



Submission to Indecon and the Department of Justice on proposed options for control and reduction of litigation costs

10 November 2022



Coimisiún um
Iomaíocht agus
Cosaint Tomhaltóirí

Competition and
Consumer Protection
Commission

remuneration on a party and party basis². Similar non-binding guidelines for practitioner and client costs³ would also be evaluated by the OLCA and LSRA.

Option 2 – Table of maximum costs prescribed by a new Litigation Costs Committee which could be derogated from in exceptional circumstances: A table of binding maximum legal costs would be developed by an independent body established by statute, the Litigation Costs Committee, with statutory powers to commission or conduct analysis of the costs of conducting civil litigation and compile data thereon and to access data on litigation costs adjudicated upon by the legal costs adjudicators or settled by the insurance industry and the State Claims Agency. A court when making an award of costs can, where exceptional grounds exist, deviate from the binding maximum scale of costs. The table of costs or charges would prescribe a table of maximum legal costs, charges or rates for the various steps or items within proceedings, or categories of proceedings, the amount of the costs allowable for each step or item being subject to variation by reference to factors such as the value of the claim or degree of complexity in the proceedings. However, the independent body's powers would also extend to fixing costs using other criteria such as on the basis of units of time or the use of grades of practitioner or staff. The table of costs would be developed with regard to principles and policies which would be applied to both legal practitioner and client costs and party and party costs. The maximum tariffs can be contracted out of by the legal practitioner and client.

Option 3 – Non-binding guidelines on costs but with significantly enhanced transparency measures and other incentives to reduce costs: Non-binding guidelines on costs would be set as per option 1, for both practitioner and client costs and party and party costs. This option would, however, include significantly enhanced transparency measures and other incentives to reduce costs. Under this alternative option, all clients would be informed in writing of these detailed costs prior to appointment and factors which could lead to any divergence from the guidelines. A written explanation of the reasons for any divergence from the guidelines would also be provided in writing at the time of invoicing of costs if the guidelines were not applied. In addition, legal practices would provide details of all

² As per the Kelly Report, legal costs due by a party to court proceedings to another party, whether on foot of a court's award of the costs or otherwise, are termed 'party and party' costs.

³ As per the Kelly Report, where a litigant retains a practitioner to act for them in litigation or business transacted in a court, the legal costs incurred on behalf of the client are termed solicitor and client costs.

such cases to the OLCA. The OLCA could publish an annual report documenting all such cases.

Option 4 – Binding Maximum Costs but only for Non-Complex Personal Injury Cases below a €30,000 Settlement Level: This option would involve prescribed binding maximum costs for non-complex personal injury cases below a €30,000 settlement level. The intention is that this would be similar to the fixed recoverable costs regime that has been in operation in England and Wales for non-complex personal injuries cases up to an award value of £25,000. The maximum costs would be proportional to the size of the settlement. Enforcement may be overseen by the OLCA and/or the LSRA.

2. Observations relevant to all the Proposed Options

Introduction

This section sets out a number of issues which the CCPC has identified as relevant to the evaluation of all of the Proposed Options, namely, information asymmetry and ‘moral hazard’ in the relationship between legal practitioner and client, the risk of price co-ordination among legal practitioners, consideration of the potential impact on innovation, the role of the OLCA in reducing litigation costs, the need for data collection on legal costs in Ireland and the importance of regular review of the fee scales set by any of the Proposed Options.

Information asymmetry and ‘moral hazard’

The CCPC is of the view that any option will have to address difficulties arising from the information asymmetry which will be present in almost all client-lawyer interactions⁴. The options should seek to address the problem of ‘moral hazard’ whereby the goals of the service provider and the objectives of the client are not fully aligned. As the client is constrained, due to information asymmetry, in expressing the price-quality relationship he or she desires, the service provider may, despite the obligation to act in the best interests of the client, be incentivised to over-supply a service to the financial detriment of the customer⁵. The OECD have noted that price competition may entail the risk of enhancing adverse selection rather than generating efficient outcomes as long as mechanisms to assess and guarantee quality are not in place⁶. The OECD suggests that

⁴ ‘Information asymmetry is a condition in which at least some relevant information is known to some but not all of the parties involved (i.e. lawyers know much more about what exactly needs to be done in a case and the corresponding fee)’, The Competition Authority, Competition in Professional Services, Solicitors and Barristers, December 2006, [Solicitors Cover FINAL \(ccpc.ie\)](https://www.ccpic.ie/Solicitors_Cover_FINAL_(ccpc.ie)). As noted by the OECD, information asymmetry can impact a client’s ability to judge the quality of the service to be acquired, <https://www.oecd.org/regreform/sectors/40080343.pdf>.

⁵ <https://www.oecd.org/regreform/sectors/40080343.pdf>

⁶ Adverse selection arises when one party to a contract can exploit information advantage to the detriment of the other party. The OECD paper is available here: <https://www.oecd.org/regreform/sectors/40080343.pdf>

regulation of legal costs should be done in such a way as to protect consumers from moral hazard, including through maximum costs schedules, through independent regulation of the legal services markets, and by lowering entry barriers.

Price Collusion

Transparency in legal fees can bring many benefits to recipients of legal services, including facilitating shopping around and reducing the information gap between lawyer and client, both of which promote competition among legal service providers and competitiveness in the wider economy. Price transparency also enables parties to litigation to make more informed decisions in the course of the proceedings, as they have greater certainty as to the potential risk associated with an award of costs against them.

However, the CCPC is concerned that the price transparency which may be achieved through implementation of the Proposed Options, may facilitate collusive behaviour in litigation services. Collusive behaviour - including tacit collusion where service providers charge the same price, not by agreement, but by following an established industry practice - is usually easier when participants can pick a simple and clear focal point as the price⁷. The non-binding guidelines or maximum costs tables proposed could both serve as that focal point.

The CCPC cautions that binding maximum costs tables present a greater risk of detriment caused by collusive behaviour than non-binding guidelines, as it follows that price

⁷ This issue was raised by Competition Authority in its 2006 Report on Solicitors and Barristers. Of particular relevance that report also stated that “...setting ranges for the maximum number of hours which may be normally recoverable as party and party costs for particular types of proceedings or steps within proceedings would have the effect of setting a price ceiling. Price ceilings can act as a focal point. The result would be a clustering of legal fees at the ceiling that would not otherwise have been observed, i.e. a large number of lawyers setting their fees at or near the maximum price allowed. In such an instance the benefits of increased transparency would be negated”, [Solicitors Cover FINAL \(ccpc.ie\)](http://www.ccpc.ie/Solicitors-Cover-FINAL).

collusion at a maximum costs level is likely to result in higher prices than price collusion at a guideline level.

Effective levels of competition in litigation services can mitigate the risk of non-binding guidelines or maximum costs tables serving as a focal point, as legal practitioners will be driven by competitive forces within the market to offer legal services at costs other those set out in the non-binding guidelines or maximum cost tables.

In this regard, the CCPC is concerned that the legal services market may not be sufficiently competitive such as to mitigate the risk that the implementation of the Proposed Options will facilitate the co-ordination of prices between service providers⁸. This would result in poorer outcomes for recipients of legal services. It is acknowledged that significant legislative reform of the legal profession has taken place and is ongoing, and that the Irish economy has relatively recently undergone substantial change since the analysis underpinning that concern was conducted in 2006⁹. Therefore, more recent data on the state of competition in the provision of legal services is needed to better understand this risk of price co-ordination. In respect of currently proposed reform measures, the CCPC is hopeful that barriers to entry into the legal professions could be reduced through the establishment of the Legal Practitioners Education and Training Committee¹⁰ and that the impending facilitation of legal partnerships has the potential to introduce a more competitive dynamic into the legal services market¹¹.

In respect of the multi-criteria analysis/cost-benefit analysis to be evaluated on the Proposed Options ('the MCA/CBA'), the CCPC strongly recommends that the existing state of competition and the impact of the Proposed Options on competition should be key criteria of the analysis, with a particular emphasis on understanding whether and to what extent, the implementation of the Proposed Options may result in co-ordination of prices

⁸ This statement aligns with previous CCPC comments regarding the legal services market, for example, see page 2, <https://www.lsr.ie/wp-content/uploads/2020/06/CCPC-Submission.pdf>. It also aligns with the findings of the Competition Authority in its 2006 Report on Solicitors and Barristers, [Solicitors Cover FINAL \(ccpc.ie\)](https://www.cca.ie/publications/Solicitors_Cover_FINAL_ccpc.ie).

⁹ The Competition Authority, Competition in Professional Services, Solicitors and Barristers, December 2006, [Solicitors Cover FINAL \(ccpc.ie\)](https://www.cca.ie/publications/Solicitors_Cover_FINAL_ccpc.ie).

¹⁰ As recommended by the LSRA in 'Setting Standards, Legal Practitioner Education and Training', September 2020, Section-34-ET-Final-Report-to-Minister.pdf (lsra.ie)

¹¹ See part 5 of the Courts and Civil Law (Miscellaneous Provisions) Bill 2022, which amends the Legal Services Regulation Act 2015, <https://www.oireachtas.ie/en/bills/bill/2022/84/>

across the provision of litigation services and identifying measures through which the risk of price co-ordination can be mitigated.

Innovation

The CCPC suggests that innovation is considered for inclusion in the list of matters for evaluation in the MCA/CBA, with a view to analysing whether and in what way each of the Proposed Options might encourage innovation in the provision of legal litigation services.

The OLCA as driver of reduction in legal costs

In light of the potential for the Proposed Options to result in price-coordination with negative impacts for recipients of legal services as set out above, the CCPC contends that further consideration should be given, in advance of the implementation of any of the Proposed Options, to whether the establishment of the OLCA has delivered a reduction in legal costs, acknowledging that such analysis may be relatively preliminary in nature, considering that the OLCA was only established in 2019¹².

This analysis is also relevant to the implementation of the Proposed Options, as it is proposed that decisions of the OLCA are utilised in setting the costs levels in the table of maximum costs and the non-binding guidelines, as discussed further below.

Data regarding legal costs

The CCPC considers that implementation of the Proposed Options does not obviate the need for the collection of comprehensive data on the levels of legal costs in Ireland, which is required in order to ensure policy measures in this area are based on the highest quality evidence. In fact, the CCPC is of the view that collection of such data will be essential to evaluating the success of any implemented Proposed Option and identifying any unintended consequences, such as the facilitation of collusive behaviour noted above¹³.

¹² The CCPC has previously stated in a submission to the Legal Services Regulatory Authority that, notwithstanding its concerns in regard to schedule 1 of the Legal Services Regulation Act 2015 which are discussed further below, the OLCA has the potential to apply downward pressure on costs, See section 4.157, [LSRA-Section-6-Report-to-Oireachtas.pdf](#).

¹³ In this regard the CCPC notes the views of Fenn and Rickman in the context of the fixed recoverable costs regime in the UK, that there is a need to continually monitor and evaluate the regulated fees that are in

This submission is made in light of the limited availability of data on legal costs in Ireland, which the National Competitiveness and Productivity Council, among others¹⁴, has identified as posing a challenge to defining and measuring legal costs¹⁵.

The CCPC accordingly suggests that the LSRA, in line with its function to promote public awareness and disseminate information to the public in respect of legal services, including the cost of such services¹⁶ and its objective to promote competition in the provision of legal services in the State¹⁷, consider establishing a method of tracking the evolution of legal costs over time and issuing annual reports on cost and price trends¹⁸.

Review of guidelines/table of costs

To the extent that it does not already form part of the Proposed Options, the CCPC recommends that regular review of the table of costs or guidelines as to costs should be established by statute, in order to ensure that the cost levels are kept up to date, take account of changing litigation procedure and technological developments and overall represent a fair estimation of legal costs for both recipients of legal services and legal practitioners¹⁹.

place and that empirical legal studies can play an important role in policy making in the area. (2011) Fenn and Rickman, Fixing Lawyers' Fees Ex Ante: A Case Study in Policy and Empirical Legal Studies, Journal of Empirical Legal Studies Volume 8, Issue 3, 533–555, September 2011, [j.1740-1461.2011.01219.x20211220-10137-7rqvg8-libre.pdf](https://doi.org/10.1740-1461.2011.01219.x20211220-10137-7rqvg8-libre.pdf) (d1wqtxts1xzle7.cloudfront.net)

¹⁴ The CCPC notes that the Kelly Report refers in multiple places to the lack of comprehensive data on litigation costs and legal costs, including by citing the Cost of Insurance Working Group, see paragraph 1.2 and 1.3 of Chapter 9. Review of the Administration of Civil Justice Report, October 2020, [gov.ie - Review of the Administration of Civil Justice: Review Group Report \(www.gov.ie\)](https://www.gov.ie/en/publications/publication-files/competitiveness-challenge-2019.pdf)

¹⁵ <https://enterprise.gov.ie/en/publications/publication-files/competitiveness-challenge-2019.pdf>

¹⁶ Section 13(2)(g) of the Legal Services Regulation Act, 2015, [Legal Services Regulation Act 2015, Section 13 \(irishstatutebook.ie\)](https://www.irishstatutebook.ie/eli/2015/act/13/section/13).

¹⁷ Section 13(4)(d) of the Legal Services Regulation Act, 2015, [Legal Services Regulation Act 2015, Section 13 \(irishstatutebook.ie\)](https://www.irishstatutebook.ie/eli/2015/act/13/section/13).

¹⁸ The CCPC has previously made this suggestion in a submission to the LSRA Public Consultation in relation to the review of the Legal Services Regulation Act 2015 under Section 6. See here: [CCPC-Submission.pdf \(lsra.ie\)](https://www.lsr.ie/CCPC-Submission.pdf)

¹⁹ The CCPC notes that legislative precedent for such a matter is set out in Section 143 of the Legal Services Regulation Act 2015, which requires the Superior Courts Rules Committee to review the scales of fees set out in Appendix W to the Rules of the Superior Courts at a minimum once every two years.

3. Observations on the Proposed Options

Option 1 – Status quo with non-binding guidelines

CCPC’s understanding of the substance of this option: The OLCA and LSRA produce non-binding guidelines by reference to individual costs for different legal tasks. The non-binding guidelines could be used to inform the adjudication of contentious claims for costs adjudicated by the OLCA. The guidelines would refer to the criteria set out in Schedule 1 of the LSR Act, to be based on statistical analysis of mean costs allowed in existing decisions of the OLCA for different types of claims by case severity, complexity and value. It would set out a table of individual cost items, take economic conditions into account and ensure no more than a reasonable level of remuneration on a party and party basis. Similar guidelines for practitioner and client costs would also be evaluated by the OLCA and LSRA.

The CCPC’s observations on option 1 are:

- a) To the extent it is proposed that Schedule 1 of the LSR Act be utilised in formulating the non-binding guidelines, Schedule 1 should be amended. Paragraph 2 of Schedule 1 of the LSR Act sets out a number of overlapping factors which could be used as a basis for justifying increases in legal costs rather than providing a basis for reducing the costs. For example, references to overlapping criteria such as ‘complexity’, ‘novelty’ and ‘specialised knowledge’ and to factors that do not relate to the nature or quality of the service provided, such as ‘the value of the property’ are likely to result in higher legal costs than would be justified by reference simply to the work actually and appropriately done²⁰.
- b) There will be significant overlap between the criteria in Schedule 1 of the LSR Act, which refers to ‘complexity’, ‘urgency attached to the matter by the client’ and ‘amount of the money, or the value of the property or interest in the property

²⁰ The CCPC has previously raised this issue in its public submission to the LSRA - Legal Services Regulatory Authority, Public Consultation in relation to the review of the Legal Services Regulation Act 2015 under Section 6. See here: [CCPC-Submission.pdf \(lsra.ie\)](#)

concerned’ and the additional proposed criteria of ‘severity’, ‘complexity’ and ‘value’, with the associated risk of an unjustified increase in costs allowable.

- c) The value of the claim should not be utilised to justify large increases in the cost levels set out in the guidelines, particularly where legal actions of different claim value fall within the same level of court jurisdiction, e.g. District Court or Circuit Court. While the CCPC appreciates that tying value of the claim to legal fees is intended to promote both the predictability of costs and the pursuit of small claims²¹, the CCPC is concerned that setting legal costs by reference to the value of the claim does not represent good value for money for the recipient of legal services, as it is not related to the nature or quality of the work done or costs incurred by the legal practitioner in providing the service and is likely to result in higher legal costs than would be justified by reference simply to the work actually and appropriately required to be performed in order to perform the task listed in the non-binding guidelines.
- d) The proposed option 1, in fixing the guidelines by reference to value of the claim, does not adequately consider claims which do not have a monetary value. Accommodation must be made for such claims to ensure that there is sufficient economic incentive for legal practitioners to provide services related to non-monetary actions.
- e) ‘Complexity’ must be clearly defined, so as to avoid dispute between the parties as to whether a matter is complex and complexity should be assessed based on the additional amount of work appropriately required to be done by a legal practitioner due to the complexity of the matter, such as to avoid incentivising legal practitioners to add complexity to proceedings.
- f) ‘Severity’ should not be used in the determination of legal costs in the non-binding guidelines for two reasons. Firstly, it is not entirely clear what it means or how it can be assessed in a manner which could give parties certainty and predictability at the outset of proceedings. Secondly, it does not represent value for money for

²¹ Hess and Hübner, in Hodges Vogenauer and Tulibacka, *op. cit.*, Chapter 11, page 351, as cited by the Kelly Report.

the client and is likely to result in higher legal costs than if the assessment is made solely on the basis of work required to be done in order to perform the task listed.

It is assumed that 'severity' is intended to be analogous to a consideration of the importance of the case and in that regard, it is noted that the criterion of 'importance of matter to the client' was removed from Schedule 1 of the LSR Act during legislative scrutiny²².

- g) Basing the non-binding guidelines on statistical analysis of mean costs allowed by the OLCA will, unless the OLCA decisions are of themselves resulting in a reduction of legal fees, only formalise the existing level of legal costs and not meet the goal of reducing litigation costs.
- h) There is no valid reason why, in formulating the non-binding guidelines, other sources of data referenced in option 2 for establishing the appropriate level of legal costs, such as data on litigation costs settled by the insurance industry and the State Claims Agency, should not be utilised.
- i) It is the CCPC's understanding of option 1 that the consequence of not adhering to the non-binding guidelines is that the divergence and the level of fees set out in the non-binding guidelines will be considered by the OLCA, should the matter be disputed²³. The CCPC is of the view that this does not constitute a significant change in the existing process regarding cost disputes.
- j) It is unclear to the CCPC how, or indeed if, it is intended for this proposal to operate in respect of costs disputes which are not subject to the jurisdiction of the OLCA, for example Circuit Court and District Court party and party costs²⁴.
- k) Option 1, because of its non-binding nature, may mislead and confuse customers of legal services. This is a particular risk in the context of party and party costs,

²² See Schedule 1, paragraph 2(e) in the Legal Services Regulation Bill 2011, as initiated, <https://data.oireachtas.ie/ie/oireachtas/bill/2011/58/eng/initiated/b5811d.pdf>

²³ In this regard, the CCPC notes that the issue requires clarification, as the view expressed in the minority report set out in the Kelly Report is that this option could leave scope for dispute as to the consequences of not adhering to the guidelines.

²⁴ In this regard, the CCPC notes that the wording of option 1 refers to use of the guidelines by the OLCA and the use of data from existing decisions of the OLCA.

where it is reasonable to assume that both legal practitioners and their clients will utilise the non-binding guidelines to assess their potential exposure on an award of costs, in turn influencing strategic decisions relevant to the litigation proceedings. However, as the guidelines are non-binding, that assessment of potential exposure may be inaccurate, to the detriment of the client.

- I) The additional transparency measures proposed in option 3 significantly enhance option 1 and should be adopted in preference to option 1 as set out here, subject to the CCPC's observations set out below.

Option 2 – Table of maximum costs prescribed by a new Litigation Costs Committee which could be derogated from in exceptional circumstances

CCPC's understanding of the substance of this option

A table of binding maximum legal costs would be developed by an independent body established by statute, the Litigation Costs Committee, with statutory powers to commission or conduct analysis of the costs of conducting civil litigation and compile data thereon and to access data on litigation costs adjudicated upon by the Legal Costs Adjudicators or settled by the insurance industry and the State Claims Agency. A court when making an award of costs can, where exceptional grounds exist, deviate from the binding maximum scale of costs.

The table of costs or charges would prescribe a table of maximum legal costs, charges or rates for the various steps or items within proceedings, or categories of proceedings, the amount of the costs allowable for each step or item being subject to variation by reference to factors such as the value of the claim or degree of complexity in the proceedings. However, the independent body's powers would also extend to fixing costs using other criteria such as on the basis of units of time or the use of grades of practitioner or staff. The table of costs would be developed with regard to principles and policies which would be applied to both legal practitioner and client costs and party and party costs. The maximum tariffs can be contracted out of by the legal practitioner and client.

The CCPC's observations on option 2:

- a) Acknowledging the power of a court to deviate from the table of maximum costs in exceptional circumstances and subject to the comments made in this section regarding the mechanics of option 2, out of all of the Proposed Options, option 2 offers recipients of legal services the highest levels of certainty, predictability and transparency in respect of legal litigation costs, across the broadest range of legal actions and particularly in the context of party and party costs.

However, as identified above, price co-ordination in litigation services could negate those positive outcomes for recipients of legal services. Although applicable across all of the Proposed Options, the CCPC wishes to emphasise again here the importance of its recommendation for competition to be included as a key criterion of the MCA/CBA, and that the LSRA should establish a method of tracking the evolution of legal costs over time. Both recommendations are important factors in mitigating the risk of price coordination.

- b) Having regard to the concerns the CCPC has raised as regards the risk of price coordination, option 2 must be implemented in such a way that it is clear to legal practitioners and clients that any charges stated in the table constitute maximum charges and do not prevent a legal practitioner from offering legal services at a lower rate.
- c) The MCA/CBA should consider the potential for option 2 to negatively impact on the quality of service provided to consumers. For example, maximum fee limits may prevent, for commercial reasons, and/or dis-incentivise legal practitioners from spending additional time or carrying out additional tasks on behalf of a client.

This risk could be mitigated by setting the maximum fee at a level which reasonably remunerates a legal practitioner and including provisions within the regime that the maximum fee scales can be derogated from in exceptional circumstances. In putting forward this point, the CCPC acknowledges that legal practitioners have many reasons to provide a high-quality service, regardless of the fees charged, which further mitigates this risk. This includes, as with any

business, commercial considerations but also includes the desire to avoid a complaint being made to the LSRA which might result in professional sanction, or the imposition of liability on foot of a professional negligence claim.

d) Acknowledging the competence of the European Commission in matters impacting on the internal market of the European Union, it does not appear to the CCPC, having reviewed relevant European jurisprudence²⁵, that the implementation of option 2 would, if designed in accordance with the following principles, result in a breach of EU law relating to competition or freedom to provide services:

- i) The State retains ultimate and effective control over the level at which fee scales are set.
- ii) The legal practitioner and client can contract out of the maximum costs' regime.
- iii) The maximum costs can be derogated from by a court in exceptional circumstances and there is flexibility to allow for proper remuneration for all types of services provided by lawyers.
- iv) The restrictions on competition are limited to what is necessary to ensure the implementation of legitimate objectives.

It is the CCPC's understanding that option 2 will meet the requirements of the first three criteria, however as noted in section 2 of this response, an analysis of the impact of the Proposed Options on competition is necessary to address the fourth criterion.

²⁵ Judgment of 19 February 2002, *Arduino*, C-35/99, EU:C:2002:97; judgement of 5 December 2006, *Cipolla and Others*, C-94/04 and C-202/04, EU:C:2006:758; judgment of 29 March 2011, *Commission v Italy*, C-565/08; judgement of 23 November 2017, *CHEZ Elektro Bulgaria AD*, C-427/16 and C-428/16, EU:C:2017:890.

- e) It should be clarified that the interests of private consumers of legal services, in addition to State bodies, should be represented in the Litigation Costs Committee, the body establishing the maximum fee scales pursuant to option 2²⁶.
- f) To the extent that it is proposed that the table of costs would be set by reference to data on litigation costs adjudicated by the OLCA or settled by the insurance industry and the State Claims Agency, it is unclear to the CCPC how that will result in a reduction in litigation costs and contends that such an approach may only formalise existing levels of legal costs. In addition, it is unclear to the CCPC how exactly the Litigation Costs Committee will utilise the data sourced from their analysis to set down maximum legal costs that meet the goal of reducing litigation costs.

To the extent that it does not form part of the proposal, the CCPC suggests that data on litigation costs to inform the table of maximum costs be drawn from a representative sample across all classes of civil litigation proceedings that can attract legal costs. This is important as, by its nature, that data may be skewed towards certain types of legal proceedings.

- g) The Litigation Costs Committee should be required by statute to consider the work properly required to be done by a legal practitioner to carry out that step or item as its primary consideration in setting the amount of costs allowable²⁷.
- h) In line with the comments made in respect of option 1, the value of the claim should not be utilised to justify large increases in the costs levels set out in the table of costs, particularly where legal actions of different claim value fall within the same level of court jurisdiction, e.g. District Court or Circuit Court.
- i) The CCPC identifies significant risks with the implementation of an approach which sets costs on the basis of units of time. Setting costs on the basis of units of

²⁶ The CCPC notes the suggestion of the minority report annexed to the Kelly Report that the composition of the Litigation Costs Committee includes input 'from consumers of legal services including State bodies', but suggests additional clarity.

²⁷ This submission is in line with previous recommendations of the Competition Authority, that, in setting the amount of costs allowable for each step or item within proceedings, or categories of proceedings, work properly done should be the primary consideration. The Competition Authority, *Competition in Professional Services, Solicitors and Barristers*, December 2006, [Solicitors Cover FINAL \(ccpc.ie\)](https://www.ccpic.ie/Solicitors-Cover-FINAL).

time may incentivise legal practitioners to add complexity to litigation proceedings, which can, in turn, result in lengthier legal proceedings. As the length of proceedings can be a key indicator of litigation costs, with longer proceedings generally attracting higher costs, indirectly incentivising longer proceedings may ultimately work against the goal of this option to reduce litigation costs.

- j) The comments in respect of assessing complexity in option 1 also apply to this option 2, as it is important that complexity is assessed by reference to work appropriately done.
- k) The enhanced transparency measures in option 3 could alternatively/additionally be utilised in respect of the regime of binding maximum costs and for the benefit of recipients of legal services. For example, legal practitioners should also be required to inform their clients, where possible and as soon as possible, that they intend to apply to court for permission to diverge from the maximum table of costs.

Option 3 – Non-binding guidelines on costs but with significantly enhanced transparency measures and other incentives to reduce costs.

CCPC’s understanding of the substance of this option: Non-binding guidelines on costs would be set as per option 1, for both practitioner and client costs and party and party costs. This option would, however, include significantly enhanced transparency measures and other incentives to reduce costs. Under this alternative option, all clients would be informed in writing of these detailed costs prior to appointment and factors which could lead to any divergence from the guidelines. A written explanation of the reasons for any divergence from the guidelines would also be provided in writing at the time of invoicing of costs if the guidelines were not applied. In addition, legal practices would provide details of all such cases to the OLCA. The OLCA could publish an annual report documenting all such cases.

The CCPC’s observations on option 3 are:

- a) The observations set out in respect of option 1 apply equally to option 3.

- b) Additional measures proposed under option 3 are welcome as they improve transparency in litigation costs.
- c) To the extent that it is not already part of the implementation of option 3, section 150 of the LSR Act should be amended such that a legal practitioner is required to inform their client, on receipt of instructions, if the costs or basis for calculation which they have disclosed in accordance with section 150 LSR Act are in excess of the non-binding guidelines. The legal practitioner should also be required to inform the consumer as to the amount of the excess. This disclosure could be included in the notice mandated by section 150(2). This submission is made as it is important that clients are, to the greatest extent possible, made aware that the guidelines have been diverged from before the legal practitioner starts work on the matter, in order to facilitate shopping around for legal services and the promotion of competition in the legal services market. In this regard, the CCPC notes that it is proposed that clients are informed at the time of invoicing costs if the guidelines were not applied and contends that disclosure of this information at the point of invoicing is too late.
- d) The requirement on a legal practitioner to inform a client on receipt of instructions that costs may be in excess of the non-binding guidelines may act as an incentive to price in line with the non-binding guidelines, as legal practitioners do not wish to lose business to other legal practitioners who are offering services at or below the level of the non-binding guidelines. However, this incentive only applies where other legal practitioners are competing on price. Accordingly, this point is related to the recommendation made in section 2 of this response that the existing levels of competition and the impact of the Proposed Options on competition in litigation services should be analysed in the MCA/CBA, with a particular emphasis on understanding whether and to what extent, the implementation of the Proposed Options may result in co-ordination of prices across the provision of litigation services and identifying measures through which the risk of price co-ordination can be mitigated.
- e) In respect of the proposal to create an annual publication which documents all reported divergences from the non-binding guidelines, the CCPC contends:

- i) That insofar as the annual report is intended to be used to help clients to evaluate legal costs, it could constitute a very complex tool to expect consumers without legal technical knowledge to be able to navigate to evaluate reasonable costs of legal services specific to their individual circumstances.
- ii) That the publication and administrative burden associated with an obligation to report a divergence from the non-binding guidelines could act as an incentive for legal practitioners to price in line with the non-binding guidelines. However, as noted in respect of option 1, pricing in line with the non-binding guidelines would only meet the goal of reducing litigation costs in circumstances where the non-binding guidelines set prices below the current levels of costs.
- iii) That publication of divergence from the guidelines has the advantage of allowing the success of the non-binding guidelines to be tracked through the publication of the annual report, assuming a high level of compliance with the requirement to report.
- iv) Legal practitioners may pass the administrative burden of reporting cost divergence on to their clients, thereby increasing costs in those instances.

Option 4 – Binding Maximum Costs but only for Non-Complex Personal Injury Cases below a €30,000 Settlement Level

CCPC's understanding of the substance of this option: This option would involve prescribed binding maximum costs for non-complex personal injury cases below a €30,000 settlement level. The intention is that this would be similar to the fixed recoverable costs regime that has been in operation in England and Wales for non-complex personal injuries cases up to an award value of £25,000. The maximum costs would be proportional to the size of the settlement. Enforcement may be overseen by the OLCA and/or LSRA.

The CCPC's observations on option 4:

- a) It should be clarified before commencing the MCA/CBA, whether option 4 is intended to apply to both legal practitioner and client costs and party and party costs, as the potential for option 4 to meet the goal of reducing litigation costs will be lessened where option 4 does not relate to both types of costs.
- b) The observations in respect of option 2 apply equally to option 4, where relevant²⁸.
- c) Clarity would be welcomed on what 'settlement level' is intended to refer to here. The threshold for application of this option 4 should, in the interests of providing certainty as to costs and risks to parties, be set by reference to the value of the personal injuries claim. In this regard, a distinction is made between using the value of the claim to establish the threshold of application of this option 4, which the CCPC supports, and using the value of the claim to set the level of costs allowable, which the CCPC, as set out in detail above in respect of options 1 and 2, has suggested should not be utilised to justify large increases in the costs levels allowable.

The CCPC understands the term 'settlement level' to apply generally to the amount of damages agreed by parties pursuant to a settlement, however, that interpretation would exclude from the scope of option 4 all cases that do not settle and in addition not meet the goal of increasing predictability and transparency in litigation costs, as parties are unlikely to be in a position to estimate the amount a case will settle for at the outset of proceedings. However, the value of the case will be known at the outset of proceedings.

- d) To the extent it is proposed that maximum costs would be proportional to the size of the settlement, it is unclear how such a proposal would meet the policy objectives of section 149(1)(a) of the LSR Act, which prohibits a legal practitioner from charging legal costs as a proportion of any damages that may be or become payable to his or her client, other than in relation to a recovery of debt or liquidated demand.

²⁸ In this regard, it is noted that it is not proposed in this option 4, that the Litigation Costs Committee establishes the binding maximum costs under this option 4 and so observations in that respect are not relevant to option 4.

- e) Legal costs should be primarily assessed on the basis of work required to be undertaken by the legal practitioner and not primarily on the basis of the size of an award of damages²⁹.
- f) The introduction of binding maximum costs as proposed in this option 4 would allow an evaluation of the application of binding maximum costs in Ireland to be performed in respect of non-complex and lower value actions, which could then be used to inform whether and how binding maximum costs, or indeed other price regulation measures, can be applied to more complex actions, as envisaged by option 2³⁰.
- g) As part of the MCA/CBA, further evidence is needed as to how many cases on average this option 4 would impact, but as a general remark, the CCPC considers that option 4, in solely confining reform measures to non-complex personal injury cases below a €30,000 settlement level, is unlikely to make a significant impact in respect of reducing litigation costs in the State overall, particularly as personal injury cases below a €15,000 claim amount and prosecuted in the District Court are already subject to the District Court scale of costs introduced by S.I. No. 17/2014 District Court (Civil Procedure) Rules 2014.
- m) In respect of the reference in the documents provided to the CCPC to research conducted by Fenn and Rickman in 2019 which showed that the Jackson reforms in England and Wales showed that real recovered base costs have reduced by just under 8% for personal injuries cases, the CCPC notes³¹ that the research excluded claims subject to fixed recoverable costs and that the 8% cost reduction figure refers to personal injury claims over £25,000. Accordingly, that research should

²⁹ This submission is in line with previous recommendations of the Competition Authority, that, in setting the amount of costs allowable for each step or item within proceedings, or categories of proceedings, work properly done should be the primary consideration. The Competition Authority, Competition in Professional Services, Solicitors and Barristers, December 2006, [Solicitors Cover FINAL \(ccpc.ie\)](#).

³⁰ The CCPC notes that this has been the approach to rolling out the fixed recoverable costs regime in the UK, [Extending Fixed Recoverable Costs in Civil Cases: The Government Response \(publishing.service.gov.uk\)](#).

³¹ This submission is put forward on the understanding that the research referenced to is 'The Impact of Legislation on the Outcomes of Civil Litigation: An Empirical Analysis of the Legal Aid Sentencing and Punishment of Offenders Act 2012', dated February 2019, Microsoft Word - MoJ LASPO impact v7.docx (ssrn.com). In particular, attention would be drawn to paragraph 5 which states that the paper focusses on two categories of claim which are not affected by the extension of fixed recoverable costs that took place in England in 2013.

not be cited in an evaluation of the fixed recoverable costs regime for personal injuries cases up to £25,000 in England.

ENDS



Coimisiún um
Iomaíocht agus
Cosaint Tomhaltóirí

Competition and
Consumer Protection
Commission

