

## PROCEDURAL REFORM OF COURTS TO COMPLEMENT REGULATORY REFORM

- The cost competitiveness of legal services has a direct impact on national competitiveness - based on World Bank data Ireland is an expensive location to enforce a business contract
- Once enacted, the competition-enhancing provisions of the Legal Services Bill must be incorporated into the regulations to be issued by the Legal Services Regulatory Authority as quickly as feasible
- Senior Counsel appointments should be reformed to facilitate greater competition in legal services
- A specialist conveyancer profession should be developed as has occurred in the UK, New Zealand and Australia
- Procedural reforms making better use of ICT and case management should be implemented

### INTRODUCTION

In general legal services account for a relatively low proportion of overall enterprise costs – certainly compared with labour costs and property costs. Nevertheless, as an input to almost every enterprise in the country, the costs of such services have a direct impact on the competitiveness of the entire Irish economy. Legal service costs also have significant knock-on effects on the cost of other vital business services, including, for example, on the cost of insurance.

### CURRENT POLICY CONTEXT

Regulation in professional services sectors often limits the scope for competition by restricting entry, limiting price competition, granting exclusive rights to perform particular services, and restricting advertising and business structures. OECD indicators examining regulation in professional services suggest that the legal profession is the profession in which most regulatory hurdles are found<sup>1</sup>.

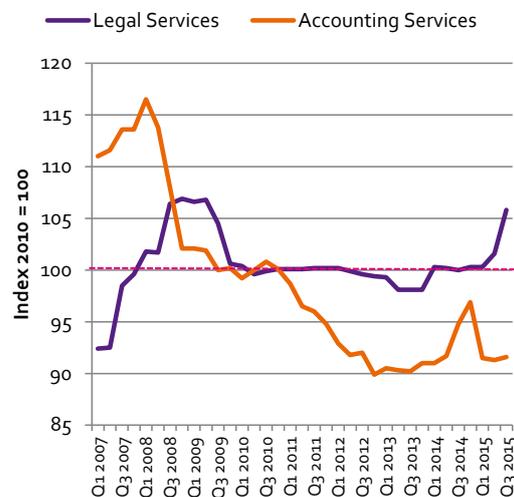
The legal profession has repeatedly been subject to a range of studies recommending reform<sup>2</sup>. Despite positive developments (such as the Bar Council reforming the restrictions it imposes on newly qualified barristers), the profession remains characterised by a range of restrictions on competition.

### HOW IRELAND PERFORMS

Figure 1 examines the evolution of accountancy and legal costs. The cost of accounting services declined steadily over the course of the recession; notwithstanding some fluctuations, prices in Q3 2015 remain more than 8% below 2010 levels. Throughout the recession, and relative to most other professions, prices for legal services did not adjust downwards

to the degree that might have been expected given economic circumstances. While prices dipped for a brief period in 2013, in Q3 2015 legal service prices were 5.8% higher than 2010 levels<sup>3</sup>.

Figure 1: Accountancy and legal services costs, Q1 2007-Q3 2015



Source: CSO, Services Producer Price Index

According to World Bank *Doing Business* data, in international terms Ireland remains an expensive location in which to enforce a business contract and is the 8<sup>th</sup> most expensive in the OECD<sub>32</sub>. The World Bank estimates that the total cost of contract enforcement in Ireland amounts to 26.9% of a claim, compared with 21.1% in the OECD (Table 1). It also takes significant time (650 days) to enforce a contract in Ireland (compared with an OECD average of 538 days – this is the 7<sup>th</sup> longest amongst the OECD<sub>32</sub>).

For the first time, the 2016 *Doing Business* report includes a “quality of judicial processes” index which covers a set of good practices (relating to court structure and proceedings, case management, court automation and alternative dispute resolution). Use of these practices can result in a more efficient

<sup>1</sup> Conway, P., and Nicoletti, G., Product Market Regulation in the Non-Manufacturing Sectors of OECD Countries: Measurement and Highlights, OECD, Economics Department Working Papers No. 530, December 2006

<sup>2</sup> For example, Legal Cost Working Group, Report of the Legal Cost Working Group, 2005; Competition Authority, Competition in Professional Services-Solicitors and Barristers, 2006; Committee of Public Accounts, Third Éirimir Report on the Procurement of Legal Services by Public Bodies, Dáil Éireann, January 2011

<sup>3</sup> The Q3 2015 legal services data refer to solicitor fees and is based on 16 respondents to the CSO survey and 90 separate price observations. Renewed efforts are required to expand the sample – ideally to capture data on barrister fees, and to provide more granular costs data on various types of legal services.

and transparent judiciary, a smaller case backlog, and faster and less costly contract enforcement. Ireland scores poorly in this index, and is ranked 26<sup>th</sup> amongst the OECD32.

**Table 1: Business Data on Enforcing a Contract, 2015**

Indicator	Ireland	OECD
<b>Time (days)</b>	<b>650.0</b>	<b>538.3</b>
<i>Filing and service</i>	60	n/a
<i>Trial and judgement</i>	500	n/a
<i>Enforcement</i>	90	n/a
<b>Costs (% of claim)</b>	<b>26.9</b>	<b>21.1</b>
<i>Attorney fees</i>	18.8	n/a
<i>Court fees</i>	2.3	n/a
<i>Enforcement fees</i>	5.8	n/a
<b>Judicial process index (0-18)</b>	<b>8.5</b>	<b>11.0</b>
<i>Court structure (0-5)</i>	4.5	n/a
<i>Case management (0-6)</i>	1.0	n/a
<i>Court automation (0-4)</i>	0.5	n/a
<i>Alternate dispute resolution (0-3)</i>	2.5	n/a

Source: World Bank, Doing Business 2016

## Policy Options

The much delayed Legal Services Bill represents an important milestone and will, when enacted, provide for:

- The establishment of a new independent Legal Services Regulatory Authority (LSRA), with responsibility for oversight of solicitors and barristers.
- The establishment of an independent complaints system.
- A reformed, more transparent legal costs regime.
- An Office of the Legal Costs Adjudicator to replace the Taxing-Master to deal with legal costs disputes.
- A framework for Alternative Business Models such as Legal Partnerships and Multi-Disciplinary Practices<sup>4</sup>.

Once enacted, the competition-enhancing and cost-reducing provisions of the **Legal Services Bill** should be rapidly incorporated into the **regulations to be issued by the LSRA**.

## Further Structural Reforms Required

The Bill represents just one stage in a planned series of reforms to modernise the provision of legal services.

The Irish two-tier legal structure of junior and senior counsel allows for higher fees to be charged but does not offer a definitive guide as to the quality of the barrister in question. The process for **Senior Counsel appointments** should be reformed so that the title becomes a useful quality signal facilitating competition in legal services. Consideration should be given to **creating a single tier counsel system**; the removal

<sup>4</sup> The Government is a major purchaser of legal services and can use its purchasing power to drive change in the market.

of the distinction would promote meritocracy and would lessen the requirement for clients to engage senior counsels where the complexity does not necessarily warrant a senior<sup>5</sup>.

Previous studies have found that the cost of conveyancing in Ireland is significantly higher than other countries with similar legal systems. The development of a **specialist conveyancing profession** with appropriate regulations and standards would enhance competition<sup>6</sup>.

## Procedural Reform

The high cost of legal services in Ireland is not entirely a result of regulatory factors and so regulatory reform is not the sole response required if costs are to be reduced. Reform of **court procedures** offers potentially significant cost savings.

Previously, the Legal Cost Working Group has recommended that court rules should include a specific order facilitating supervision by the court of the **pace of litigation**; this should contain **measures to penalise unnecessary delays**.

Elsewhere, the OCED found that differences in trial length (which in turn impact upon legal costs) appear to be more a function of the structure of spending, and the structure and governance of courts rather than simply the amount of resources devoted to justice<sup>7</sup>. This suggests that significant efficiencies and saving could be achieved through:

- The application of technological solutions (i.e. greater computerisation, use of electronic forms, websites and electronic registers)<sup>8</sup>;
- More **active management of cases** by courts and other governance reforms (e.g. delegation of broader managerial responsibilities to judges covering supervision of non-judge staff and administration of budgets);
- The **systematic production of statistics** at court level.

The procedural reforms recommended by the Legal Cost Working Group should be reviewed and implemented, where feasible, making reference to the findings of the OECD.

**Further Reading:** The policy positions summarised herein are drawn largely from the Competitiveness Challenge 2015. See [www.competitiveness.ie](http://www.competitiveness.ie). The NCC reports to the Taoiseach on key competitiveness issues facing the Irish economy. This Bulletin has been issued by the Chair and Secretariat.

<sup>5</sup> The Legal Services Bill contains a provision meaning that the granting of patents of precedence (i.e. conferring the status of Senior Counsel) is no longer solely the preserve of barristers; this is a welcome step.

<sup>6</sup> In the UK, the Council for Licenced Conveyancers is the regulatory body for the conveyancer profession. Evaluations have found that the introduction of a licensed conveyancing profession in the UK had a positive effect on price competition. See Zerp et al, Summary of the Comparative Legal & Economic Study into the EU Conveyancing Services Market, COMP/2006/D3/003, 2007

<sup>7</sup> OECD, Judicial Performance and its Determinants: A Cross Country Perspective – A Going for Growth Report, OECD Economic Papers No. 05, June 2013

<sup>8</sup> Future legislation (e.g. Civil Liabilities Amendment Bill 2015) may contain provisions to facilitate the development of e-Courts.