



Submission to the Environmental Legal Costs Consultation

The Interdepartmental
Group on Environmental
Legal Costs

30 August 2024



Coimisiún um
Iomaíocht agus
Cosaint Tomhaltóirí

Competition and
Consumer Protection
Commission



Introduction

The Competition and Consumer Protection Commission (CCPC) welcomes the opportunity to respond to the Interdepartmental Group on Environmental Legal Costs Stakeholder Consultation. In this submission, the CCPC will provide its views on the system of regulating costs in judicial review proceedings as proposed in Section 290 of the Planning and Development Bill 2023¹ (the Bill) in areas relevant to its remit.

The CCPC notes that Part 9 of the Bill will introduce several measures to promote access to justice in line with Article 9 of the Aarhus Convention and the principles set out in the European Commission 'Notice on access to justice in environmental matters' ('the Notice')².

The CCPC does not have a remit in relation to planning or environmental law, however its functions include promoting competition and the interests and welfare of consumers. To that end any regulations which might affect the market for legal services in Ireland are of particular interest to the CCPC. It is within this context that we provide the views below.

This submission will first set out a brief account of the CCPC's advocacy priorities in regard to reform of the legal services sector and will then provide views on the implementation of the measures set out in Part 9 of the Bill.

¹ [Planning and Development Bill 2023 – No. 81 of 2023 – Houses of the Oireachtas](#)

² https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2017.275.01.0001.01.ENG&toc=OJ%3AC%3A2017%3A275%3ATOC

Reform of the legal services sector

A well-functioning legal services sector is essential to underpin the rule of law and support a thriving economy. Promoting appropriate pro-competitive regulatory reform of the legal sector can improve access to justice for consumers and firms while reducing the cost of doing business and improving the consumer experience. Despite calls for reform over many decades, it is only in more recent years that there has been meaningful progress in Ireland, while several important pro-competitive reforms remain pending³.

The CCPC has long advocated for greater transparency on the costs of legal services as it is vital that consumers have access to information on price, service, and quality available in the market to make better informed purchasing decisions and to drive competition. The CCPC engaged with the Indecon review of options to control litigation costs commissioned by the Department of Justice on foot of the *Report of the Review of the Administration of Civil Justice in Ireland*⁴. The Indecon report to the Department of Justice subsequently recommended non-binding guidelines with enhanced transparency measures⁵. The CCPC understands that in respect of litigation costs this would require legal practitioners to inform all clients in writing of the detailed costs in the guidelines prior to appointment, and notification of the factors which could lead to any divergence from the guidelines⁶.

The CCPC has also advocated for enhanced transparency and price comparison regarding specific legal services (such as conveyancing⁷) and in relation to the introduction of Legal

³ The Competition Authority, a predecessor agency of the CCPC, published *Solicitors and Barristers*, a market study of the legal services sector, in 2006. The study contained 29 recommendations for reform. Many of the recommendations have been implemented but some remain outstanding. The study is available here: <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/03/Solicitors-and-barristers-full-report.pdf>

⁴ The CCPC's submission is available here: <https://www.ccpc.ie/business/business/research/submissions/ccpc-submission-to-indecon-and-the-department-of-justice-on-proposed-options-for-control-and-reduction-of-litigation-costs/>

⁵ Available here: <https://www.gov.ie/en/publication/af946-civil-litigation-cost-models-a-multi-criteria-impact-evaluation-of-options-for-the-control-of-litigation-costs/>

⁶ Indecon suggest that "The increased transparency would help consumers make more informed decisions when choosing a legal practitioner. It could also potentially facilitate practitioners who wished to gain a competitive advantage by offering costs below the guidelines or by providing certainty that there would be no exceptions to the guideline costs".

⁷ <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2022/02/Submission-to-LSRA-Conveyancing.pdf>

Partnerships and a new Code of Practice for Practising Barristers⁸. The CCPC has recommended that the Legal Services Regulatory Authority (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 services⁹ and its objective to promote competition in the provision of legal services in the State¹⁰, consider establishing a method of tracking the evolution of legal costs over time and issuing annual reports on cost and price trends¹¹. The CCPC recognises that the establishment of such a monitoring system would be resource intensive however it would provide a much greater degree of transparency in the market with significant benefits for consumers of legal services.

The proposed system of regulating costs

The CCPC understands that Section 290 of the Bill will provide for the regulation of the costs to be awarded to a successful applicant in judicial review proceedings under the Aarhus Convention¹² on access to information, public participation in decision-making and access to justice in environmental matters and proceedings in relation to the environment given effect by the Bill under Section 289¹³. The CCPC further understands that Section 290 will regulate the contribution of the Environmental Legal Costs Financial Assistance Mechanism ('the financial assistance mechanism') to the costs of unsuccessful applicants, or partly successful applicants, that qualify for support from the mechanism.

Part 9 of the Bill therefore sets out rules around the bearing of costs for such proceedings, which includes the establishment of the financial assistance mechanism, to contribute towards the costs incurred by applicants in legal proceedings who do not succeed in obtaining relief or succeeds in obtaining relief only in part.

⁸ <https://www.ccpc.ie/business/business/research/submissions/ccpc-submission-to-indecon-and-the-department-of-justice-on-proposed-options-for-control-and-reduction-of-litigation-costs/>

⁹ Section 13(2)(g) of the Legal Services Regulation Act 2015

¹⁰ Section 13(4)(d) of the Legal Services Regulation Act 2015

¹¹ 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, available here:

<https://www.ccpc.ie/business/business/research/submissions/ccpc-submission-to-the-legal-services-regulatory-authority-lsra-third-statement-of-strategy-survey-in-2022/>

¹² [Aarhus - European Commission \(europa.eu\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:3200601000130001-6)

¹³ The CCPC notes that the Aarhus Convention establishes that, in certain cases, natural and legal persons (such as non-governmental organisations) can bring a case to a court or to other impartial bodies in order to allow for the review of acts or omissions of public or private bodies.

The CCPC notes that the European Commission Notice at Section 5 on ‘Costs’¹⁴ sets out relevant content of the Aarhus Convention and criteria from the Court of Justice of the European Union (CJEU) to ensure that the cost of judicial proceedings and litigation costs do not become prohibitively expensive.

Regulating costs

The CCPC understands that Section 290 of the Bill will empower the Minister for the Environment, Climate and Communications to prescribe monetary amounts in relation to the proceedings and the contribution to made by the financial assistance mechanism to the costs of a qualifying applicant that is unsuccessful or partly successful in the proceedings. Section 290 sets out that the Minister will make regulations which may prescribe cost amounts for different types of legal work and processes related to the proceedings. The CCPC further understands that the Interdepartmental Group (IDG) on Environmental Legal Costs has been established to progress the drafting of these regulations and to review in order to mitigate any potential risks arising from the establishment of the financial assistance mechanism.

As noted above, the CCPC advocates for reforms which will improve the transparency of costs in relation to legal services. However, the CCPC considers that careful design of the regulations is required to ensure that they meet the objectives of promoting access to justice while retaining competition between legal practitioners. Setting allowable costs should not result in a price ceiling which becomes a target for legal practitioners to meet thereby artificially raising prices. In this respect the CCPC notes the provisions of Section 298(a) of the Bill which would amend the Legal Services Regulation Act 2015 to provide for a legal practitioner to indicate to a client in a Section 150 notice¹⁵ whether or not they are willing to charge fees to the client only in accordance with the monetary amount standing prescribed under Section 290. This would appear to allow for legal practitioners to charge clients in relevant proceedings below the level of regulated costs under the

¹⁴ [EUR-Lex - 52017XC0818\(02\) - EN - EUR-Lex \(europa.eu\)](#)

¹⁵ Section 150 of the Legal Services Regulation Act 2015 provides for a legal practitioner to provide a notice to a client of legal costs that will be incurred in a matter or, if this not reasonably practical at the time, the basis on which such legal costs will be calculated.

regulations. Such a provision is welcome in so far as it may assist in promoting price competition between legal practitioners in relation to matters under Part 9 of the Bill.

The CCPC notes that the Bill does not explicitly state that costs such as disbursements will be subject to the regulations under Section 290. Disbursements such as the cost of expert witnesses naturally contribute to the cost of proceedings and it is suggested that this be considered further by the IDG¹⁶.

Price transparency

Competition law guards against a range of harms to the competitive process, including the risk of anti-competitive agreements or coordinated practices which result in the fixing of the price of goods or services¹⁷. One means by which to counteract potential coordination on price by lawyers would be to mandate the collection and publication of price data for lawyers that fall within the scope of the regulations as well as those whose clients avail of the financial assistance mechanism¹⁸. This appears to be envisaged in respect of the financial assistance mechanism under section 295(3) of the Bill¹⁹. The CCPC would strongly support such publication being required by future regulations made under Section 295(3). This would be analogous to the data published by the Department of Justice on fees paid to lawyers under the Criminal Legal Aid Scheme but with a further degree of transparency

¹⁶ The CCPC notes in this regard that fees payable to categories of expert witness are subject to regulation under the Criminal Legal Aid Scheme. See here: <https://www.gov.ie/pdf/?file=https://assets.gov.ie/45725/5b347deb068741849e2daae894351e86.pdf#page=1>

¹⁷ Section 4 of the Competition Act 2002, as amended, prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State.

¹⁸ The CCPC notes that Section 291(3) of the Bill states that it “shall be a function of the Minister for the Environment, Climate and Communications to operate and administer the environmental legal costs financial assistance mechanism, without prejudice to the power of that Minister to authorise another person, by regulations under *section 295*, to administer the environmental legal costs financial assistance mechanism for the time being on behalf of that Minister.”

¹⁹ Section 295(3)(c) states that regulations made by the Minister may “prescribe the manner in which, and means by which, payments under the environmental legal costs financial assistance mechanism are made, and the information (including an itemised list of the payments made from the environmental legal costs financial assistance mechanism in respect of particular matters or items) that shall accompany such payments;”. Section 295(3)(f) states that such regulations may “provide for the keeping of records and accounts regarding the operation of the environmental legal costs financial assistance mechanism;”.

applying to the allowable costs paid to lawyers whose clients do not avail of the mechanism²⁰.

In addition, the CCPC notes that Section 295(3)(e) provides for regulations to prescribe requirements applicable to or incumbent upon legal practitioners in order to avail of moneys made available from the financial assistance mechanism. It is recommended that such requirements should include a requirement to publish the prices to be charged to consumers or organisations for representation in relevant proceedings under Part 9 of the Bill. This would ensure that there is enhanced transparency on the level of costs involved in such proceedings which provide price transparency to assist consumers in selecting a solicitor to represent them in relevant proceedings as well as informing any future price monitoring by the LSRA.

Calculating professional fees

The CCPC notes that in making the relevant regulations under Section 290, the Minister for the Environment, Climate and Communications may prescribe different cost amounts for work carried out by different categories of legal practitioners, including by reference to the amount of experience possessed by, and the nature of legal qualification of, the legal practitioner. The CCPC strongly believes that this should not result in higher fees being available to legal practitioners simply based on seniority. The CCPC therefore considers that the IDG should consider drafting criteria for assessing experience and the relevant nature of legal qualifications which should be developed in light of the overall objective to ensure that costs are not prohibitive.

In addition, in the *Solicitors and Barristers* market study, the Competition Authority noted that the Bar Council had in 1990 removed the rule which provided for a junior counsel to receive two-thirds of the senior counsel's fee in a case. Despite this, the practice of junior counsel charging roughly two-thirds of a senior counsel's fees had persisted up to the publication of the market study in 2006²¹. Following engagement with the Competition

²⁰ The CCPC notes that the rates payable under the Criminal Legal Aid Scheme are set by the Minister for Justice, with the consent of the Minister for Public Expenditure and Reform. See also: [www.gov.ie/pdf/?file=https://assets.gov.ie/45725/5b347deb068741849e2daae894351e86.pdf#page=1](https://assets.gov.ie/45725/5b347deb068741849e2daae894351e86.pdf#page=1)

²¹ This was noted in the Report of the Legal Cost Working Group in 2005 which identified the practice as "unacceptable and unfair given its arbitrary nature". See here:

Authority in 2005, the Bar Council amended its Code of Conduct by inserting a new Rule 12(1) which states that barristers' fees are based on commitments undertaken and work done²². However, it is noted that the setting of fees of junior counsel at two-thirds of those paid to senior counsel is still the case for certain actions under the Criminal Legal Aid Scheme²³.

The CCPC recommends that the regulations to be made under Section 290 should avoid setting counsel fees in this manner and should instead provide for a means to remunerate lawyers based on an assessment of work done. For example, if a junior counsel in proceedings were responsible for the majority of the representation of an applicant during proceedings then the fee they receive should reflect the value of their contribution. The CCPC further notes the content of Schedule 1 of the Legal Services Regulation Act 2015 which sets out principles relating to the assessment of legal costs and recommends that the IDG take those criteria into consideration when drafting the regulations²⁴.

The level of cost is a key consideration in ensuring that proceedings are not prohibitive and ensuring value for the public in the operation of the scheme²⁵. It will be important to set costs at a reasonable level which does not inadvertently raise the costs of proceedings.

ENDS

https://unece.org/fileadmin/DAM/env/pp/compliance/C2014-113_Ireland/frCommC113_02.11.2015/F40_Legal_Costs_Working_group_2005.pdf

²² See page 132 here: <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/03/Solicitors-and-barristers-full-report.pdf>

²³ See here:

<https://www.irishstatutebook.ie/eli/1978/si/33/made/en/print#:~:text=These%20Regulations%20provide%20for%20changes,appeals%20to%20the%20Circuit%20Court>. See also: <https://www.gov.ie/pdf/?file=https://assets.gov.ie/45725/5b347deb068741849e2daae894351e86.pdf#page=1>

²⁴ Schedule 1 sets out principles and matters to be applied by the Office of the Legal Costs Adjudicator when adjudicating on a bill of costs. Matters for consideration as to whether a bill of costs is reasonable include the complexity and novelty of the issues involved in the legal work; the skill or specialised knowledge relevant to the matter which the legal practitioner has applied to the matter, and the time and labour that the legal practitioner has reasonably expended on the matter.

²⁵ The CCPC notes in this regard the analysis of Indecon in its evaluation of options to control litigation costs, that if cost levels were set at average cost elements, costs would rise for most litigants. See page xvii: <https://www.gov.ie/en/publication/af946-civil-litigation-cost-models-a-multi-criteria-impact-evaluation-of-options-for-the-control-of-litigation-costs/>

