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TRAINING & DEVELOPMENT PROGRAMME

Knowledge Network

Webinar Series

What will change in the Courts? The Civil Justice Review Report

Friday, 22 January 2021 | 8.30 am to 9.30 am

Seán Barton
Partner
+353 1 607 1219
Sean.Barton@mccannfitzgerald.com

Remit and scope of review

- Review set up in 2017 to *"report to the Minister for Justice and make recommendations for changes with a view to 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."*
- Report published December 2020
- 97 sets of submissions in public consultation
- Detailed consideration of comparative reviews and reforms in England and Wales; Scotland; Northern Ireland; Hong Kong; Canada (Ontario and British Columbia)
- Review against international performance evaluations
- Over 90 recommendations with emphasis on proposals which would not need primary legislation (quicker to implement)

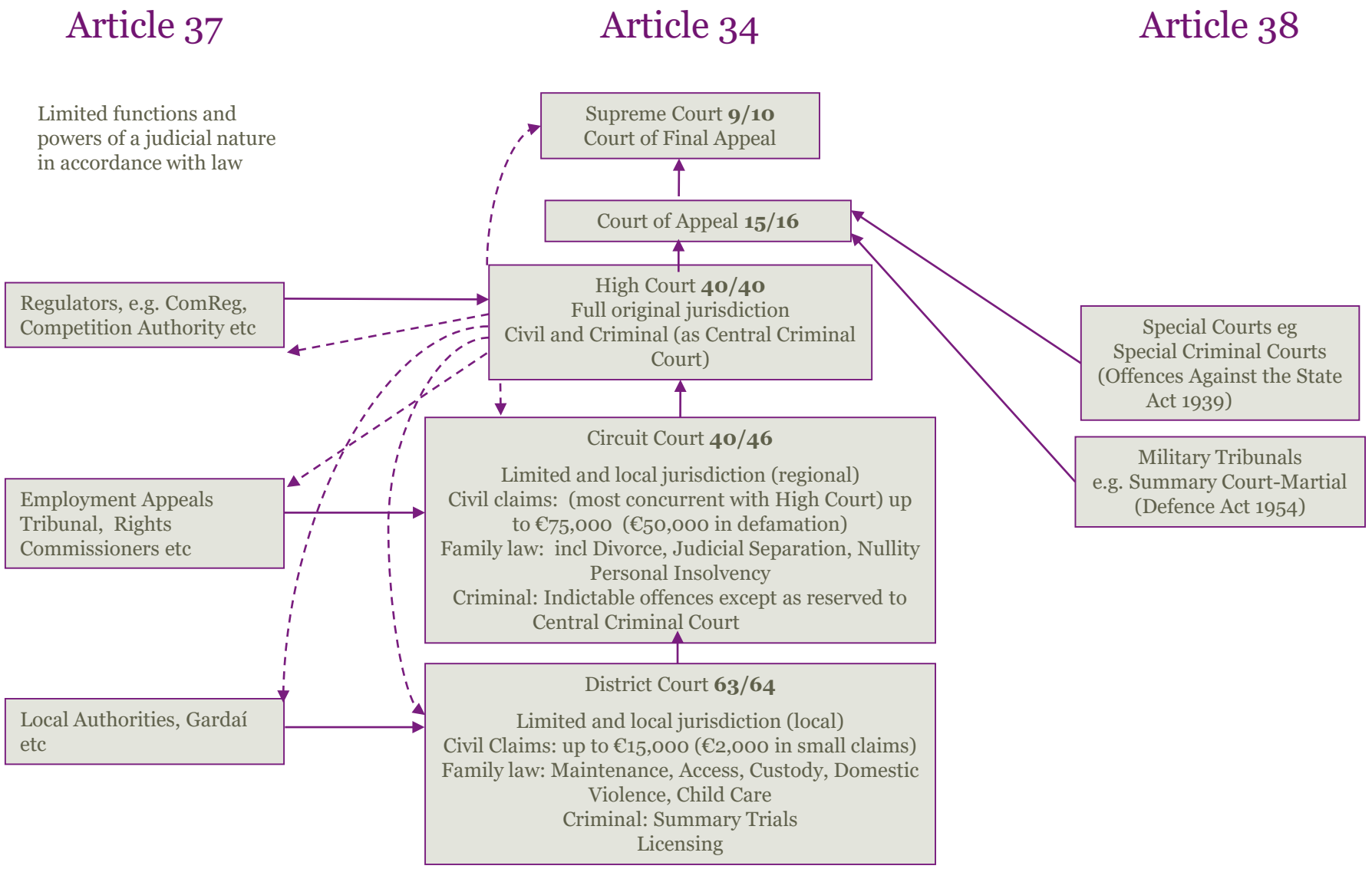
Other Relevant Recent Reviews

- Law Reform Commission Reports especially Consolidation and Reform of Courts Acts (LRC 2010)
- Working Group on Medical Negligence and Periodic Payments (2010-2013)
  - PPOs (not used), Pre-Action Protocols (PAPs)(awaiting commencement), case management
- Cost of Insurance Working Group (2016-2020)
  - PAPs for personal injuries, strengthen book of quantum, enforce early notification of claims, cap on damages?
- Personal Injuries Commission (2017-2018)
  - Standardised whiplash reports; Personal Injuries Guidelines Committee of Judicial Council
- Expert group on Article 13 ECHR (2013)
  - Expedite proceedings rather than compensate delay; limit adjournment; automatic discontinuance of dormant cases; expedition by court where risk of unreasonable delay
- Committee on Court Practice and Procedure 28th report (2003)
  - Support, policy objectives for rules of court committees, time limit for agreement
- Reform and Development/Strategy and Reform Directorate of the Courts Service and court rules based reform (since 2004)

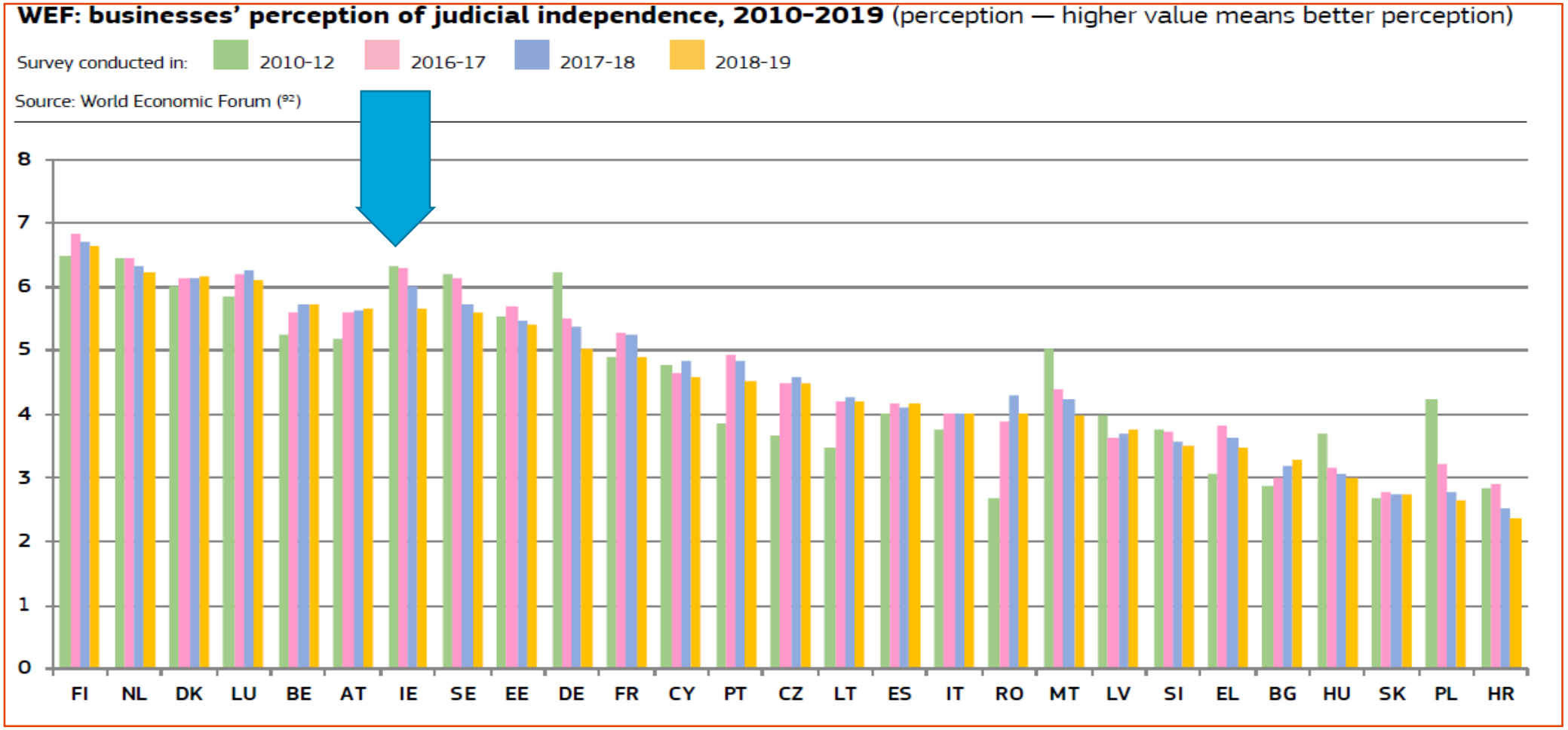
Our civil justice model

- **Common law**
- **Adversarial** – based on most persuasive of competing presentations with limited decision-maker inquisition
- **Party-driven** but increasing judicial **case management** (ECHR risk)
- Complex legal underpinning, mix of old and new – constitution, legislation, court rules, statutory practice directions (appeal courts), convention
- Independent **fully professional judiciary**, chosen as a second career not a first (therefore relatively more costly)
- **Loser pays** principle (outside family law): costs assessed case by case
- Very **limited funding of legal representation**, high use of no foal no fee/self representation/NGO role
- **Mediation** (generally non-funded) on the rise: compromise rather than winner takes all, although we rank poorly on promotion and incentives

Courts structure



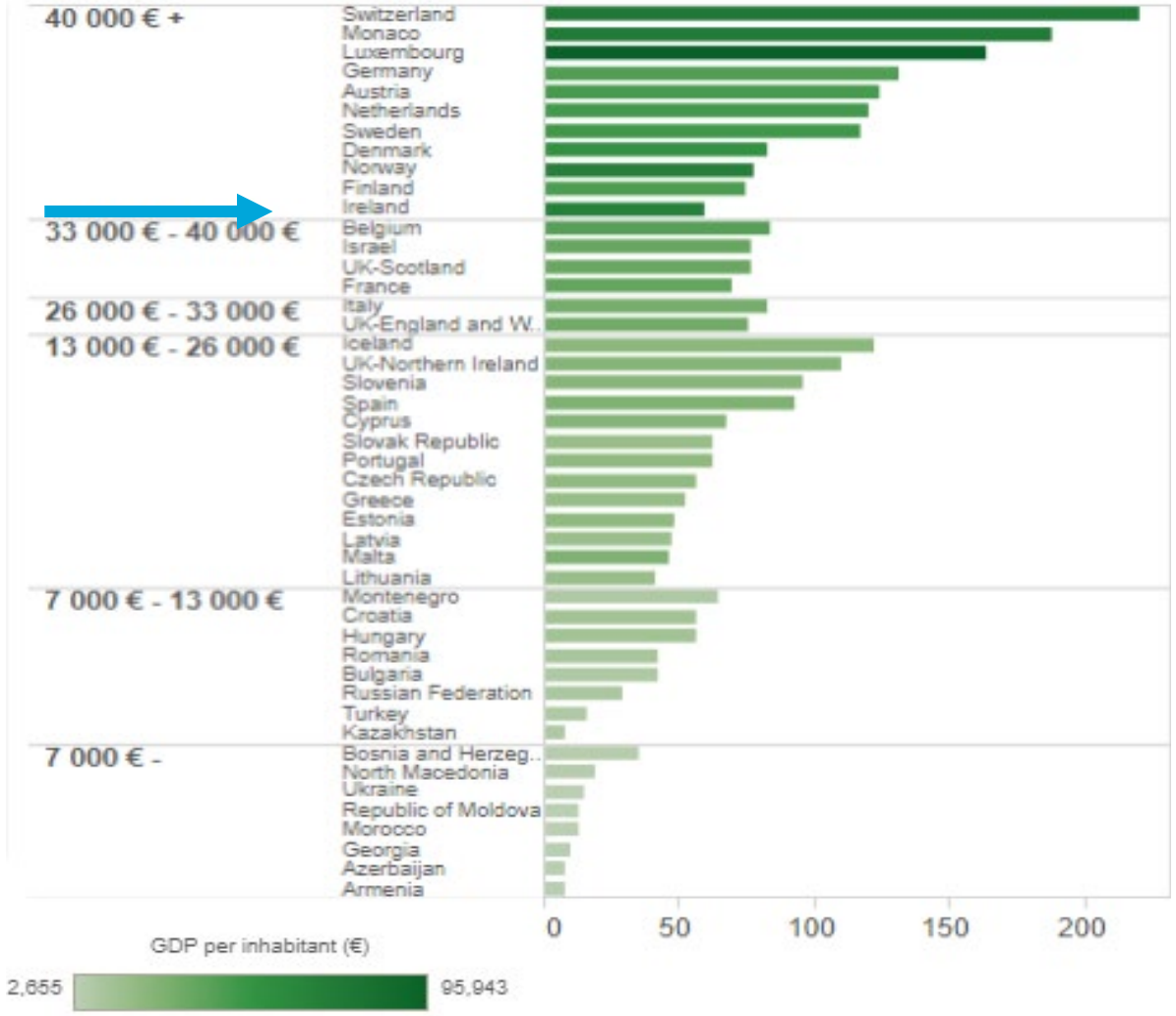
How are we currently performing? Integrity (European Commission Justice Scoreboard 2020/WEF)



How are we currently performing? Efficiency/speed (World Bank Doing Business)

Indicator	Ireland	OECD high income	Best Regulatory Performance
Time (days)	650	589.6	120 (Singapore)
Cost (% of claim value)	26.9	21.5	0.1 (Bhutan)

How do we perform on resourcing?



CEPEJ (Council of Europe 47)
European judicial systems
Efficiency and quality of justice
2020 edition (2018 data)

(salaries, legal aid and operating costs)

Average €72 per capita; Ireland €55, but lowest in spending as % of GDP per capita

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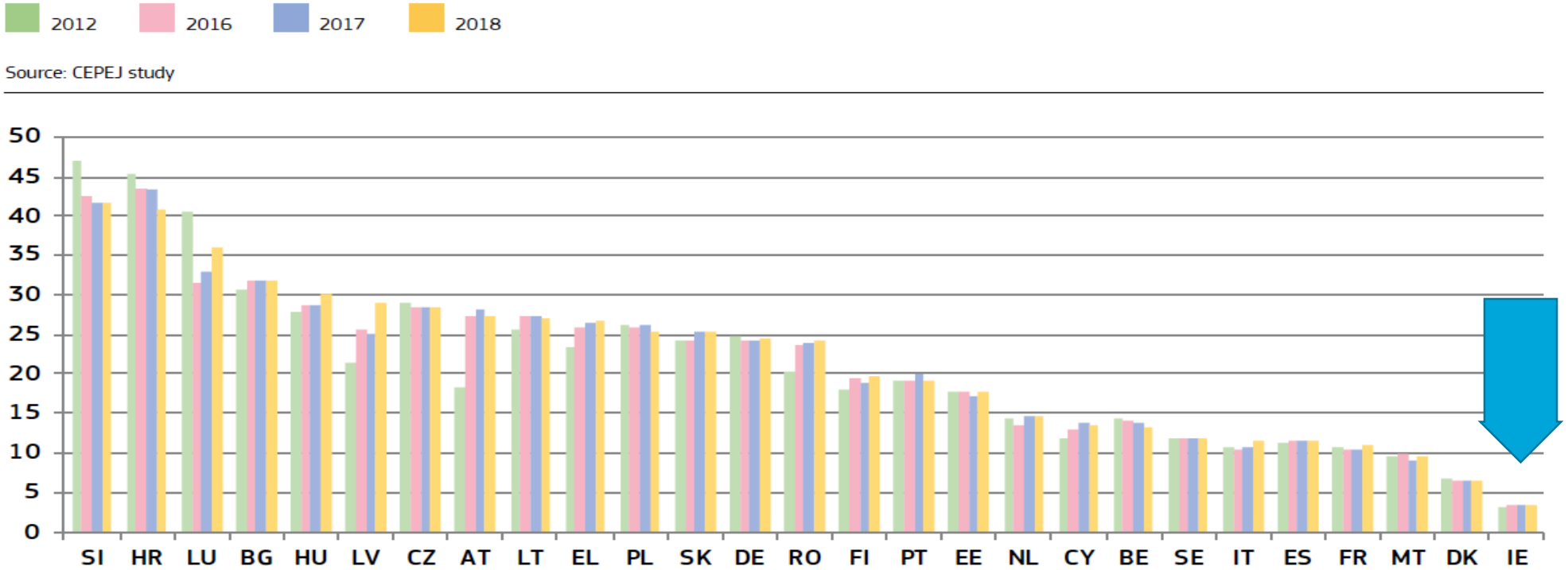
Funding generally

- Courts Service total expenditure **2008**: €139.1 million; 1,090 staff
- Included receipts by court fees €38 million
- Courts Service total expenditure **2019**: €139.4 million; 1,080 staff
- Includes receipts by court fees €47.1 million: among lowest court fee rates in EU, but access to justice issues
- Legal Aid Board 2020: €42.2 million including €1 million for Abhaile scheme: 101.8 solicitors

How we perform on resourcing: Judges per capita (very similar for non-judge court staff) (EU Justice Scoreboard)

Figure 35

Number of judges, 2012-2018 (*) (per 100 000 inhabitants)



Source: CEPEJ study

(*) This category consists of judges working full-time, under the CEPEJ methodology. It does not include the Rechtspfleger/court clerks that exist in some Member States. **AT**: Data on administrative justice is introduced for 2016 cycle for the first time. **EL**: the total number of professional judges includes different categories over the years shown above, which partly explains their variation. Since 2016, data on number of professional judges includes all the ranks for criminal and political justice as well as administrative judges. **IT**: The regional audit commissions, local tax commissions and military courts are not taken into consideration. **LU**: numbers have been revised following an improved methodology.

Distribution of jurisdiction

- New civil litigious cases (c. 945 per judge)

Court (judges at 31.12.19)	2014 in		2019 in	
District (63)	71,471		91,070	
Circuit (40)	30,446		26,703	
High (40)	21,079		17,339	

- New criminal cases (c. 2,970 per judge)

Court	2019 in
District	406,480
Circuit	16,487
High	1,982

- Continue review of configuration of circuits/districts
- Keep Commercial Court threshold under review

The standard steps in a civil dispute

- Claimant invokes invoke the court within the limitation period
- Written pleadings with facts complained of and legal remedies claimed; clarifications and defence (what's admitted and denied)
- Exchange of "relevant" documents
- *Present evidence (written/oral, including experts)*
- *Legal argument*
- *Decision/reasons*
- *Appeal*
- Enforcement

ADR

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Recommendations:
Procedure – pre-engagement with court and case management

- Implement **pre-action protocols** (PAPs) in clinical negligence
- Legislate to extend remit of rules committees to deal with pre-action matters including PAPs (in High Court) and pre-action discovery
- **Case management**
  - Already in High Court (commercial, competition, chancery/non-jury* by rules, personal injuries by statute)
  - Available in all cases in the Circuit Court and District Court but mainly used in complex family/long-trial actions
  - Case management judges or court officers?

Recommendations: Procedures – pleadings

- Parties not fully complying with requirements at present under CLCA for particulars, especially pre-existing medical conditions, but have remedies (e.g. stay or dismissal); recommend **greater precision in pleading** in all cases – but how do you enforce this effectively except by case management?
- **Harmonise and modernise terminology and procedures** across the courts (would require enactment of Courts Consolidation and Reform Bill (LRC 2010)
  - District Court has modernised terminology (2014)
- Set over-arching **case conduct principles** (LRC 2010)
- **Permit rules committees to modify law of evidence** (LRC 2010)
- Permit **statutory practice directions** by Presidents of trial courts (LRC 2010)
- Retain **three routes** to outcome
  - Summary (specific sum) – no return date and result by default judgment or trial (usually on affidavit)
  - Plenary (general damages or equitable remedies) – no return date and result by default judgment or trial (usually on oral evidence)
  - Special (various) – early return date with outcome or case management

Recommendations:
Procedures – pleadings/pre-trial delay

- "One bite": no **dual use of particulars and section 11 notices**
- Better use of **interrogatories**
- Address strategic use of ***lis pendens***
- Enforce/apply rules on exchange of **expert reports**, joint expert meetings, hot-tubbing and controlling use of experts and apply costs sanctions
- **Limit adjournments** (art 13 ECHR expert group)/stricter compliance with time limits to reduce volume and resource use of default motions
- **Automatic discontinuance** where no engagement with court for a specified period (art 13 ECHR expert group)
- Improve culture around **ADR** use
- Additional specialist High Court lists – **IP** and **Clinical Negligence** (at least)
- Myths around **sitting times** and **vacations**

Recommendations: The end of discovery?

- Current discovery regime is *"failing all parties involved in litigation"*.
- Current approach: (a) documents sought are **relevant**; (b) they are **necessary**; (c) discovery is **not disproportionate** or excessive; and (d) consideration has been given to **alternative sources** of information, where appropriate; train of inquiry relevance based on broad pleadings, suited to the age before photocopiers, and certainly the age before the Cloud.
- *Peruvian Guano* (1882) 11 QBD 55: *"… every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly" because… a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences."*
- Recommends moving away from train of inquiry relevance based on the pleadings to a new standard of 'relevant and material to the outcome of the proceedings', with documents produced earlier and in a more streamlined manner.
- Requires primary legislation because of *Tobin v Minister for Defence*
  - Court of Appeal [2018] IECA 230: discovery is increasingly presenting an undue burden and should be curtailed
  - Supreme Court [2019] IESC 57: overturning the Court of Appeal, emphasised the importance of discovery in our legal system and its role in keeping parties honest and uncovering the truth, as well as encouraging settlement; need for proportionality but onus on the producing party to demonstrate through evidence why the discovery sought in a particular case is unduly burdensome.

Recommendations: The end of discovery (2)?

- Follows Article 3 of the IBA Rules on the Taking of Evidence in International Arbitration and Rules of the Dubai International Financial Centre Courts 2014
- Abolish common law discovery, substituting 'Production of Documents', requiring parties to produce documents on which they rely, including publicly available documents, within a defined period after delivering their claim or defence (standard production); provision for entitlement to inspect documents and to request production of documents that are relevant and material to the outcome by targeted searching to be defined by the court in default of agreement and with potential for costs penalties for parties who do not engage constructively.
- Producing party to provide a sworn statement that it had produced all documents in its possession, custody or control which had been requested and to which no objection was made; notice of objection to produce specified documents on basis of lack of materiality, legal impediment or privilege, unreasonable burden, loss or destruction, proportionality or fairness. If disputed, requesting party applies for document production order.
- Court could order document production by non-parties, applying similar principles, and could order production of documents by parties on its own initiative.
- Middle ground between conventional common law discovery and civil law tradition.
- Front-loads costs but logically pins production of records into case pleaded, rather than abstract exercise.

Irish litigation costs – how terrible are they really?

Chart 1: Legal Costs as % of claim value EU Member States
(Word Bank Group Doing Business Survey 2020)

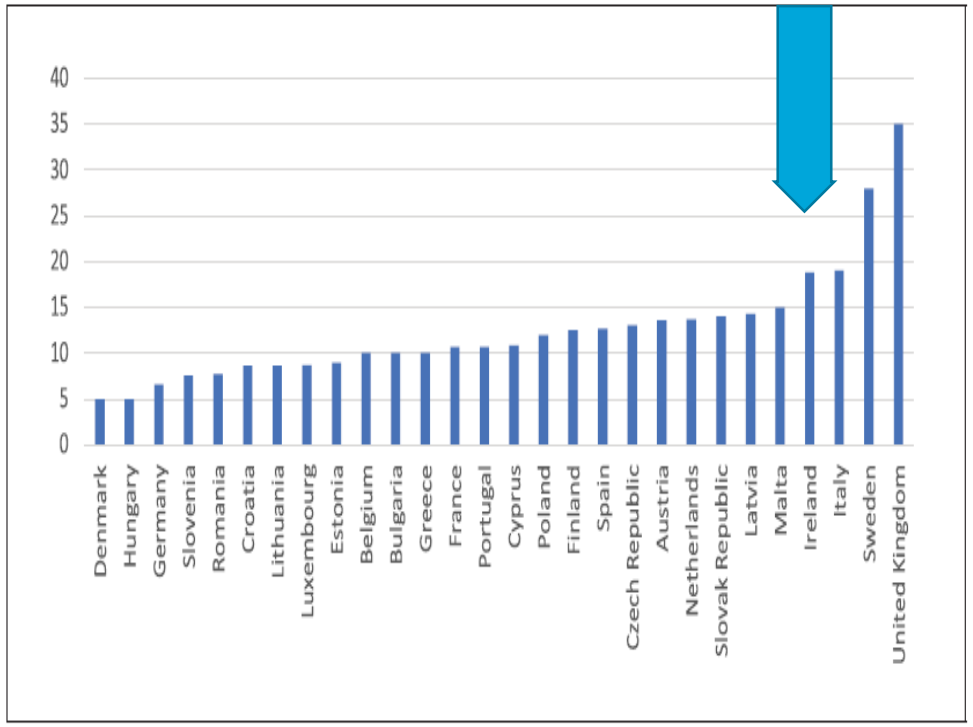
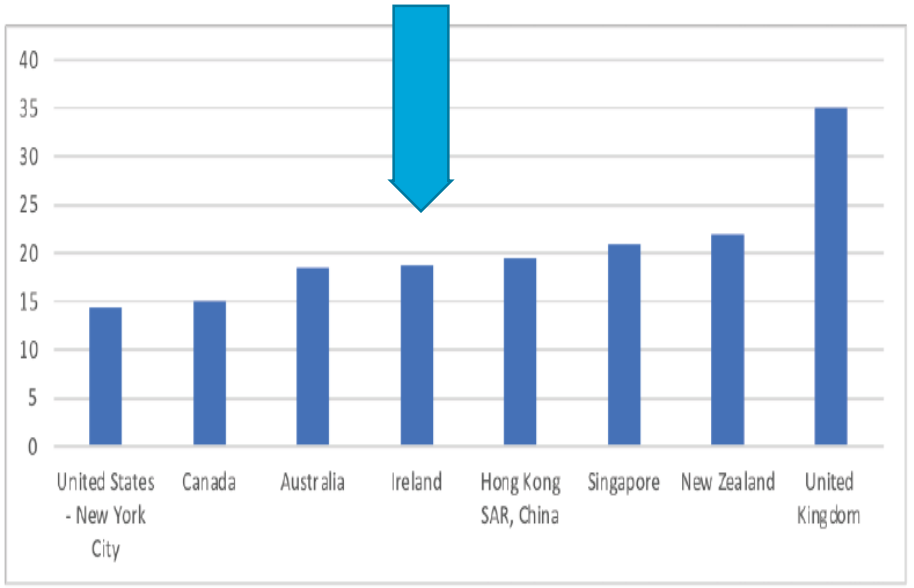


Chart 2: Legal Costs as % of claim value significant common law jurisdictions
(World Bank Group Doing Business Survey 2020)



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Recommendations: litigation costs

- Significant procedural reform may increase efficiency, but also front-load and increase costs: UK experience
- Majority report: wait and see how changes imposed by Legal Services Regulation Act 2015 work out
  - section 150 notices, updated costs estimates, third party estimates
  - greater transparency (register and guidelines) and simplicity in Legal Costs Adjudication regime – reasonably incurred, reasonable in amount
  - ability to make lodgement against costs
- Minority report: table of recoverable costs
- No proposed significant changes to exceptions to costs follow the event (common throughout EU)
- Third party funding
  - Litigation funding generally prohibited as maintenance/champerty: *Persona*
  - Await detailed LRC study on funding but merit in ISIP proposal to allow funding for insolvency officers where there is a reasonable case which would increase the pool of available assets
  - ATE insurance permissible on appropriate terms: *Greenclean*
  - Contingency fees should remain prohibited
  - And NB “no foal no fee”

Technology and e-Litigation

- Crisis is the mother of innovation, but the front end (tech-enabled courtrooms and virtual hearings) is the easy part; 8,000+ videoconference hearings in 2019
- DAR (200+); display (90); videoconferencing (65)
- What about the back end?
- Courts Service Capability Review (2019): ICT *"is not resourced and configured to deliver effectively"*; reasons include *"under-resourcing"* and *"persistent underinvestment"*
- E-filing possible in a tiny minority of situations: small claims; personal insolvency; leave to appeal to SC; LCAO; pilot in liquor licensing
- Online access to court files: desirable for parties but risks associated with wider access – section 65, 1926 Act

What eLitigation looks like

- Secure digital environment enabling -
  - parties/their representatives to file with the court and exchange pleadings and other documents throughout the life-cycle of the case, at first instance and on appeal
  - transaction online of court fee and other payments associated with the case
  - generation and dissemination of hearing dates and court calendar management
  - online applications for adjournments or other orders or directions, where appropriate
  - association of audio or video recordings in the case with the digital case file or record
  - recording and issuance of orders and directions in the case
  - distinct workspaces for judges and court registrars with access to the digital case file or record, and to forms and precedents
  - dissemination/publication of case outcomes (orders, directions and judgments)
- Facility to conduct a hearing before the court using courtroom technology (e.g. evidence presentation, video-conferencing, digital audio recording) to the fullest extent
- Varying levels of access to the digital court record for parties, judges, court staff and members of the public, consonant with data protection and privacy rights
- Capture case management information and caseflow data (adjournments, timescale to disposal, delivery of judgment etc.)

There's a big but

- This needs massive investment in infrastructure, training etc and would be helped by standardisation, centralised case management and document management systems to allow a genuine move to a Digital First approach

Expenditure on ICT in the courts in 2016
(CEPEJ report, Evaluation of European Judicial Systems 2018)[31]

Jurisdiction	Population	Absolute amount allocated to ICT in Courts
Croatia	4.154 million	€10,003,698
Denmark	5.748 million	€20,416,666
Finland	5.503 million	€16,582,298*
Ireland	**4.673 million**	**€8,320,000****
Scotland	5.404 million	€3,056,332
Slovakia	5.435 million	€ 19,403,837***

* amount actually spent in 2016 (amount allocated was not provided)
** amount actually spent in 2016: €9,105,000
*** amount actually spent in 2016, the bulk of which was provided by European funds and co-financing.

Recommendations: multi-party litigation

- Repeated sets of multiple claims out of same controversy: specialist compensation tribunal (Residential Institutions, Hep C) or multiple actions (army deafness, pyrite damage, tracker mortgages)
- Capacity for joinder, representative actions, consolidation and test cases, but all have limitations
- Objective need to legislate for a comprehensive multi-party action (MPA) procedure, balanced with importance of regulatory oversight and enforcement: advantages of judicial economy/avoiding duplication; lower cost risk/overall costs and deterrent effect on wrongdoers
- Prefers English group litigation order (GLO) model over US class action (concerns re US "opt out" approach)
  - certification by court
  - every claimant issues claim and joins MPA register
  - lead representation on issues
  - basis of global settlement clear at point of opt in, not decided by court
  - adverse costs divided among members of the MPA register to which the GLO applies
  - no specific recommendation on third party financing/contingency fees/extension of civil legal aid
- May need to go further again to establish single representative action facility required by Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers

Recommendations: Judicial Review/public law

- Too many bad cases get too far
- Proposes change of threshold for leave:
  - Currently "**arguable case**" threshold and applicant must have "**sufficient interest**"
  - Proposes that court must be satisfied that there are **substantial grounds** for contending that the decision is invalid or other relief should be granted and the claim has a **reasonable prospect of success** and (generally) the applicant has a **substantial interest** in the outcome
- Proposed exclusion of cases involving clerical or typographical errors, slips or omissions, or where the decision document does not accurately reflect the intended decision unless the decision-maker has refused to rectify
- Tighten timelines and procedures and documents
- Discussion of submissions around role for specialist NGOs in public law issues (e.g. environmental)

Recommendations: quality of user experience

- Courts Service Capability Review (2019) and Strategic Vision (2020)
  - Co-location of mediation facilities/services
  - Centralisation of services
  - Restorative justice initiatives
  - Outreach/community engagement
- Information: courts.ie 3.3 million visits in 2019 – information and guidance but not advice
- Accessibility and quality of facilities: 187 venues in 2004 to 95 in 2016, mix of new (high accessibility, victim facilities, etc), refurbished heritage and old
- Efficiency and responsiveness of court staff: high level of engagement, Customer Charter, increased (modest) investment in learning and development, but 35% of staff over 55
- Particular issues around children: next friend/GAL; settlements; privacy; role as witness
- Litigants in person: 30% in Court of Appeal and Supreme Court- can't pay/won't pay
- Persons with capacity issues: wards of court/Assisted Decision-Making (Capacity) Act 2015

Conclusions

- Primary legislation sometimes ill-informed and too interventionist
- Increasing Europeanisation
- Are there incentives for reform: are party-funded or cost-neutral reforms more likely (e.g. discovery)
- No assessment of resource implications of additional jurisdictions
- Performing better than relative level of investment would justify
- Vulnerabilities around effectiveness because of resource constraints, especially in case management
- Credible prospect of continuing minor iterative improvements and significant continuing dependence on external economic environment

Questions?

Seán Barton
Partner
+353 1 607 1219
Sean.Barton@mccannfitzgerald.com

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