

Submission to The Civil Justice Review 2018 by Haydn Price

Total words including attachments: 4969

Irish Courts continue to breach EU Fundamental Rights of small companies

01. I ask the Civil Justice Review to please look at Ireland's out dated requirement that all companies appearing before its courts use lawyers to represent them in all matters, even the smallest and simplest cases. The current situation is illegal under EU law because Ireland fails to offer any legal aid regime for companies to counter balance enforced representation on poor entities¹. Since the ECJ ruled in Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, if the courts force companies to use lawyers a suitable legal aid regime must exist for poor companies. The Irish government and courts have failed to take action, despite knowing this for years. Successive Justice Ministers and their officials have been told of the problem but the illegality and enforced representation still continues. The matter has been raised by many TDs and Senators of all parties.
02. Changing this rule would remove an outdated procedure and improve access to justice for thousands of vulnerable court users who cannot afford lawyers.
03. Ireland's current position is bad for harmonization and fails to effectively protect small companies. Ireland is again breaking E.U. law, meanwhile others states' have taken their E.U. responsibilities seriously and introduced procedures to prevent these problem decades ago. Holland for example allows companies to participate unrepresented in cases up to €24,000, Germany €5,000 (and provides legal aid for higher amounts) and Sweden unlimited.
04. To attend court in Ireland, all companies must engage barristers and or solicitors at often disproportionate costs for the simplest procedures (such as rate delays, copyright claims and small trade disputes). Frequently prohibitive costs cause valid cases to be abandoned and justice to be denied. Nothing planned by the state to make legal costs lower or more transparent adequately addresses the Irish prohibition on self representation for small companies. As a result, Ireland is also breaching both Article 47 of the Charter of Fundamental Rights of the European Union (2010C 8302) governing the right to an effective remedy and for some cases Articles 2 and 3 of Directive 2004/48/EC on the Enforcement of Intellectual Property Rights.
05. The Irish courts also refuse to recognise Articles 2 and 3 and Recital 17 of Directive 2004/48/EC as "Direct Rights" and cause lower value cases to be prosecuted in a disproportionately costly and delayed manner. They then significantly increase costs still further by automatically allowing the re-hearing of the same case in a higher court, so tripling and quadrupling costs. Ireland is effectively an unprotected market for small E.U. companies, where infringement can go unpunished. Ireland is out of step with most of the E.U. and despite calls to do so² has not (for example) implemented a no-lawyer Small Claims Intellectual Property process where cases are inexpensive and do not require lawyers.

¹ Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* 22 Dec 2010.

² Modernising Copyright; The Copyright Review Committee 2013 p10, 25-27, 168 (displayed at pdf Tab 14 p93-97)

06. Ireland encourages small companies to produce and sell across the single market and offers many incentives to boost the Irish creative economy but leaves small E.U. companies effectively unprotected when these same products are for example infringed. There is a lack of joined up thinking by the state. Ireland needs to comply with E.U. law and remove this outdated obstacle to justice.
07. Article 47 of the Charter of Fundamental Rights of The European Union (2010C 8302) states;
- “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”
08. The Charter became legally binding on the EU institutions and on national governments on 1 December 2009, with the entry into force of the Treaty of Lisbon. The Charter applies when EU countries adopt or apply a national law implementing an EU directive or when their authorities apply an EU regulation directly. In cases where the Charter does not apply, the protection of fundamental rights is guaranteed under the constitutions or constitutional traditions of EU countries and international conventions they have ratified.³
09. The Irish requirement for lawyers to represent all limited companies in all matters is caused by the Irish courts and not by elected law makers. No Irish law has ever been passed causing this situation. The Irish courts made their own rule in 1968 and now cite it rather than any statute. In 1968 the Irish Supreme Court was asked if companies could appear before its court without lawyers (*Battle v Irish Art Promotion Centre Ltd* [1968] IR 252). To find the answer in 1968, the Irish court looked at what was then happening in English courts. The Irish court reviewed English cases from 20 years earlier (the 1940's) and found that the answer in England was “no”. So, Ireland in the 1960's followed the then English 1940's view. However in England, Northern Ireland and almost all other EU states the rules were later relaxed or abandoned. Ireland has not changed but England has not applied the rule for the past 30 years.
10. In 2010 the Irish Law Reform Commission report “Consolidation and Reform of The Courts Acts” 2010 reaffirmed the Irish situation at page p33 citing *Battle v Irish Art* saying:
- “Rights to be heard in court ... These would obviously include practising barristers and solicitors, and litigants in person, though not a representative of a body corporate.”
11. However despite its 522 pages, the report did not mention the overriding effect of Article 47 of the Charter of Fundamental Rights or the ECJ's requirement for a suitable legal aid regime for companies if companies are forced to use lawyers. Both Enterprise and Justice Ministers have been told of the reports clear inadequacy but keep citing it as justification to do nothing. The matter has been raised in Dáil Éireann many times.

³ http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm

12. 30 years ago in the 1990s, England and many E.U. countries modernised their rules and allowed companies to appear before their courts without lawyers⁴. This increased access to justice, gave real teeth to protection and the court systems in those countries still functioned well.
13. In 2013 the Irish Supreme Court once again considered the representation issue in Coffey and others [2013] IESC 11. This time the Irish court surprisingly did not look at what England was now doing but instead looked at former commonwealth countries that still used the old English ways. It was if the Irish court chose examples to suit the answer it wanted. If the English tradition was the cause in 1968, why was it not part of the answer in 2013? The court also did not consider Article 47 and the EU courts demand for company legal aid in absence of self representation. All this makes the current situation look very unjust and unacceptable.
14. Also in 2013 but unconnected to the Irish Supreme Courts ruling, The Irish Copyright Review Committee separately held a wide public consultation and made a series of recommendations at the request of the Irish Minister for Jobs, Enterprise & Innovation. One key observation was the need for a Small Claims Intellectual Property process in Irish courts⁵. E.U. rights owners could then bring claims up to €15,000 without the need for lawyers. The committee also acknowledged that other E.U. countries had already implemented such proposals. Five years on and these recommendations have still not been implemented by the state.
15. In 2015 the then Minister for Jobs, Enterprise and Innovation said he wanted to improve things but nothing seems to have changed in practice. In its March 2016 report The Irish Company Law Review Group (which is appointed by and reports to the Minister) acknowledged the problem but did nothing to resolve it. The group was dominated by barristers and solicitors and again did not mention Article 47 Fundamental Rights or Irelands' lack of required legal aid for companies. Its report is therefore not credible but is still cited as a justification for no change. Its summary said;

*"The Irish Courts, like many others, apply the rule strictly; and though they contemplate exceptions in rare and exceptional circumstances, there are few examples of such cases, if any.... The Company Law Review Group remains to be convinced of the need for wider reform of the rule..."*⁶

16. On 30th November 2015 the E.U. Commission said in relation to Ireland;

"When implementing Union law, Member States must respect the provisions of the Charter of Fundamental Rights of the European Union, in particular the right to an effective remedy and to a fair trial protected under its Article 47. The matter of legal representation before courts, even though a matter that is usually regulated by domestic rules on general civil procedure, must comply with the right to an effective access to court in particular where legal representation is rendered compulsory. **The European Court of Human Right has considered in its jurisprudence that compulsory legal representation is not in itself contrary to the right to an effective remedy, but that such provisions on legal representation must be complemented by appropriate**

⁴ Guide to the Intellectual Property Enterprise Court Small Claims Track July 2014 (pdf Tab 17 p149 "Parties" and 154 "Costs..")

⁵ The Copyright Review Committee 2013 page 10, 25-27, 168 (displayed at pdf Tab 14)

⁶ Company Law Review Group Report on Representation of Companies in Court Mar 2016 p5+ (displayed at pdf Tab 15)

provision on legal aid so as to ensure the right to an effective remedy.⁷ The Court of Justice of the European Union considers that the right to an effective remedy must be interpreted as meaning that legal persons must be able to access legal aid.⁸ It is for national courts to ensure that such access is effectively granted to legal persons.”

17. The Commission then concluded;

“....Directive 2004/48/EC on the Enforcement of Intellectual Property Rights has been correctly transposed into Irish law through various legislative acts, namely the general Rules of the Superior Courts, separate IPR Acts (if applicable), equity law and case-law. In addition, the existing principle of compulsory legal representation of limited liability companies before court, and the limits imposed by Irish law on the legal costs are not per se in conflict with EU law, **as long as there is relevant national regime on legal aid**⁹. On this basis, the Commission decided not to pursue the case and has closed the procedure.”

18. The EU Commission appears to be unaware that Ireland has no legal aid for companies¹⁰ and by the Commissions own logic Ireland is therefore in conflict with E.U. law. Article 47 of the Charter of Fundamental Rights and Articles 2 and 3 of Directive 2004/48/EC have not therefore been adequately applied or implemented. In other E.U. states (to avoid failure to comply with E.U. law) these Articles have been implemented so small companies do not have this problem¹¹. The EU Commissions previous investigation into the Irish situation is therefore flawed and incomplete and it has been asked to re-open it by various MEPs, TDs and Senators.

19. The Irish courts also refused to recognise Articles 2 and 3 and Recital 17 of the Directive as a “Direct Right” and failed to follow clear ECJ rulings which force the Irish court to apply the “Direct Effect Principal”¹² and which give firm guidance on the need for proportional legal costs in Intellectual Property cases¹³.

20. The Irish situation is incompatible with Community law and E.U. companies are suffering discrimination as a result. The Irish State is not effectively or proportionately protecting the rights granted by the Community. The Irish situation is not dissuasive of infringements and is therefore prohibited by Directive 2004/48/EC. The Irish court deliberately frustrates Irish enforcement by small E.U. companies and makes it easier for infringers to infringe the property of rights holders without penalty. The situation must change.

Haydn Price
31, 20 Harcourt Street, Dublin 2
12th February 2018

⁷ *Airey v. Ireland*, 9 October 1979 (Eur. Court H.R., Series A, No 32, p. 11)

⁸ Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* 22 Dec 2010.

⁹ Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH* 22 Dec 2010" (displayed at pdf Tab 18)

¹⁰ Section 26-28 of Irish Civil Legal Aid Act 1995. Irish legal aid is only available for people not companies.

¹¹ Intellectual Property Court Users' Committee Working Group Consultation June 2009 p10 "These instruments *oblige* the UK to have effective protection for intellectual property. The current system arguably is defective in as far as it fails to provide Cost-effective procedures for smaller IP disputes and access to justice for SMEs." (displayed at pdf Tab 16)

¹² *Pablo Star Media Ltd v EW Scripts* 2015/477JR 21 Dec 2015 and 2015/2226 Circuit Court 7 May 2015 (displayed at pdf Tabs 8-12); *Francovich v Rep of Italy* (C-6 & 9/90) [1991] ECR I-5375 & *Finanze v Simmenthal* Case 106/77 [1978] ECR 629

¹³ *David Edwards, v Environment Agency*, [2013] EUECJ C260/11 (11 April 2013) (displayed at pdf Tab 7)

DAIL QUESTION NO. 173 DÁIL QUESTION addressed to the Minister for Justice and Equality (Deputy Frances Fitzgerald) by Deputy Kate O'Connell for WRITTEN on Wednesday, 13th June 2016.

Deputy Kate O'Connell asked the **Tánaiste and Minister for Justice and Equality** if she is aware of a reply received by a person from the European Commission on 30 November 2015; if she will confirm that Ireland has no national regime on legal aid for companies and companies cannot access legal aid here at all; and her views on whether Ireland may be in breach of its fundamental obligations under Article 47, if it forces companies to be represented by lawyers and does not offer any regime for legal aid for companies. [21227/16]

REPLY

Tánaiste and Minister for Justice and Equality (Deputy Frances Fitzgerald): I can inform the Deputy that section 5(1) of the Civil Legal Aid Act 1995 states that the principle function of the Legal Aid Board is, inter alia, to provide legal aid and advice in civil cases to persons who satisfy the requirements of the Act. The Board has always interpreted the word 'persons' to mean natural persons only and not to include legal persons. Section 29(1) of the Act requires that a person satisfy certain financial eligibility criteria set out in Regulations. The financial eligibility criteria that are set out in the Civil Legal Aid Regulations 1996 – 2013 clearly contemplate a natural person's income and resources being assessed and do not contemplate the assessment being in relation to a legal person.

I am aware of Case C-258/13 regarding Article 47 of the European Union Charter of Fundamental Rights which was heard by the European Court of Justice. While there are no plans at present to introduce legal aid for the type of commercial enterprise referred to, the situation is kept under review in my Department.

DAIL QUESTION NO. 140 DÁIL QUESTION addressed to the Minister for Justice and Equality (Deputy Frances Fitzgerald) by Deputy Clare Daly for WRITTEN on Wednesday, 13th June 2016.

Deputy Clare Daly asked the **Tánaiste and Minister for Justice and Equality** her plans to either introduce a system of legal aid for small limited liability companies or to legislate to allow companies to represent themselves before the courts given that the system as currently constructed places a requirement on small companies to have legal representation, but without a system in place of legal aid for such small companies. **[20477/16]**

REPLY

Tánaiste and Minister for Justice and Equality (Deputy Frances Fitzgerald): I can inform the Deputy that section 5(1) of the Civil Legal Aid Act 1995 states that the principle function of the Legal Aid Board is, inter alia, to provide legal aid and advice in civil cases to persons who satisfy the requirements of the Act. The Board has always interpreted the word 'persons' to mean natural persons only and not to include legal persons. Section 29(1) of the Act requires that a person satisfy certain financial eligibility criteria set out in Regulations. The financial eligibility criteria that are set out in the Civil Legal Aid Regulations 1996 – 2013 clearly contemplate a natural person's income and resources being assessed and do not contemplate the assessment being in relation to a legal person.

There are no plans at present to introduce legal aid for the type of commercial enterprise referred to but the situation is kept under review in my Department.

Question from Deputy Pat Casey

To ask the Minister for Jobs; Enterprise and Innovation the status of legislation in relation to a general scheme of copyright approved by government (details supplied); and if she will make a statement on the matter. (Details Supplied) in order to improve access to the courts system for intellectual property claims, in particular to facilitate lower value IP infringement cases to be brought before the district and circuit courts, and to allow companies represent themselves in lower value claims in order to obey the European Court ruling (Case C-57) that fixed legal costs which fail to recover the true legal costs of bringing an IP claim were prohibited under EU law

Reply

I have obtained Government approval for a General Scheme of a Bill entitled Copyright and Related Rights (Amendment) (Miscellaneous Intellectual Property) Bill. The Bill is currently being drafted by the Office of the Parliamentary Counsel.

Detailed information on the contents of this Bill has not yet been made public, while the progress of drafting is underway. However, one of the primary intentions of the Bill is to make certain improvements in the area of access to justice for intellectual property claims. In particular, the Bill will facilitate lower value intellectual property infringement cases to be brought before the Circuit and District courts. I intend to publish the Bill as soon as possible, once the initial drafting work is complete.

The Bill does not deal with the issue of self-representation before the Courts. The Deputy will appreciate that, in general, the issue of the jurisdiction of the courts is not an aspect that comes within my Department's direct responsibility. The question of whether companies should be permitted to represent themselves in Court comes within the policy remit of the Department of Justice and Equality. The Department of Justice and Equality also deals with matters related to legal costs in the courts.

Deputy Pat Casey to Deputy Charles Flanagan, Minister for Justice and Equality

Legal Costs

Deputy Pat Casey:

I wish to ask the Minister for Justice and Equality, in light of ongoing concern about his Department's approach, what his Department is actively doing to bring Ireland into line with EU law by ensuring that limited companies can access our courts if they cannot afford to engage the often disproportionately expensive solicitors and barristers by whom our courts insist they must be represented. The previous Minister said in reply to parliamentary questions in 2016 that she was aware of case C-258/13 regarding Article 47 of the European Union Charter of Fundamental Rights ... While there are no plans at present to introduce legal aid for the type of commercial enterprise referred to, the situation is kept under review in my Department.

Article 47 of the EU Charter of Fundamental Rights, on the right to an effective remedy and to a fair trial states:

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice”.

In essence, this is being denied to small businesses in Ireland due to the rules that they must engage expensive legal representation in order to get redress before the Irish courts. As a businessman, on several occasions I have been in need of legal redress for relatively small amounts, but the certainty of the expensive legal cost involved ensured that I could not pursue the matter. Businesses in Ireland have enough stress without the added frustration of knowing that the justice system, which is paid for through our taxes, is denied to them.

With regard to intellectual property, there has been a major problem with protections for people with rights in this area. This has been raised on many occasions in both Houses of the Oireachtas. Holders of intellectual property rights are in many instances individual people who need their rights defended without incurring massive legal fees. They can do this in other EU countries but not in Ireland. This has been known by the Government for some years now and many Deputies on all sides of the Dáil, including the current Taoiseach, have tried to secure action on it, but it appears to have been lost in translation in the Department of Justice and Equality. It appears that the Government knows it is breaking EU law but is doing little about it. It also appears that the European Commission has been led to believe that the problem does not exist in Ireland.

Will the Minister tell the House what his Department or the Government has told the EU,

either directly or indirectly, on this matter?

Deputy Charles Flanagan:

I acknowledge the important issue raised by Deputy Casey. At its root is the question of the impact of legal costs on small and medium enterprises in terms of their access to the courts and other means of legal redress. As such, the Deputy will appreciate that it is an issue which straddles both the Department of Justice and Equality and the Department of Business, Enterprise and Innovation in policy terms. That said, the Deputy will appreciate the priority that must be given to our more vulnerable citizens in the allocation of finite Exchequer funding in support of the provision of civil legal aid.

It is important to note the key structural and transparency reforms that are being made to the legal costs regime under the Legal Services Regulation Act 2015, which will also be of key benefit to business and small and medium sized enterprises. For example, as well as obliging legal practitioners to provide better costs information, the Act allows employed or corporate lawyers to act in proceedings on behalf of their employers and for direct access to barristers on non-contentious business. Another important development is the Mediation Act 2017, which will come into operation fully on 1 January 2018. The Act, which deals with disputes of a civil nature, will speed up the resolution of disputes, reduce legal costs associated with such disputes and reduce or avoid the stress involved in adversarial court proceedings.

In case C-258/13 cited by the Deputy, the Court of Justice of the European Union determined in its order of 28 November 2013 that it "clearly had no jurisdiction to rule on the question referred to it" including as it would have related to the interpretation of Article 47 of the EU Charter of Fundamental Rights.

Against a background of ever increasing demand for civil legal aid, great care was taken to maintain the Legal Aid Board budget during the recession. It has seen a budget allocation increase of 28% over the 2011 to 2017 period, with an increase of over 10% during the period 2016 to 2017. The board received an additional €1.25 million in the budget this year, bringing the budget to a total of €38.9 million. This has built on those other budgetary increases made in recent years - over €8 million since 2011 - to continue to reduce waiting lists and to consolidate services across a number of areas. This includes the Abhaile scheme for persons in mortgage arrears. It also includes provision for pay increases in 2018.

At present, the Legal Aid Board, which was established under the Civil Legal Aid Act 1995, provides civil legal aid and advice to persons of limited means who cannot afford to pay a solicitor privately. Section 5(1) of the Civil Legal Aid Act 1995 states that the principal function of the Legal Aid Board is to provide legal aid and advice in civil cases to persons, who satisfy the requirements of the Act. The board has always interpreted the word "persons" to mean natural persons only and not to include legal persons, that is, companies. Section 29(1) of the Act requires that a person satisfy certain financial eligibility criteria set out in regulations. The financial eligibility criteria set out in the civil legal aid regulations 1996-2013 clearly contemplate a natural person's income and resources being assessed.

There are no plans at present in the Department of Justice and Equality to introduce a scheme of legal aid for commercial enterprises. However, the Department is in regular contact with officials in the Department of Business, Enterprise and Innovation on cross-departmental matters and the situation in regard to legal aid of the nature referred to will be kept under review. I am not in a position to make any firm commitments to the Deputy having regard to constraints on my budget.

Deputy Pat Casey:

I thank the Minister for his response. It is disappointing that a sector of Irish society, the small and medium sized enterprises that play a huge role in that society, is left without any support. To put it in perspective, we are talking about amounts in excess of €2,000. If the amount is above €2,000 we must engage the legal professions. It is equally disappointing that even the Chief Justice, Mr. Justice Frank Clarke, last September stated that there was little point in having a good court system if a great many people found it difficult or even impossible to access it for practical reasons. He said it was increasingly becoming the case that many types of litigation are moving beyond the resources of many. The Taoiseach said it seven years ago when he asked the very same question, yet we are back here seven years later and there is still no movement regarding this aspect of legal aid or indeed tackling the small claims court and looking at increasing the claims amount there. I understood that this requires just a statutory instrument, which would insert language into the small claims court legislation allowing these claims to go through an easier court system, one that does not require as many complicated forms as barristers or solicitors. Intellectual property should be considered as a separate entity.

Deputy Charles Flanagan:

While I appreciate that Deputy Casey would support the provision of civil legal aid to small businesses and enterprises, it is important that we do not lose sight of the enhanced and much more transparent legal cost regime that is being introduced at the moment under the Legal Services Regulation Act 2015. This will impose greater transparency obligations on barristers and solicitors in the charging of legal fees to private and commercial clients and includes discussing the legal costs implications of any new developments in a case with a client before proceeding any further. The Act allows employed or corporate lawyers to act in proceedings on behalf of their employers and for direct access to barristers on non-contentious business. It also allows barristers sharing a premises to advertise themselves. This had all been prevented under existing codes. Under the Act, it will not be permissible for legal practitioners to set fees at a specified percentage or proportion of damages payable to a client from contentious business. Moreover, it will no longer be permissible for barristers to charge junior counsel fees at a specified percentage or proportion of those pertaining to senior counsel. In addition, there will be a new office of the legal costs adjudicator, which will replace the existing Office of the Taxing Master and maintain a publicly accessible register of determinations. It will be supported in its decisions by a set of legal cost principles contained in Schedule 1 to the 2015 Act.

As Deputy Casey may appreciate, a review of the administration of civil justice in Ireland has recently commenced under the chairmanship of the President of the High Court, Mr. Justice Peter Kelly. Among other things, this review will consider such areas as access to justice, reducing the costs of litigation, ensuring timely hearings and the removal of obsolete, unnecessary or indeed over-complex rules of practice and procedure.

On the matter of extending the scope of civil legal aid to corporate entities, I again point to the enormous demand for such legal aid, including in respect of sensitive litigation in areas such as family law. As I mentioned in my opening remarks, priority continues to be given to our more vulnerable citizens in the allocation of finite Exchequer funding in support of the provision of such legal aid.

Ends