



**Response to the Commission's
Staff Working Document
Country Report Ireland 2015**

{COM (2015) 85 final}

10th April 2015

1. Introduction:

- 1.1 The purpose of the within document is to provide comments on the '*Commission Staff Working Document, Country Report Ireland 2015, including an In-Depth Review on the prevention and correction of macroeconomic imbalances*' (the "**Working Document**"). The Bar Council welcomes and is grateful for the opportunity to make observations on the Working Document.
- 1.2 This submission should be read in conjunction with our submission presented to the European Commission (the "**Commission**") during the meeting of 17 September 2014.

2. Position of the Bar Council on the Legal Services Regulation Bill, 2011

- 2.1 At the outset, it is important to emphasise that the Bar Council supports the main provisions of the Legal Services Regulation Bill, 2011 (the "**Bill**") dealing with legal costs (Parts 10 and 11 of the Bill) as well as many of the major aspects of the Bill. The primary objective of and impetus for the Bill is the understandable desire to reduce legal costs for clients. However, certain provisions of the Bill if enacted in its current format reach far beyond what was required by the Troika in the Memorandum of Understanding of 2010 (and subsequent such Memoranda) in order to reduce legal costs. It is critical, therefore, that these measures be closely scrutinised to see if there is any evidence that they will increase competitiveness within the legal profession and, more fundamentally, reduce costs for the client.
- 2.2 There is a risk that if the structural provisions in the Bill are implemented without proper analysis, this will impact significantly upon the independent referral Bar in Ireland. Such an eventuality would be to the detriment of the administration of justice in the jurisdiction.

3. Structure of Submission

3.1 This submission is structured as follows:

- **Section 4** summarises the relevant portions of the Working Document,
- **Section 5** provides a broad outline of the functioning of the Bar of Ireland,
- **Section 6** sets out the Bar Council's comments on the Working Document,
- **Section 7** addresses the issue of costs,
- **Section 8** provides some concluding comments.

4. Relevant portions of the Working Document:

- 4.1 The portions of the Working Document relevant to the provision of legal services in Ireland are found at pages 54 – 55 and 66 – 67.
- 4.2 The Working Document states that the Government “...published the *Legal Services Regulation Bill in October 2011, building on a number of recommendations from the Competition Authority’s 2006 report.*” However, it is important to acknowledge that some of the provisions of the Bill go further than what was recommended in the Competition Authority’s report and indeed are beyond what is required by the Troika’s Memorandum of Understanding.
- 4.3 As regards delays in the legislative process, this is attributed in the report to being “...due to ongoing pressures from vested interests.” The Bar Council is supportive of the overwhelming majority of the provisions in the Bill and has not engaged in any attempt to delay the Bill. Rather, it is the Bar Council’s understanding was that the delays had arisen from within the Department itself and other priorities for the Government’s legislative programme.
- 4.4 The Working Document states that “Among other things, [the Bill] provides for the establishment of legal partnerships between solicitors and barristers and possible multi-disciplinary practices bringing together barristers, solicitors and other professional service providers (such as accountants) or even services of non-professional nature.” It is later noted that there is uncertainty as to whether multidisciplinary practices will be legislated for, but states that “legal partnerships appear to be safeguarded.”

5. Structure of the Independent Referral Bar in Ireland:

- 5.1 By way of background, the Bar of Ireland is an independent referral bar composed of approximately 2,300 members. The existence of an independent Bar in a common law jurisdiction is central to the working of the courts and thus the rule of law. All barristers are sole traders who compete directly and fiercely against one another to supply legal services. The Bar of Ireland provides specialised advocacy and advisory services to a wide client base at home and abroad. The legal profession in Ireland is divided into two distinct categories of lawyers, solicitors and barristers. The two professions perform different but complementary roles.
- 5.2 Barristers have an overriding obligation to the Court which is a cornerstone of the administration of justice. In common law systems, the independence of the judicial function is dependent upon the fundamental and overriding of advocates to the Court.¹ A weakened judicial system, where there is a perception of diminished independence, can only but have a negative impact on economic competitiveness deterring foreign companies from establishing bases in Ireland and / or from choosing Ireland as the jurisdiction in which to litigate. Further, the Bar Council and members of the barristers profession in Ireland have been proactive in encouraging the rise of

¹ This has been widely recognised as essential to the independence of the judiciary. It is peculiarly so in a system where the Courts are not sufficiently resourced and rely for support on independent advocates whose primary duty is to the Court and the justice system. Thus Clarke LJ: “The existence of an independent Bar is central to the working of the courts and thus the rule of law, and without the rule of law, justice and democracy are nothing. There it is in a nutshell.” (World Bar Conference, London, 2012).

alternative dispute resolution including by establishing a specific dispute resolution centre and engaging with other professions to foster a competitive climate for dispute resolution other than through the Court process.

- 5.3 As referred to above, competition between individual barristers is intense. Barristers are required to submit fee estimates for work to solicitors and clients and if the latter do not consider the estimate to be competitive another individual is instructed. Some direct professional access to barristers is permitted. As a barrister is not in the direct employment of a particular company, or a member of or economically linked to a law firm, this facilitates a wide range of choice for consumers in Ireland to instruct the barrister of their choosing. The small solicitor's practice in the western most tip of Ireland can instruct directly the most senior barrister specialising in a particular field without fear that that barrister works exclusively for, or owes allegiance to, a particular law firm or corporate entity. Such access to justice is further enhanced by the "Cab rank" rule with which Irish barristers must comply. The present structure of the profession is highly advantageous to the individual litigant.
- 5.4 In contrast, there are approximately 9,000 solicitors in practice, the vast majority of whom work in firms with other solicitors. As is common in many other European capitals, there are five or six large law firms based in Dublin carrying on specialist commercial work including the routine contractual requirements of businesses operating in this jurisdiction. Set up costs for business and merger and acquisition fees are in no way impacted by fees charged by barristers when providing specialist advisory and advocacy services.
- 5.5 The absence of a system of civil legal aid is problematic for many clients. The traditional role of barristers in many instances is to represent clients on a no-win, no-fee basis in wide range of areas. Requiring barristers to engage in partnerships with other professionals would undoubtedly impact on this vital service.

6. Bar Council Response to the Working Document:

Multidisciplinary practices

- 6.1 The Working Document notes that there is some uncertainty as regards whether multidisciplinary practices ("MDPs") will ultimately form part of the Bill. It states: *"The amendments will require the future Legal Services Regulatory Authority to conduct research and consultations on multidisciplinary practices before issuing a recommendation to the Minister, who will then determine whether the section of the legislation on multidisciplinary practices should be commenced or not. Although the authorities indicate that their intention remains to allow multidisciplinary practices, uncertainty on this matter has increased significantly as the recommendation from the Legal Services Regulatory Authority may well go in the opposite direction."*
- 6.2 According to the most recent amendments, it would appear that MDPs will not be legislated for in the first instance but instead may be subject to a consultation process. For the sake of completeness, we believe it is appropriate to include a summary of the Bar Council's arguments in respect of MDPs.
- 6.3 The principal issue of concern is that there is no empirical evidence that MDPs reduce legal costs for the consumers of legal services. In fact, the Competition Authority did

not recommend the introduction of MDPs. Instead, it suggested that the new legal services regulatory authority (which it recommended should be set up) should research the issue properly. The potential negative effects of MDPs on the administration of justice (such as conflicts of interest) are well documented and have been acknowledged by the Court of Justice of the European Communities (*Case C-309/99 Wouters* [2002] ECR I-1577). At least 20 Member States of the European Union do not permit MDPs and the Bar Council is not aware of the Commission requiring their introduction in any of those Member States. The Bar Council has cautioned against the immediate introduction of MDPs and has submitted to the Irish Minister for Justice that a proper consultation exercise be carried out by the new regulatory authority to determine whether, and if so, how, such structures should be introduced in Ireland and whether they would enhance competitiveness in this jurisdiction and reduce legal costs (something the Competition Authority recommended in 2006). There is a real risk that the introduction of MDPs without such advance scrutiny of their effects could lead to a fundamental shift in the way the justice system serves our democratic society.

- 6.4 MDPs have been permitted in England & Wales since 2007, but the first such practice was not licensed until 2012 and there has been minimal uptake of these business structure.. There is no evidence of any downward impact on legal costs as a result of the introduction of MDPs, in fact, the cost of regulation of the legal professions has increased – a cost which when levied on the professions is ultimately reflected in prices charged to clients. The Bar Council has cautioned against the immediate introduction of MDPs, and has suggested that a research function be conferred on the new regulatory authority and that it carry out a proper consultation exercise to determine whether such structures would increase competitiveness in this jurisdiction and reduce legal costs.

Legal partnerships

- 6.5 The Working Documents refer to legal partnerships being safeguarded by the most recent version of the Bill. The Competition Authority in its report in 2006 stated that legal disciplinary partnerships and MDPs required further research due to issues about access to justice and regulatory concerns. The Bar Council submits that the introduction of legal partnerships should be subject to the same consultative process as MDPs.
- 6.6 Access to justice concerns have not been addressed at all in the legislative process. Legal partnerships (“LPs”) could result in the extinction of smaller solicitors’ practices throughout the country which can now access experts in each area of law from the Irish Bar on an equal basis with big firms in Dublin. It is possible that LPs will result in the centralisation of legal services in Dublin or abroad; the demise of local solicitors practices throughout the country and a consequent lack of choice; the contraction of the legal market and the lack of access to justice – those on a lower income will not have the means to access specialist advocates in an equal manner through their local solicitor as economically powerful blocks based in Dublin or abroad.
- 6.7 It is important that any LP provision does not operate to prohibit barristers who wish to continue to practise as sole practitioners in an independent Bar from associating solely with other such barristers. The Bar Council has consistently stated that the

legislation must not be coercive, having regard to the public interest, and the interests of clients.

6.8 There are also serious legal and constitutional impediments to the introduction of such a provision. Constitutional rights of freedom of association (and disassociation) and property rights would be infringed if these particular provisions were introduced in a coercive manner.

6.9 In addition the Bar Council has suggested that the Bill should include express provision to the effect that if LPs are introduced, all reasonable efforts will be made by the Authority to regulate in a way which does not increase the cost of practice for barristers and solicitors who do not wish to form LPs including a provision for the review of the costs of regulating such structures and their implications for the costs paid by clients.

7. Legal Costs

7.1 Undoubtedly, barristers play a critical role in providing services in the context of litigation. The economic downturn in Ireland exerted severe downward pressure on the professional fees of barristers. The most obvious example of this is in respect of the fees paid by the State, the largest consumer of legal services in Ireland. Barristers are now routinely required to complete full public tender processes in order to be briefed by State and Semi-State enterprises. The most recent statistics show the annual spend by the Chief State Solicitor's office on barristers' services to be €12.39 million and civil legal aid payments to barristers are €4.79m. Just over €13m is paid to prosecuting counsel by the Director of Public Prosecutions while €18.1m is paid to defence counsel under the Criminal Legal Aid Scheme. These sums represent a tiny proportion of the total State spend on legal services, the vast majority of which is paid for services rendered by solicitors.

7.2 A review of the published figures from the State departments who are the biggest single consumer of barristers' services show that professional fees paid to barristers demonstrate significant decreases during the period 2006 – 2014. For example:

- Director of Public Prosecutions Annual Reports, during the period 2008 – 2013, demonstrate an average decrease in counsel fees paid of 26%;
- Attorney General/Chief State Solicitors Office Annual Reports, during the period 2008 – 2014, demonstrate a decrease in fees paid to counsel of 45%;
- Legal Aid Board Annual Reports, during the period 2006 – 2013, demonstrate a decrease in total counsel fees paid of 34% and cost per case handled of 50%.

7.3 Equally, in the realm of private business, by way of example, insurance companies and banks have greatly reduced the fees they pay to barristers and in many cases require barristers to tender for work and adhere to fixed fees for specific items of work which are not negotiable for instance if, due to complexity, a particular drafting task or court application takes longer than predicted. As a sole practitioner, a barrister has little bargaining power and is typically a price taker on the market which results in competitive fees for all range of clients. In the event of any dispute about fees charged there is an existing facility for independent cost adjudication by a public

official appointed by the State, known as a Taxing Master. The Courts Service Annual Reports during the period 2010² – 2013, demonstrate a decrease of 29% in legal costs allowed arising from the taxation of costs process.

7.4 Moreover, many barristers, more commonly on the plaintiff side, accept instructions on a 'no foal no fee' basis. This means that the barrister will not get paid at all unless his or her client is successful in the litigation. This type of fee arrangement is common in all types of litigation, but from the viewpoint of economic competitiveness the more relevant examples include providing services to companies at risk of insolvency, to employees who have been selected for redundancy and to businesses who have suffered economic losses due to inability of a contractual purchaser to discharge fees. This is a significant cost saving for litigants, whether individuals or commercial entities, in the State. The Bar has a great tradition of representing those who cannot afford legal assistance pro bono and it is will be difficult for this to continue in the face of large business structures such as MDPs.

7.5 The reduction in fees has resulted in, and is evidenced by, a very obvious market correction. The number of barristers exiting the profession has increased significantly due to inability of many to earn a reasonable living at a reduced fee level. Whereas in the year 2007/2008 61 people left the Law Library, this number increased to 136 in 2011/2012 and to 153 in 2013/2014, representing a two and a half fold increase in those leaving the profession since the commencement of the economic downturn.

7.6 In conclusion, increased competitiveness in legal fees is, of course, a very worthy objective which the Bar Council supports. Structural reforms, untested and unproven from a cost perspective, are not synonymous with reduced fees. The provisions of the Bill which permit MDPs and other far-reaching structural alterations should be the subject of considered assessment prior to implementation to avoid added costs to the consumer.

7.7 In relation to the cost of legal services in Ireland, the Bar Council submits that:

- It is not correct to state that legal services costs have failed to adjust downwards since the onset of the financial crisis. Fees paid by private clients have been severely reduced due to the difficult economic conditions and intense competition among barristers in respect of a finite amount of work. This is the reality regarding fees for the overwhelming majority of barristers in practice (59% of whom are in practice less than 10 years). This has had a severe impact on the income of many barristers which is not offset by the fact that the overhead costs of running a practice are pooled among all barristers in the Law Library creating efficiencies of scale;
- It is not correct to say that legal costs have failed to adjust downwards "*due to insufficient competition*". The Law Library comprises of 2,300 individual sole traders competing for a finite pool of work. Competition amongst barristers is intense and leads to constant downward pressure on legal costs;
- Barristers providing services funded by the State have seen reductions in their professional fees of between 26% - 50% during the period 2006 - 2014;

² Figures are not available prior to 2010

- The Commission document refers to a figure of 18.8%, representing lawyers' fees, in the context of the cost of enforcing contracts in this jurisdiction. While none of the figures contained in the document are explained and while no source material is referenced, it appears that this figure has been taken from the World Bank's Doing Business 2013 report which does not relate to barristers' fees but rather to solicitors' costs in enforcing a business contract. When compared to our closest comparator, the UK, where 35% of overall costs are attributable to lawyers' fees, Ireland performs extremely well. Ireland's performance is also very much in-line with other common law jurisdictions; in Australia 18.5% of overall costs are attributable to lawyers' fees, while in Canada the figure is 15%. The use of the data in this manner by the Commission is not an accurate reflection of competition between barristers on fees;
- It is also worth noting that the Irish Central Statistics Office (CSO) does not presently gather information on the professional fees paid to barristers. In gathering information on legal costs, the CSO states that *'under professional and legal services the following sample of items are included for pricing: (a) engineers'/surveyors' fees; (b) estate agents' fees; and (c) solicitors' fees³.'*
- With regard to "delays in the delivery of justice" and a perceived failure to implement case management, it should be borne in mind when reading the Commission's comments that Ireland has by far the lowest number of judges per capita in Europe – six times less approximately than the European average. It is not possible to reconcile the Commission's recommendations with problems that arise as a result of a lack of resources in a time of economic uncertainty.

³ <http://www.cso.ie/en/media/csoie/surveysandmethodologies/surveys/prices/documents/frequentlyaskedquestions.pdf>

8. Concluding Comments

- 8.1 The Bar Council is grateful for the opportunity to provide comments on the Working Document, and is keen to engage further with the Commission on these issues.
- 8.2 As submitted above, it is important to clarify that the Bar Council has not in any way caused the delay in the legislative process. This, we understand, is due to competing demands on departmental resources. However, the Bar Council has engaged with the Minister and Departmental officials to express its views (the majority of which are supportive) on the Bill while endeavouring to ensure that the interests of the client in accessing justice are not undermined.
- 8.3 The Bar Council welcomes those cost reforms in the Bill, provided that the overall structure thereof does not result in a disproportionate increase in regulatory costs for barristers and consequently, their clients. It is critical to acknowledge, however, that very significant reductions in fees occurred during the economic downturn as evidenced in section 5 above.
- 8.4 As regards structural reforms, the Bar Council is unconvinced that legal partnerships (or multi disciplinary partnerships) will benefit consumers of legal services in Ireland. A comprehensive consultation process should be undertaken before legal partnerships are introduced and the entitlement of barristers to continue or choose to practice as independent sole traders (if they so wish) must be ensured.
- 8.5 We would be happy to expand on any of the above should it be of assistance.