicant/respondent/intervenor.

Re para 91 – The real issue here is that the term "conduct of proceedings" is not compliant with the *rule of law*. If Ireland has genuine reasons for withdrawing an SCP from an applicant, then it needs to iterate those in legislation, so as to remove the inherent uncertainties. The current approach has the effect of assigning a legislative role to the courts to iterate terms and conditions which breaches the "principles and policy" test for a delegated authority.[101]

Re para 93 – I never suggested that the mere inclusion of an environmental claim should engage an SCP for all other claims. I suggested that a proportionate response in required, which respects the principle of *equality of arms*. The court identified that "proceedings" is not defined. This uncertainty needs to be addressed via legislation to take account of the possible scenarios which may reasonably arise. For example, a proportionate response might allow a related claim to obtain an SCP, where such a claim is linked to other claims that are clearly environmental and well grounded.

Re para 101- It should be pointed out that there is no *indemnity principle* prescribed in Irish law. None of the rules which apply to legal costs adjudication stipulate that the fees sought at a taxation hearings cannot exceed those agreed between the winning client and her lawyer.[102] If this was the case (and I contend that it should be the case), then the "no foal no fee" system could not operate.[103] It is true that any costs obtained at taxation hearings, in excess of fees agreed between the winning litigant and her lawyer, are not given to the winning litigant. In *Clarke v Stevens*[104] the court said at para 6 – "*In substance, in such cases, **an agreement** between counsel and his own client (through the relevant instructing solicitor) as to the amount of counsels' fees **is**, in substance, whatever about theory, **entirely irrelevant**. The client is not going to pay those fees one way or the other. The person who will decide the amount of fees which will ultimately be paid to counsel in the event of the relevant proceedings being successfully concluded is either the party against whom costs are awarded (in the event that agreement can be reached) or the Taxing Master (in the absence of such agreement). It is inevitable, in those circumstances, that there will be a process of negotiation*

[100] See para 8 of Edwards/*Pallikaropoulos* v Environment Agency (No 2) [2013] UKSC, 4th December 2009 - "Although the EIA Directive and the IPPC Directive were not applicable in *Morgan*, both of them are applicable in the case now before us."
[Morgan v Hinton Organics (Wessex) Ltd [2009] EWCA Civ 107]

[101] See *The Irish Times* article –'Law used to ban 'head shop' drug deemed unconstitutional' (11th March 2015) – "Mr Justice Gerard Hogan, on behalf of the Court of Appeal, said section 2(2) of the 1977 Act was repugnant to article 15.2.1 of the Constitution which vests sole exclusive power to make laws in the Oireachtas. The fundamental objective of principles and policies in relation to this constitutional provision is to ensure legislative power is not ceded by the Oireachtas 'under the guise of regulatory power', he said." – See - *Bederev v Ireland* [2015] IECA 38

[102] See article by Prof David Gwynn Morgan in *The Irish Times* 'The life-support case and the Redmond case show the need for fresh legal thinking' – "*This daily rate has to allow for the fact that quite often a lawyer will not be paid, most frequently when there is a "no foal, no fee" agreement and no progeny. So the level of fee agreed has to be sufficient for the income on the sunny days, when a fee is paid, to compensate for the rainy days when there is no fee*." 2nd January 2015.

[103] There are no other service providers who contract to accept payment on the basis that they get paid on the outcome of a chance event, after the service is provided.

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

or, indeed, arbitration (before the Taxing Master) before the amount of fees to be ultimately paid to counsel can be determined."

Re para 103 – Ireland says that taxing masters enquire into costs agreements [arrangements] between a lawyer and her client implying that this assists fairness, with regard to adverse legal costs hearings. This appears to address my claim in my clarification (p.22) that such agreements are "out of bounds" for evidence purposes. However, this does not unwind any such unfairness. The "evidence" which might be introduced by the lawyer (of the prior agreement with her client) is not fully challengeable as her client is not cross-examinable.[105] Any appeal to the High Court may not remedy this deficiency, and may prove prohibitively expensive for most.[106]

Re para 102 – Ireland states - "These three principles (the value of the matter, its importance, and its complexity) are neither the primary determinants of any fee nor the starting point for any assessment." This claim is rejected by the expert analysis of the Competition Authority in its 2006 report. – See para 6.60 – "Despite this statutory power, analysis of data from legal costs accountants - undertaken by Dr. Vincent Hogan, UCD, on behalf of the Competition Authority - indicates that the size of the damages awarded in a particular case is a much more important determinant in the taxation of costs than the actual legal work done on a case."[107] At para 6.63, in citing the Legal Costs Working Group report, the CA report states – "In the High Court, the most important determinant of fees charged in PI cases would seem to be the level of the award made to the plaintiff." And it further adds at para 6.64 – "The evidence suggests that consumers are not always paying solely for work done and as a result may be paying excessive fees to lawyers."

Re para 104 – Ireland states – "Moreover taxation is not a substitute for the responsibility of both the legal professional and the private client to negotiate in advance…" As referenced earlier, the Legal Costs Working Group pointed out that this is not really practical. Additionally, one-off litigants, who will likely make up the majority of environmental litigants, are not aware of the unfair legal costs rules such as the 8% tax, or the one sixth rule. The general failure to publish, in an accessible form, the outcomes of legal costs disputes, feeds into this complacency. There is no requirement in law for lawyers to alert potential clients, when engaging in contracts for legal services, of the unfair terms of contracts which can be deployed by lawyers, should fee disputes arise.

Re para 105 – Ireland states – "Each party can recover costs of representation before the Taxing Master in the event that it is successful." This is incorrect. In party v party legal costs disputes, at taxation hearings, neither side can recover its costs, except perhaps in relation to the court fee which applies to the submittal of the bill for taxation.[108]

In lawyer-own-client disputes, the client can only recover costs, if the bill is reduced by one sixth. Hence, if the client "succeeds" in reducing the bill by one seventh (for example), the client has to pay the costs of his lawyer, and receives none of the costs the client may incur. It should be also noted that there is a further rule that comes to the assistance of lawyers here, but only to the assistance of

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[105] *Kerojärvi v Finland ECHR (Application no. 17506/90)*, 19 July 1995 - See para 34. - "*In the view of the applicant and the Commission, irrespective of whether the documents in question had any bearing on the Supreme Court's rejection of the appeal, it had a duty under Article 6 para. 1 (art. 6-1) to communicate them to him ex officio."*

[106] Any appeal to the High Court restricts the presentment of new evidence to exceptional circumstances. Order 99, Sub. 38 (4) states –"and no further evidence shall be received upon the hearing thereof, unless the Court shall otherwise direct."

[107] See page 141 of the 2006 report.

[108] See Section 27(6), of the Courts and Court Officers Act (1995)

lawyers. This is - 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."[109] This measure allows the lawyer, whose fees are being challenged, to be reimbursed for her travelling expenses to the taxation hearings. No such expenses are awardable in favour of the client. It should also be noted that, barristers (by custom, if not by rule) are not expected to attend taxation hearings, so a solicitor and a legal costs accountant can represent barristers at such hearings, and expect to be paid for their costs.[110]

Re para 106 - Ireland claims – "The Communicant (at page 16 of the Clarification) also makes general assertions about the number of lawyers which will be used in a given case. However, not only is this unsubstantiated by reference to any Irish case…". This is incorrect.[111]

It is quite common for court reports to identify, all the lawyers/agents involved in a case. This should be viewed as an international norm. See *C-530/11* at the CJEU, for example. Contrast this with *McCoy (CA),* where the list of lawyers is not detailed in the published judgement on the Courts Service website. The Master of the High Court outlined, in his published decision, included in my clarification, that the use of four lawyers was the "industry norm". (…*would it be unfair to the defendants to reduce the team below the industry standard of two Senior Counsel, one junior and a senior partner in attendance?)* In the absence of any clear evidence to the contrary, provided by Ireland, the comments of the Master of the High Court should be taken as indicative of the prevailing norm. In *Mooreview*, the defendants argued for the need to employ four lawyers (apparently on the basis that four were used at the HC hearing). However, the Master held that three was sufficient as "these are not full appeals in any real sense".

Re para 107 – The decision cited by Ireland here has no relevance to legal costs related to environmental litigation. It should be noted that the courts usually apply the *American Rule* in family law legal actions, and any adverse costs disputes are exempt from stamp duty.

Re para 111 – Ireland claims that most environmental cases currently taken involve "no foal no fee" agreements, where the one sixth rule is not going to apply. Firstly, it should be noted, that the absence of accessible decisions in relation to costs disputes, related to environmental cases, this claim is not rebuttable. But, if one assumes this claim to be true (which it likely is), it simply points to the fact that most persons of modest wealth are excluded from the courts, due to the threat of prohibitive costs. The "no foal no fee" agreement, by its very nature, can generally only assist "judgement proof" litigants, as persons of modest wealth are at risk, for adverse costs, where no SCP exists for Section 7 hearings.

Re para 117 – I made no claim to the effect that Aarhus 9(4) mandates legal-aid. Nor, did I even mention Article 9(5).

Re para 120 - Ireland appears to conflate certain issues here. The concern, I expressed, in relation to appeals, was primarily related to Section 7 hearings (See page 7 of my clarification).

Re para 129 – Ireland states – "The older approach of using comparators for assessment is no longer the basis of taxation."

[109] Note – This was cited in my 25/8/2014 communication, in footnote 14 on page 5.
[110] While, it could be argued that Order 99, sub (12), contradicts the 1849 Solicitors (Amendment Act), as far as I'm aware, no such challenge has ever been made. Of course, it also breaches "equality before the law".
[111] I cited commentary from *Mooreview/First Active* in my clarification. See para 39 of *Mooreview.*

The above statement provides no evidence to support it, by reference to any change of law or any court decision. It also fails to identify any date, on which this key feature of the legal costs system is supposed to have changed. Any purported change, could have occurred after my communication was either submitted or admitted. I therefore submit, that the clear evidence provided in my clarification should be preferred, unless there is clear evidence provided to the contrary by Ireland.

Further, para 130, refers to "clear statutory obligations" to "only to use comparators at the end of the process as a verification or checking mechanism." However, a search of the Irish statute website for the term "comparator" reveals no Statute or Instrument related to legal costs using this word.[112] The important role that comparators play was also referenced in *Lord.* See also my response above (to para 102 of Ireland's reply), referencing the limited significance of "statutory rules".

Re para 135 (b) - The low number of judges per capita reflects the low level of adjudicative time engaged with court hearings.[113] Ireland has an average level of criminality, of the COE member states, if the number of prisoners is a reasonable measure of this, and thus the amount of judicial time assigned to criminal matters is likely to correspond to a European average. Therefore, the amount of judicial time assigned to civil matters must be proportionately very low, compared to the other 47 COE states. This logically reflects the very low level of legal disputes which are set down for trial in Ireland. The logical explanation for this, is that prohibitive legal costs deter people from litigating generally. Reference to *common law* does not alter that analysis, in Ireland's favour. In fact, a common law system is likely to require more judicial time per case, not less. Reference to the adversarial nature of proceedings is not germane, as all COE states, whether civil law based, or amalgam jurisdictions like Ireland[114], are required to maintain adversarial proceedings, in order to comply with Article 6(1) ECHR, to which all are signatories. Ireland's reference to this analysis as "an aside" is out of place.

Re para 135 (d) – Access to decisions, which relate to the environment, clearly need to be accessible to all members of the public to comply with Article 9(4). Any order given to the parties, is part of the decision of the court (which includes all obligations emanating from that decision). Any such orders need to be published, and made publically accessible.

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Correction: On Page 22 of my clarification, I referenced *James v UK* (1986) as the source of a quotation from an ECHR case. - However, the case should have been referenced as – *Kennedy v UK* (2010) Application no. 26839/05 (ECHR, revised 18/08/2010)

End of reply. (See web-links below)

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Kieran Fitzpatrick – 2nd November 2015

[112] The term is used seven times, but none relate to legal costs. http://www.irishstatutebook.ie/eli/ResultsAll.html?q=comparator&search_type=all&button=Search

[113] Chief Justice Susan Denham said - "This all paints a picture of a Judiciary and Courts system that has been under developed" - From article by Órla Ryan, 'Ireland's judges are struggling to "maintain services to which people have a right"', (thejournal.ie), 6th October 2014.

[114] Despite the emphasis which many commonly place on the differences between so-called common law states and civil law states, there is growing acceptance of the reality of the convergence of these supposedly distinct categorizations.

Web-links of most cases, reports and articles cited are provided below.-

1. ABA Commission Report (1992)
   http://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report.html#13

2. Access to Justice in environmental matters – Aarhus Convention and EU Legislation (see page 6)
   http://ec.europa.eu/environment/legal/law/pdf/Access%20to%20justice%20aarhus.pdf

3. *AIB v Treacy* (No.2)[2013] IEHC 242
   http://www.courts.ie/Judgments.nsf/0/1C9D9254D8B3D10C80257B82003058B8

4. *Airey v Ireland* (1979) App. No. 6289/73, (ECHR, 9 October 1979)
   http://hudoc.echr.coe.int/eng?i=001-57420#{"itemid":["001-57420"]}

5. *Altrip v Germany* CJEU (C-72/12), 7th November 2013 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62012CJ0072

6. Bar Council submission to Competition Authority --
   http://www.tca.ie/images/uploaded/documents/Bar_Council.pdf

7. Bar Council submission (2/2/2005) to Legal Costs Working Group (2005) – See attached file.

8. *Bates v State Bar Arizona* (1977) 433 US 350
   https://supreme.justia.com/cases/federal/us/433/350/case.html or http://caselaw.findlaw.com/us-supreme-court/433/350.html#sthash.azFmSZFM.dpuf

9. *Bederev v Ireland* [2015] IECA 38
   http://www.courts.ie/Judgments.nsf/0/AD1638C8122F48EF80257E04003F88DF

10. *Belilos v Switzerland* (1988) Application no. 10328/83 , (ECHR, 29 April 1988)
    http://hudoc.echr.coe.int/eng#{"appno":["10328/83"]}

11. Bernadette Rainey, Elizabeth Wicks, and Clare Ovey, *The European Convention On Human Rights,* (Oxford University Press 2014, 6th Edn.) 37

12. *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) http://www.saflii.org/za/cases/ZACC/2009/14.html

13. *Burden v UK* ECHR, (Appl. No. 13378/05) http://hudoc.echr.coe.int/eng?i=001-86146

14. Charles Lysaght, 'New legal regulations will not hurt lawyers' fees' *The Irish Times*, 13th September 2015 *http://www.irishtimes.com/opinion/charles-lysaght-new-legal-regulations-will-not-hurt-lawyers-fees-1.2371655*

15. *Clarke v Stevens* [2008] IEHC 203
    http://www.courts.ie/Judgments.nsf/0/A0EB11BA7FECB0D68025749F004D96A8

16. *Commission v Ireland* (C-427/07), CJEU, 16th July 2009-
    http://curia.europa.eu/juris/document/document.jsf?text=&docid=72488&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=150320

17. *Commission v UK* (Case C-530/11), CJEU, on 13th February 2014 http://curia.europa.eu/juris/document/document.jsf?text=&docid=147843&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=239902

18. Comparator-The term is used seven times, but none relate to legal costs. http://www.irishstatutebook.ie/eli/ResultsAll.html?q=comparator&search_type=all&button=Search

19. Competition Authority Report, 2006 http://www.tca.ie/images/uploaded/documents/Solicitors%20and%20barristers%20full%20report.pdf

20. Courts and Court Officers Act (1995) (Section 27(6) http://www.irishstatutebook.ie/eli/1995/act/31/section/27/enacted/en/html .

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24. *Doran v Ireland* [2003] ECHR 417 http://hudoc.echr.coe.int/fre#{"itemid":["001-61277"]}

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30. *Foster v British Gas* [1991] 2 A.C. 306 (18 April 1991), CJEU related decision - http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61989CJ0188

31. *Fraport v The Philippines* (International Centre For Settlement of Investment Disputes Washington D.C.- Case No. ARB/03/25), Decision issued - 23rd December 2010 http://www.italaw.com/sites/default/files/case-documents/ita0341.pdf

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33. *Grosjean v American Press Co.*, Inc. (1936) 297 U.S. 233
https://supreme.justia.com/cases/federal/us/297/233/case.html#250

34. *Hannigan v DPP* [2001] IESC 10
http://www.courts.ie/Judgments.nsf/0/884B808E5E83205180256F19004386FD

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http://hudoc.echr.coe.int/eng#{"display":["0"],"languageisocode":["FRE"],"appno":["53146/99"],"itemid":["001-71697"]}

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http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

37. *Ireland v The United Kingdom* (1978) Application no. 5310/71 (ECHR, 18th January 1978)
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http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2013nov12_larah_l.authcheckdam.pdf#page=1&zoom=auto,0,654 -

43. LSRB [2011], Section 113 (5) c. (See Ireland's reply)

44. Mark Tighe, 'EC proceeds against Ireland over advert restrictions on barristers', 10th August 2014, page 4 of *The Sunday Times* (Irish edition).

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56. Philip Pettit, *Just Freedom: A moral compass for a complex world* (New York, W.W. Norton & Company, 2014) p.138.

57. *Road Sense v Scottish Ministers* [2011] CSOH 10 http://www.bailii.org/scot/cases/ScotCS/2011/2011CSOH10.html

58. *Roe v The Blood Transfusion Service* [1996] 3 IR 67 - This decision is not available online. The *ratio* of the case is outlined in para 54 of *D v Ireland* (2006) [Admissibility of] Application no. 26499/02 (ECHR, 27th June 2006) http://hudoc.echr.coe.int/eng?i=001-76233#{"itemid":["001-76233"]}

59. SANRAL v City of Cape Town (20786/14) [2015] ZASCA 58 (30 March, 2015) http://www.justice.gov.za/sca/judgments/sca_2015/sca2015-058.pdf

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