

Submission to the Review of the Administration of Civil Justice

Submission on behalf of:

The Department of Business, Enterprise, and Innovation

IDA Ireland

Enterprise Ireland



**An Roinn Gnó,
Fiontar agus Nuálaíochta**
Department of Business,
Enterprise and Innovation



June 2018

The Department of Business, Enterprise and Innovation (DBEI) seeks to promote measures that improve the ease of doing business in Ireland, in order to support a vibrant economy and facilitate enterprises to create employment. The accessibility, usability and efficiency of the civil justice system is one aspect of the state's function that has implications for the ease of doing business in this jurisdiction. Whether to facilitate the enforcement of contracts, enable the planning process, or protect the rights of employees, there are countless ways in which the justice system is regularly required to support an open, equitable and reliable business environment. Ireland's common-law based justice system has proved itself to be attractive to both indigenous enterprise creation and investment from foreign enterprises looking to Ireland as a place of business; it has been part of this State's success in promoting itself as an open, reliable and easily understood operating environment for enterprise.

DBEI has responsibility for two agencies which promote employment in the State and their observations are incorporated in this submission, reflecting feedback received from Irish and foreign owned enterprises operating in Ireland on their experiences of interacting with the justice system. IDA Ireland is Ireland's inward investment promotion agency, operating with the primary objective of encouraging investment into the country by foreign-owned companies. Many of their client companies will have reason to rely on the Irish court system in some capacity, and IDA Ireland promotes Ireland as having a robust, reliable legal system in which to locate and operate a multinational business. Enterprise Ireland supports and promotes Ireland's indigenous exporting companies, and is responsible for the development and growth of Irish enterprises in overseas markets. In this way, their purpose is to support sustainable economic growth, regional development and secure employment in the State.

The Impact of the Administration of Civil Justice on Ireland's Business Environment

The administration of the justice system, and in particular its efficiency, transparency of process and timeliness in decision making, has significant implications for enterprises and employees who rely on its functions. The practicalities of using the courts, engaging with their administrative processes, and interacting with the justice system more broadly, is therefore integral to the business environment and relevant to the work of this Department. We welcome the work of the Review of Administration of Civil Justice, and support its objectives of improving access to civil justice in the State, promoting early resolution of disputes, reducing the cost of litigation, creating a more responsive and proportionate system and ensuring better outcomes for court users.

Notwithstanding that the Irish justice system is broadly well-regarded, it is also clear that the administration of justice, and the amount of time and resources required of those seeking to use it can be unduly burdensome. A recent demonstration of this perception can be found in the World Bank's 'Doing Business 2018' profile of Ireland (which can be accessed here: <http://www.doingbusiness.org/~media/WBG/DoingBusiness/Documents/Profiles/Country/IRL.pdf>) found that while Ireland ranked amongst the most favourable environments in which to do business, on measures assessing the enforcement of contracts the Irish legal process costs more and takes a longer time than the average for peer OECD countries, with whom we are competing for inward investment. Indicators used by the study included time taken to enforce a contract in days, cost as a

percentage of value of claim including attorney, court and enforcement fees, and the quality of judicial processes. In the World Bank report's assessment, the judicial process performs well in terms of court structure and proceedings but scores very poorly on case management and court automation. Case management deficiencies identified include having no maximum to the number of adjournments sought, the lack of electronic case management tools and the lack of a pretrial conference for case management. The report also criticises the absence of an electronic complaint and claims filing systems for courts, the lack of electronic payment facilities for courts and the lack of electronic publication of judgements rendered in commercial cases at all court levels.

Ease of access to the Irish courts for Small and Medium Enterprises (SMEs) is part of a healthy business environment. As many SMEs are operating with significant resource constraints and tight operational cash-flow, the judicial system must ensure that recourse to the courts does not threaten the viability of these entities. Delays on payments received for costs awarded through the courts can have a disproportionately negative impact on SMEs. We have received anecdotal reports of delays of payment of up to eighteen months, this could pose substantial risks to an enterprise's operations. SMEs that are involved in legal cases are often unable to access finance from banks during the court process, as the legal outcome is unknown. The length of commercial cases, and a lack of visibility on the likely timeframe involved, can disincentivise small companies from availing of the judicial system, and undermine the equitable and robust legal environment for SMEs in Ireland. Further, the company examinership mechanism is followed by firms seeking to rescue and return to health, these are ailing but potentially viable companies. There is a perception that the costs of examinership can be too expensive for small companies, with professional fees running into tens of thousands of euros.

The ability of companies to grow is linked strongly to their ability to exploit the value represented by their intellectual assets including registered Intellectual Property (IP) like patents, trademarks, designs and unregistered assets like copyright, trade secrets etc. All companies prefer to locate their IP in a jurisdiction where there is strong legal certainty that they can be defended; it is fundamental to deciding where companies base innovative business activity. Feedback received from enterprises indicates that Ireland is an expensive jurisdiction in which to enforce IP rights and this may be a barrier to SMEs seeking such protections. The Intellectual Property Enterprise Court (formerly County patent courts) in the UK may serve as an example that could be considered in Ireland, building on the progress made following the introduction of the commercial court.

In order to maintain Ireland's competitiveness as a place to do business, invest and employ people, it is important that the State takes action to address inefficiencies, prohibitive costs or out-of-date processes in the areas identified.

Improving the Efficiency of the Court System

It is the view of this Department, and the development agencies, that in many instances the court system could operate in a more efficient and timely manner when dealing with certain types of cases, and in particular those that deal with the planning process, the delivery of strategic infrastructure and some commercial cases. There are a number of changes that could be made to substantially improve the efficiency of the courts system.

DBEI, Enterprise Ireland and IDA Ireland would strongly encourage the Review of Administration of Civil Justice to consider what improvements to efficiency could be achieved by implementing changes

to court procedures and improving case management. We would highlight the following practices for strong consideration:

- Using written or ‘document only’ reviews, rather than hearings in commercial and planning cases where appropriate. Order 84 of the Rules of the Superior Court enables a judge to exercise discretion as to whether an oral hearing is necessary or not in judicial review proceedings. Proceedings could be expedited considerably if it was deemed that oral hearings are not required in many cases where the matters to be addressed are procedural in nature. While state bodies can already indicate their preference for written submissions only to the judge in question in cases of judicial review, further use and facilitation of this through digital platforms could greatly expedite decision making. The Review should consider whether ‘written only’ procedures could be used to a greater extent in other areas, such as commercial cases.
- Provide for more definitive requirements on judges to deliver their judgements in reasonable timeframes. This should include early guidance to all parties on case management, likely timelines and transparency to the greatest extent possible as to the likely scheduling and duration of proceedings. Judges should be directed to adhere strictly to deadlines, and direct all parties to adhere to deadlines for submission etc also, with little tolerance for extensions. There should be a defined and enforced limit on the number of adjournments permitted in a case. Enterprises and investors value highly the increased level of certainty such a measure would provide. Visibility on timeframes for the administration of justice are of key concern for many enterprises looking to invest or expand in the State.
- Strengthen the pre-hearing process by narrowing down the issues under discussion to those that are most relevant in order to make earlier progress where possible.
- Assess whether there is scope to deploy specialist judges in technical areas of high demand. We welcome that a dedicated Judge, Judge Barniville, will now have the capacity to determine at a specified time each week whether leave to apply for judicial review in strategic infrastructure development cases should be granted. This should help to speed up the process somewhat. However perhaps more transformative changes could bring further efficiencies, such as enabling and resourcing a specialist Planning and Environmental law division in the High Court with specialist Judges to hear judicial reviews of environmental and planning related decisions. We would acknowledge that there are resource constraints, and that further appointments of judges are required in both the High Court and Supreme Court.
- Introducing the use of electronic methods of communications including e-litigation and all possibilities for making court documents, including complaints, claims, submissions and pleadings, available or accessible digitally via the internet to the greatest extent possible. With court documentation including judgements, case management documents, and reports such as age of pending cases reports and single-case progress reports, being available digitally, online as appropriate.
- Importantly, where procedures to allow more efficient decision making by courts are introduced and successful, for example accelerated judicial review processes or any of the suggestions made above, these should be replicated in any applicable court where an appeal can be lodged – this is necessary in order to prevent simply shifting the ‘bottleneck’ to the appeals process from the decision-making process.

Improving the Process for Judicial Review of Planning Decisions

We would highlight, in particular, delays in the processing of judicial reviews of planning cases. While acknowledging that the Practice Direction of the President of the High Court in February 2018 may help speed up judicial reviews in cases of Strategic Infrastructure Development, there are outstanding issues that need to be addressed. We are aware that some of these pertain to legislative constraints, however as these have direct consequences for the administration of the justice system it is important that they are highlighted in this context. The usability and efficiency of Ireland's planning system, and its judicial aspects, have become an area of reputational risk for the state in its efforts to attract significant overseas investors and employers to expand their operations in the jurisdiction, with recent high-profile cases garnering much international attention. The process for judicial review of planning decisions can be conducted in a more efficient manner, while also emphasising the continuing importance of public and community consultation processes.

- As already stated, appointing more judges, while also implementing procedural reform, is required. The Practice Direction of the President of the High Court in February 2018 should help speed up judicial reviews in cases of Strategic Infrastructure Development. Enabling a specialist Planning and Environmental law division in the High Court and reducing delays in hearing appeals, would be likely to provide a better and broader solution.
- At present the Planning and Development Act 2000 requires that a planning judicial review be brought within 8 weeks. This period could be shortened under legislation, for example to four weeks, while preserving judicial discretion to extend that time limit in certain circumstances.
- The rules concerning who may challenge a planning decision could be tightened in a number of ways without compromising the 'Aarhus Convention':
 - a. At present persons who had not participated in the planning process can bring an application for judicial review. In respect of individual litigants (as distinct from environmental associations) there should be a requirement that a person must have previously participated in the planning process before they can seek a judicial review of the decision resulting from that process.
 - b. The test as to whether an individual litigant can bring a judicial review at the moment is that he or she must have "sufficient interest" in the matter. This could be changed to limit access to judicial review only to those persons who are "directly affected" by a proposed development.
 - c. The Minister for Housing Planning and Local Government could in future introduce legislation prescribing the criteria a group must meet to be defined as "environmental association" under EU legislation, so as to preserve the integrity and credibility of groups who seek to make legitimate interventions in such matters under this provision.
- At present, objectors face little risk of bearing the other side's costs if they lose – and in many cases recover their own costs. In England and Wales they have introduced statutory caps on the costs an unsuccessful individual litigant (in a judicial review of a planning matter) can be obliged to pay and on the amount they can recover if successful. If a similar measure were to be introduced here, it could in some cases act as a deterrent to frivolous or unsound objections being made.
- The new accelerated judicial review procedures related to strategic infrastructure projects should also apply to all other consent or licencing requirements. This could include consents such as industrial emissions and waste licences authorised by the Environmental Protection

Agency. It should also cover those procurement decisions which can be challenged and introduce significant delays to the initiation of significant infrastructure projects even after development related consent issues have been overcome.

While positive steps have been made regarding procedural and legislative actions required, such as through amendments to the Planning Act relating to strategic infrastructure projects, further issues, including many of those mentioned above, remain to be addressed.

Directives Regarding Class Action Procedure

DBEI is currently working on two proposals for EU Directives, which are at Working Group stage, that envisage some form of 'class-action' procedure:

1. A proposal for a Directive on Representative Actions for the Protection of the Collective Interests of Consumers (https://ec.europa.eu/info/sites/info/files/proposal_for_a_directive_on_representative_actions_for_the_protection_of_the_collective_interests_of_consumers_0.pdf); and
2. A proposal for a Regulation on promoting fairness and transparency for business users of online intermediation services (<https://ec.europa.eu/digital-single-market/en/news/regulation-promoting-fairness-and-transparency-business-users-online-intermediation-services>).

The former proposes enabling "qualified entities" (such as consumer bodies) to bring representative actions aimed at the protection of the collective interests of consumers. The latter proposes enabling representative bodies to act in the collective interest of a business' users who may prefer to remain anonymous, to ensure the effectiveness of the proposed legal obligations under the Regulation. While both Proposals are at an early stage, it is envisaged that this would require a significant change to our legal system.

There is currently no legislative framework in Ireland to facilitate class action cases. However, multiparty or multi-plaintiff litigation does occur and is often brought by way of 'representative actions' and 'test cases'. In representative actions plaintiffs cannot seek damages for wrongs committed and plaintiffs cannot avail of legal aid in these types of cases. In Ireland the approach to multi-party actions has tended to be the 'test case'. However, there are other shortcomings to the 'test case' procedure, the most obvious being it is essentially an individualised means of resolving collective grievances.

It is our understanding that the Minister for Justice has referred the issue of reform of multi-party actions to the Review of Administration of Civil Justice Committee. It is therefore important for the Committee to know that these proposed Directives would require that Irish law on 'class actions' is amended in future. For instance, Article 6(1) of the Proposal for a Directive on Representative Actions proposes allowing "qualified entities" to seek compensation in the form of a redress order. This would involve a change to our law, as damages are not currently available as a remedy in representative actions under Irish law. The Department would like the Review to be aware of these proposed EU law requirements and to consider them when examining any recommendations relating to reform to this area of law.

Conclusion

Our submission primarily focuses on providing an enterprise and competitiveness perspective on the work undertaken by the Review. For enterprises, their employees and the economy more broadly, the more usable, transparent and accessible our justice system is, the more confidence all actors can have in Ireland as a place to do business and be employed. Greater use of digital technology and the internet to facilitate courts, more explicit time constraints on cases and guidance to judges on case management, transparency of process and therefore costs, the appointment of more judges, and certain legislative changes, may all have a role in delivering a more efficient system. We welcome the work that the Review is undertaking in this regard and await your recommendations.