



Services Directive: Assessment of Implementation Measures in Member States

National Report for Ireland

**Part Two: Analysis of
national requirements in
specific service sectors**

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<p style="text-align: center;">National Report Part Two Analysis of national requirements in specific service sectors</p>

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ABBREVIATIONS

CER	Commission for Energy Regulation
CSCS	Construction Skills Certificate Scheme
ECCSA Ltd	Electrical Contractors Safety and Standards Association (Ireland) Limited
EEA	European Economic Area
FAS	Training and Employment Authority
FETAC	Further Education and Training Awards Council
FSAI	Food Safety Authority of Ireland
HAS	Health and Safety Authority
HETAC	Higher Education and Training Awards Council
HSE	Health Services Executive
ICAI	Institute of Chartered Accountants in Ireland
ICT	Information and communications technology
IFCO	Irish Film Classification Board
LPG	Liquefied Petroleum Gas
NQAI	National Qualification Authority of Ireland
QSCS	Quarry Skills Certification Scheme
RECI Ltd	Electrical Contractors of Ireland Limited
RGII	Register of Gas Installers of Ireland
RIAI	Royal Institute of Architects in Ireland
SCS	Society of Chartered Surveyors
Services Directive	Directive 2006/123/EC on services in the internal market
S.I.	Statutory Instrument
TFEU	Treaty on the Functioning of the European Union

1. Introduction

National measures implementing Articles 14, 15 and 16(2) of the Services Directive

As explained in Part I of this Report, the European Union (Provision of Services) Regulations 2010¹ - a horizontal measure – gives effect to virtually all the provisions of the Services Directive in Ireland. The sole exception to this universal mode of transposition by a single legal instrument is Article 42 of the Services Directive which was implemented separately by the European Communities (Court Orders for the Protection of Consumer Interests) Regulation 2010.² The transposition of Article 42 added the Services Directive to the list of Directives which are covered by Directive 2009/22/EC on injunctions for the protection of consumers' interests.³ Since Article 42 of the Directive is not germane to the objectives of this study, neither that Article nor the second set of Irish Regulations will be examined further in the context of this Report.

In addition to introducing the European Union (Provision of Services) Regulations, Ireland was also supposed to screen its existing sector-specific legislation in the light of the new legal regime for the provision of services. This screening process was designed to enable Ireland to identify prohibited requirements and to remove them before a specified deadline of 28 December 2009.⁴ As the Services Directive was not transposed into Irish law until 10 November 2010, the removal process – in respect of prohibited requirements - appears to have been delayed indefinitely. Nor is there any evidence that Ireland has, at this point in time, adapted its sector-specific legislation in order to bring it in line with the provisions of the Services Directive. Specific instances of sector-specific legislation – in force in Ireland and in conflict with the Services Directive - will be identified in this Report.

Article 14 of the Services Directive lists the requirements which the Member State or a competent authority within it is prohibited from including in either its legislation or its other rules. This provision was designed to ensure that certain kinds of barriers are not put in the way of persons or businesses wishing to provide services in the different Member States of the Union. Regulation 20 of the 2010 Regulations transposed Article 14 of the Services Directive almost verbatim into the Irish law. The eight key provisions of that Article were transposed into Irish law in the following format:

- Regulation 20, paragraph 1(a)(i) and (ii) transpose Article 14(1)(a) and (b);
- Regulation 20, paragraph 1(b)(i) and (ii) transpose Article 14(2);
- Regulation 20, paragraph 1(c)(i) and(ii) transpose Article 14(3);
- Regulation 20, paragraph 1(d) transposes Article 14(4);
- Regulation 20, paragraph 1 (e)(i), (ii) and (iii) and paragraph 2 transpose Article 14(5);
- Regulation 20, paragraph 1(f)(i) and (ii) and paragraph 3 transpose Article 14(6);
- Regulation 20, paragraph 1 (g) and paragraph 4 transpose Article 14(7); and
- Regulation 20, paragraph 1(h) transposes Article 14(8).

Given the substantial extent to which Regulation 20 constitutes a mirror image of Article 14, it is safe to state that this particular Regulation is in line with both the letter and the spirit of the Services Directive.

Article 15 of the Services Directive contains three pivotal provisions, all of which interact with one another. Article 15(1) stipulates that Member States must, *inter alia*, ensure that certain requirements imposed on service providers -listed in Article 15(2)- are compatible with the conditions as to non-discrimination, necessity and proportionality defined in Article 15(3) of the same Directive. Article 15

¹ S.I. No. 533 of 2010

² S.I. No. 555 of 2010; the decision to transpose Article 42 separately was taken for reasons of transparency.

³ Note that S.I. No. 555 of 2010 is also comprised of Regulations which transposed Directive 2009/22/EC (on injunctions for the protection of consumers' interests) in its entirety into Irish law.

⁴ See Article 44 (1) of the Services Directive.

was transposed into Irish law by Regulation 21 of the 2010 Regulations. Under Regulation 21(1), the competent authorities in Ireland are prohibited from making “access to, or the exercise of, a service activity by a provider or recipient” subject to any of the requirements set out in paragraph 2 (which transposes Article 15(2) of the Directive almost *verbatim* into Irish law) “unless those requirements are non-discriminatory, necessary and proportionate.” The latter principles are defined in depth in Article 21(3)(a),(b) and (c) of the 2010 Regulations.

In transposing the above principles into Irish law in the context of the provision of services, the drafters of the 2010 Regulations used almost the exact same wording as had been used in Article 21 (3)(a),(b) and (c) of the Directive itself. It is important to point out, however, that Article 15(3)(c) of the Services Directive refers to a requirement being “suitable” in terms of its proportionality. Whereas Regulation 21(3)(c)(i) of the 2010 Regulations adopts a different yardstick by referring to a requirement being “necessary” in order to be proportionate. This is inherently problematic insofar as there may be several “suitable” measures to achieve a goal (i.e. measures which, if adopted, can achieve the objective pursued), but not all of them will be necessary (i.e. essential for the attainment of the goal). Therefore, since the two terms do not have the exact same meaning, the transposition could be characterised as ambiguous.

There is an obligation, under Article 15(6) of the Services Directive, for Member States to refrain from the introduction of new requirements contrary to any or all of the three principles as to non-discrimination, necessity and proportionality. The deadline date for compliance with Article 15(6) was 28 December 2009. Ireland only implemented the Services Directive into Irish law on 10 November 2010. Furthermore, under Article 15(7) of the Services Directive, Member States are obliged to notify the Commission of any new “laws, regulations or administrative provisions” of the type identified in Article 15(6). Ireland implemented Article 15(7) of the Services Directive almost *verbatim* in the form of Regulation 20(6) of the 2010 Regulations.⁵

Article 15(5) of the Services Directive made provision for a mutual evaluation report in which the Member States would specify: (a) non-discriminatory, proportionate and necessary requirements which they intended to maintain and (b) the requirements which they had abolished or made less stringent. Ireland participated in the mutual evaluation exercise by identifying requirements which it regarded as being in potential conflict with the Services Directive. As an example, Ireland identified the legislative rules relating to employment agencies as potentially problematic in the light of the provisions of the Services Directive. However, although the Irish government introduced an Employment Agencies Regulation Bill in July 2009 to remedy this perceived mischief, there was a change of government in March 2011 and there is no indication, as yet, that this Bill will be enacted into law in the near future. It is important to reiterate that Ireland still needs to adapt its sector-specific legislation in the services area to make it compatible with the Services Directive itself.

Article 16(1) of the Services Directive obliges Member States to “respect the right of providers to provide services in a Member State other than that in which they are established”. Both Article 16(1) and 16(2) of the Services Directive were transposed into Irish law by Regulation 6 of the 2010 Regulations. For the most part, Irish implementation of this provision was in compliance with both the letter and spirit of the Services Directive. However, there is a solitary question mark in relation to the manner in which Article 16(1)(c) was transposed into Irish law by Regulation 6(2)(c) of the 2010 Regulations. As already spelt out in the Table of Concordance annexed to Part I of this National Report, the Directive refers to a requirement being “suitable” in the context of its proportionality. Whereas Regulation 6(2)(c) of the Irish Regulations adopts a different yardstick by referring to a requirement being “necessary” in order to be proportionate. As explained earlier, this distinction could prove significant in practice insofar as there may be several “suitable” measures to achieve a goal (i.e. measures which, if adopted, can achieve the objective pursued), but not all of them will be necessary (i.e. essential for the attainment of the goal). Therefore, since the two terms do not have the

⁵ Once again, Irish implementation was late insofar as Regulation 20 (6) came into force on 10 November 2010, eleven months after the deadline of 28 December 2009.

exact same meaning, the transposition of the proportionality principle into Irish law – in the context of the provision of services - could be categorised as being ambiguous.

Ireland notified the European Union (Provision of Services) Regulations 2010 to the Commission as “the main provisions of national law” adopted “in the field” covered by the Service Directive.⁶

⁶ In accordance with Article 44(2) of that Directive.

2. Retail

2.1 Overview

In order to establish the extent to which legislation applicable to the retail sector in Ireland is compatible with the Services Directive, the following pieces of national, regional and local legislation were examined and evaluated:

- Explosives Act 1875 and associated legislation and regulations⁷
- Firearms Act 1925
- Bray Promenade, Esplanade and Seashore Bye-Laws 1942⁸
- Occasional Trading Act 1979⁹
- Sale of Goods and Supply of Services Act 1980, Part IV¹⁰
- Video Recordings Act 1989¹¹
- Casual Trading Act 1995¹²
- Casual Trading Act 1995 (Forms) Regulations 1996¹³
- Bye-Laws made under the Casual Trading legislation by Cork County Council and Dublin City Council respectively
- Intoxicating Liquor Act 2000¹⁴
- Local Government Act 2001
- Wicklow County Council Beach Bye-Laws for the County Health District of Wicklow 2001¹⁵
- Retail Planning Guidelines 2005¹⁶
- Kerry County Council Amended (Beach) Bye-Laws 2007¹⁷
- Intoxicating Liquor Act 2008¹⁸
- Cork County Council Bye-Laws for the Regulation of Harbours on the Coastline of County Cork 2009¹⁹

⁷ Although the Explosives Act 1875 is the primary piece of legislation, there are also five pieces of additional legislation and circa 30 sets of Regulations on the subject of explosives. The Dangerous Substances Act 1972 contained a more up-to-date framework for the regulation of explosives. Indeed, the explosives part of that legislation deals, *inter alia*, with importation, keeping, sale, purchase, certificates, manufacture, marking and records. However, the commencement order for that part dealing with explosives was never signed; so the 1972 Act never came into force as the primary legislation regulating explosives in Ireland. Instead, explosives continue to be regulated within the statutory framework of the 1875 legislation. For an overview of the law in this area, see Guide to the Explosives Legislation (issued by the Office of the Government Inspector of Explosives – February 2010).

⁸ Made under the Public Health Acts, Amendment Act, 1907; see: <http://braytowncouncil.ie/media/mediabye-laws/Bray%20Promenade%20Esplanade%20and%20Sea-Shore%20Bye-Laws%201942.pdf>

⁹ See <http://www.irishstatutebook.ie/1979/en/act/pub/0035/index.html>

¹⁰ This is a horizontal piece of domestic legislation which applies across the board to the vast majority of business to consumer contracts for services concluded in the Republic of Ireland. Under this Private law legislation, there is an implied term to the effect that the supplier of the service must have the necessary skill to render the service; and there is also an implied term which stipulates that the service must be supplied with due skill care and diligence. If materials are used in the context of the provision of a service, they must be sound and reasonably fit for the purpose for which they are required. Finally, any goods supplied under a services contract must be of merchantable quality. See <http://www.irishstatutebook.ie/1980/en/act/pub/0016/index.html>

¹¹ See <http://www.irishstatutebook.ie/1989/en/act/pub/0022/index.html>

¹² See <http://www.irishstatutebook.ie/1995/en/act/pub/0019/index.html>

¹³ S.I. No. 146 of 1996

¹⁴ See <http://www.irishstatutebook.ie/2000/en/act/pub/0017/index.html>

¹⁵ Made under the Local Government Act 2001

¹⁶ Ministerial Guidelines made under Section 28 of the Planning and Development Act 2000 (Prn. 4246). See <http://www.envirom.ie/en/Publications/DevelopmentandHousing/Planning/FileDownload,1613>, en.pdf.

¹⁷ Made under the Local Government Act 2001

¹⁸ See <http://www.irishstatutebook.ie/2008/en/act/pub/0017/index.html>

2.2 Prohibited requirements - Article 14 analysis

Article 14 checklist

Reference	Prohibited requirements	Finding		Notes
		Situation pre-implementation	Situation post-implementation	
14(1)	Requirements based directly or indirectly on nationality or residency	√	√	None identified
14(5)	Economic tests	X	X	The Retail Planning Guidelines 2005 are contrary to Article 14(5) of the Services Directive insofar as the Department of Environment, Community and Local Government appears to justify the size cap on sales floor-space within the State on the basis that its removal would not create “economies of scale” for larger retail outlets. These size caps preclude the larger hypermarkets, such as Carrefour or Kaufland, from securing access to the Irish marketplace.
14(6)	Involvement of competing operators in the decisions of competent authorities	√	√	None identified
14(7)	Obligations to obtain financial guarantees or insurances from operators established in the same Member State	√	√	None identified

Findings with respect to the Article 14 prohibitions

The vast majority of the Irish legislation, regulations and guidelines applicable to the retail services sector seem to be in line with the provisions of Article 14 of the Services Directive.

The one exception would appear to be the Retail Planning Guidelines for Planning Authorities 2005. These guidelines impose a universal upper size limit on food-store outlets throughout the State. In recognition of the “rapidly growing retail requirements of Dublin”, the size cap on sales floor-space within the Greater Dublin Area is set at 3,500 square metres. In the remainder of the country, there is a lower limit of 3,000 square metres in operation. As a consequence, traditionally larger stores such as the French hypermarket multiple, Carrefour, the huge German retailer, Kaufland, and the American Walmart chain, are all precluded from entering the Irish marketplace under the current rules. The sole exception to this is IKEA, which opened a 30,000 square metre unit in Ballymun in Dublin in August 2009. The reason that IKEA falls outside the strict requirements of the Retail Planning Guidelines 2005 is because its retail outlet is classified as a warehouse and not as a food or grocery-store.

Usually, guidelines of this nature are justified on the basis of protection of the urban and rural environments, country and town planning rules, the protection of workers, social policy objectives, the protection of artistic and historic heritage and consumer protection. Intriguingly, however, the authors of the 2005 Guidelines (the Department of Environment, Community and Local Government) seek to justify them mainly on the basis of a negative economic assumption, *viz.* that “economies of scale in food-store operations may not be pronounced and are in any event exhausted at a level not much over 2,000 square metres”. The Department concludes that, as a result of the alleged absence of economies of scale in respect of food-stores above 2,000 square metres in size, the imposition of floor-space caps

¹⁹ Made, *inter alia*, under the Local Government Act 2001; see <http://www.corkcoco.ie/co/pdf/135568484.pdf>

at levels above this threshold “would not have pronounced anti-competitive effects.” They also opined that “by encouraging competition at the local level”, an important effect of the retail cap “could be to reduce the potential for local monopolies”.

Under Article 14(5) of the Services Directive, however, Member States are precluded from “making access to a service activity in their territory subject to compliance with, *inter alia*:

“an assessment of the potential or current economic effects of the activity or an assessment of the appropriateness of the activity in relation to the economic planning objective set by the competent authority”.

Given the unequivocal extent to which economic tests are prohibited by the Services Directive, the economic justifications underpinning the universal upper size limit on food-store outlets (in both the Greater Dublin Area and elsewhere in the State) are in contravention of Article 14(5) of that Directive.

It is also salutary to point out – contrary to the views expressed in the Retail Planning Guidelines 2005 - that the Irish Competition Authority has stated that the current limits could prevent competition by imposing restrictions on the size of new outlets. There also seems to be recognition in the Department of Environment, Community and Local Government that – in the midst of a severe economic recession – it is necessary to re-examine the universal sizes cap on floor space on food-store outlets throughout the State. To this end, it published a Review of the Retail Planning Guidelines (Issues Paper) in June 2010. Almost 200 submissions were received in response to this Review Document. Although the review concluded more than a year ago, a new set of Retail Planning Guidelines has still to emerge as a result of this process. It goes almost without saying, however, that the current system is no longer tenable in the light of the provisions of Article 14(5) of the Services Directive.

The floor-space caps, of 3,000 and 3,500 square metres respectively, on large food-stores in Ireland are also classifiable as quantitative restrictions on the provision of services. Their legality will also have to be examined in the context of Article 15 of the Services Directive in the next section of this Report.

2.3 Requirements to be evaluated - Article 15 analysis

Article 15(2) checklist

Reference	Requirements to be evaluated	Finding	Notes
15(2)(a)	Quantitative or territorial restrictions	X	<p>As explained earlier, the Retail Planning Guidelines 2005 impose floor-space caps in respect of large food-stores operating in Ireland. These caps operate as quantitative restrictions on the provision of services insofar as the 3,500 square metres floor-space limit in the Greater Dublin Area (as well as the 3,000 square metres limit in the rest of the country) preclude hypermarket-operators such as Carrefour (from France) and Kaufland (from Germany) from competing in the Irish marketplace. Given that there are no Irish-owned hypermarket-operators, the floor-space caps effectively operate as a form of covert discrimination as against hypermarkets such as Carrefour and Kaufland.</p> <p>The Casual Trading Act 1995 and the Casual Trading Act 1995 (Forms) Regulations 1996, regulate ambulant sales in local markets (both outdoor and indoor), street selling, as well as sales in other public areas (outside sports grounds, for example). The local authorities in Ireland usually only grant a limited number of</p>

			<p>casual trading licences in respect of specific geographical areas or sporting events. These restrictions on the grant of such licences are quantitative in nature and the authorities often seek to justify them on the grounds of public health, public safety, the protection of the urban and rural environments, consumer protection, fairness of trade transactions and the prevention of fraud.</p> <p>The legality of the above restrictions, applicable to casual trading, will be examined in greater detail in the next part of this Report. For the moment, it will suffice to state that the conditions of non-discrimination and necessity are probably adhered to by the competent authorities in Ireland whenever they issue casual trading licences. It is less clear whether the Irish casual trading regime represents the best way to regulate these particulars traders.</p> <p>In Ireland, quantitative restrictions are also imposed in respect of the number of premises entitled to sell alcohol. This includes public houses (pubs, bars and lounges), hotels, restaurants, theatres and off-licences (retail outlets selling alcohol for consumption elsewhere). Access to business of retailing alcohol for public consumption is regulated under the Intoxicating Liquor Acts 2000-2008. Without going into detail in these notes, it is important to point out that the Irish licensing regime is examined at a later juncture in the main text of this report in order to assess its compatibility with the principles of non-discrimination, necessity and proportionality.</p>
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Findings with respect to the Article 15 elements for evaluation, including justification analyses

As explained in detail in the preceding section, the Retail Planning Guidelines 2005 impose floor-space caps in respect of large food-stores operating in Ireland. Although these guidelines do not overtly discriminate on the basis of nationality, they discriminate covertly insofar as there are no indigenous hypermarket-operators in Ireland. It could then be argued that the sales-cap could effectively preclude French and German operators (such as Carrefour and Kaufhof respectively) from gaining access to the Irish marketplace. So in the opinion of the expert these guidelines would be unlikely to survive scrutiny by the Court of Justice of the European Union (if the Commission decided to institute infringement proceedings against Ireland under Article 258 of the Treaty on the Functioning of the European Union (TFEU)). However, as pointed out in the section dealing with Article 14 prohibitions, these floor-space caps are, in any event, currently being reviewed by the Department of Environment, Community and Local Government. Although the Retail Planning Guidelines do not receive a specific name-check in the Commission Staff Working Paper on the process of mutual evaluation, the Commission appears to have been notified²⁰ that Ireland was operating a “Large Convenience Store Floor-Space Cap”.²¹

It is important, at this juncture, to distinguish between two separate pieces of Irish legislation, namely the Occasional Trading Act 1979 and the Casual Trading Act of 1985. Under the 1979 legislation, “occasional trading” refers to the retail sale of goods “at a premises or place (not being a public

²⁰ See Commission Staff Working Paper, page 63, footnote 159.

²¹ To borrow the term of art first used in the Retail Planning Guidelines 2005, paragraph 48.

place)” where the seller has been in occupation for a continuous period of less than three months.²² There is therefore a degree of impermanence involved in being an occasional trader. Because occasional trading licences are issued in respect of private places, the competent authorities do not impose quantitative restrictions in respect of the issue of such licences.

Casual trading, on the other hand, means the retail sale of goods “at a place (including a public road) to which the public have access as of right”. The regulatory regime applies to selling goods by retail on a street, road, market square, footpath, roadside or any other places to which the public have access as of right (including places designated as casual trading areas by local authorities). Quantitative restrictions are often imposed on casual traders on the basis of public security, public health or environmental concerns (including the traffic problems caused by such trading). In the first part of this Report, the casual trading regime regulated by Cork City Council was examined in substantial detail. This time around, the spotlight will be placed on Dublin City Council, another of the competent authorities responsible for the regulation of casual trading.

In Dublin, applicants for casual trading licences must complete a statutory application form, providing details of their name, address, phone number, occupation, personal public service number or tax reference number in the case of a company or – in the case of a limited company – the company registration number.²³ The applicant must also provide details of any casual trading licence previously held and on the goods to be sold. Applicants are obliged to pay the appropriate fee for the licence and must be free of two or more convictions under the legislation for a period of three years.²⁴ Dublin City Council issues both Designated Area Trading licences and Event Trading licences. The first category of licence relates mainly to street trading in Dublin. The second category of licence applies to the sale of goods in the vicinity of an event and for the duration of such event. In the event of an excess of applications in respect of either category of licence, applicants on the waiting list are dealt with on a “first come, first served” basis. Although this basis of assessment is quantitative in nature, it appears to comply with the non-discrimination, necessity and proportionality requirements encapsulated in Article 15(3) of the Services Directive. In regulating the number of casual trading licences issued in its catchment area on a “first, come, first served basis”, Dublin City Council seems to be taking account of the public security, public health, environmental, consumer protection and fair trading concerns underpinning the regulatory regime which it operates. Against this, however, the unduly formalistic nature of the Irish authorisation requirements raises questions as to whether the regulatory regime in this jurisdiction is proportionate.

In Ireland, applicants for certain liquor licences are required to produce tax clearance certificates. The liquor licences covered by this requirement include: spirit retailer’s licence (including those granted to publicans, hoteliers and restaurateurs), off-licences (shops selling alcohol for consumption elsewhere) and wine retailers on-licences. The Intoxicating Liquor Acts of the years 2000 and 2008 respectively delineate the different circumstances under which a new licence may be applied for:

- A new licence for premises where there was never a full licence before. This involves extinguishing, with the consent of the holder, an existing full licence (which can be located anywhere in the country);
- Transfer a licence from an old licensed premises to a more suitable one in the immediate vicinity of the licence being extinguished (but only in rural areas), where an existing

²² Recent years have witnessed the birth of the “Pop-up Shop” phenomenon in Ireland. The “Pop-up Shop” involves imaginative business people hiring premises to open a new venture, with the sole intention of trading for a short space of time, usually between a few days and a few months. The most famous name to be associated with this phenomenon in Dublin was “CrackBIRD”, a restaurant specialising exclusively in chicken dishes. The entrepreneur behind this venture managed to secure the premises for a period of three months at a low rent. Under the Occasional Trading legislation, traders who continue in business for three months or more are entitled to a refund of their licensing fees. This is in recognition of the fact that there is an element of permanence to traders who manage to stay in business for three months or more.

²³ Casual Trading Act 1995 (Forms) Regulations 1996 (S.I. No. 146 of 1996).

²⁴ Casual Trading Act 1995, section 4(7).

- premises has burnt down or has been destroyed or demolished, provided the new premises are to be in the immediate vicinity or the licence being extinguished;
- If licensed premises are to be demolished by a local authority or disposed of under a compulsory purchase order, then the local authority will certify a suitable new site for the transfer of the existing licence;
- If premises have been licensed within the previous five years but the licence was allowed to lapse (due to a lack of tax clearance or in circumstances in which a publican has ceased trading), an application can be made to revive that licence;
- If there are premises adjoining or attached to the licensed premises (such as an extension), a new licence can be sought to cover the adjoining/attached premises.

Intoxicating liquor licences are granted by the Circuit Court. There are a number of prerequisites to the grant of a licence. The applicant must adduce evidence of compliance with Planning laws and Safety, Health and Welfare at Work legislation. If the applicant is intending to serve food, the premises must meet the requirements of the Health Services Executive (HSE).²⁵ The applicant is also obliged to produce both a Fire Certificate (establishing that the premises are compliant with the Fire Regulations) and – as stated earlier - a Tax Clearance Certificate.²⁶ If the applicant is a company or trading under a business name, the certificate of incorporation or certificate of registration of a business name must also be produced.

During the mutual evaluation process, Ireland notified the Commission that quantitative restrictions are imposed in respect of premises authorised to sell alcohol. A key indicator of such restrictions is the requirement – encapsulated in the Intoxicating Liquor Acts of 2000 and 2008 respectively – that an existing liquor licence must be extinguished before a new licence can be granted by the Circuit Court. This restrictive regime applies not only to public houses (pubs), but also to hotels, restaurants, theatres and off-licences. Although the linkage between the extinction of an old licence and the grant of a new one appears non-discriminatory on its face, serious questions still arise as to whether the Irish regime complies with the necessity and proportionality requirements set out in Article 15(3) of the Services Directive.

The Irish authorities justify the restrictive licensing regime is justifiable on the basis of “an overriding reason relating to the public interest”, viz., the public health benefits which flow from the restrictive availability of alcohol.

However, although the war against alcoholism is a praiseworthy objective, the existing Irish licensing regime appears to be disproportionate insofar as there are other, less restrictive, methods capable of fighting this particular war including: increases in excise duty designed to prevent cheap alcohol from overrunning the marketplace, clever (multi-media) educational campaigns designed to catch the imagination of younger drinkers in particular, the provision of alternatives to pubs as sources of entertainment for young people, and a more cohesive approach to the hours of the day and night alcohol is available in different retail outlets. As matters stand at present, the “old licence for new” requirement in Irish licensing law makes it much more difficult for foreign retailers of alcohol to gain access to the Irish marketplace. Consequently, the Intoxicating Liquor Acts of 2000 and 2008 respectively may need to be reviewed in the wake of the transposition of the Services Directive into Irish law.

2.4 Restrictions to the freedom to provide services - Article 16(2) analysis

Article 16(2) checklist

Reference	Prohibited requirements	Finding	Notes
16(2)(a)	Obligation to have an establishment in the	X	Under Regulation 3 of the Public Sales of

²⁵ www.HSE.ie. See also the website of the Food Safety Authority of Ireland: www.FSAl.ie.

²⁶ For further details, see www.revenue.ie.

	territory where the service is provided		Greyhounds Regulations 1966, public sales of greyhounds cannot be held without a licence granted by Bord na gConn (the Irish Greyhound Board). It is implicit in the 1966 Regulations that the service provider must have a greyhound track in the Board's territory in order to hold a licensed sale within its jurisdiction. These Regulations effectively foreclose access to the Irish marketplace for potential sellers from outside the jurisdiction wanting to conduct public sales of greyhounds. They contravene Article 16(2)(a) of the Services Directive insofar as they impose an establishment requirement on sellers from outside the Republic of Ireland.
16(2)(b)	Obligation to obtain an authorisation or a registration	X	<p>In Ireland, licences are necessary in order to engage in occasional and casual trading. As explained below, the authorisation requirements – especially in relation to casual trading (under the Casual Trading Act 1995 (Forms) Regulations 1996) – are markedly stringent and could be categorised as being disproportionate.</p> <p>There are a number of bye-laws which, <i>inter alia</i>, regulate trading in harbours and on beaches. The authorisation requirements in respect of harbours are probably justifiable on public security grounds. Similar requirements in respect of beaches are more difficult to justify; unless, of course the authorisation requirements applicable to casual traders on beaches in Wicklow and Kerry can be justified on environmental grounds, <i>viz.</i> the preservation of the unspoilt beauty and scenic integrity of the beaches in these areas.</p> <p>Under the Explosives Act 1875 (and its Associated Regulations) and the Firearms Act 1925, licensing regimes operate in respect of the importation, exportation and usage of explosives and firearms in Ireland. The authorisation requirements governing both explosives and firearms are probably justifiable on a number of grounds, including public policy, public security and public health.</p> <p>Finally, the Irish Film Classification Board (“IFCO”) is the competent authority responsible for the licensing of videos/DVDs/Blu-ray recordings for sale, hire or distribution in Ireland. This regulatory regime is quite restrictive in so far as the video industry is concerned; but most probably justifiable on the basis that it prevents excessively violent or sexually exploitative material from circulating in the Irish marketplace. Note, however, that this legislation does not apply to videos which are either distributed or sold online.</p>
16(2)(c)	Ban on setting up an infrastructure	√	None identified
16(2)(d)	Application of specific contractual arrangements between the service provider and the recipient restricting the provision of the service by the self-employed	√	None identified
16(2)(e)	Obligation to possess a specific identity document	√	None identified
16(2)(f)	Requirements affecting the use of equipment	√	None identified
16(2)(g)	Restrictions on recipients	√	None identified

Findings with respect to the Article 16(2) prohibitions, including justification analyses

Under Regulation 3 of the Public Sales of Greyhounds Regulations 1966, public sales of greyhounds cannot be held without a licence granted by Bord na gConn (the Irish Greyhound Board). It is implicit in the 1966 Regulations that the service provider must have a greyhound track in the Board's territory in order to hold a licensed sale within its jurisdiction. These Regulations effectively foreclose access to the Irish marketplace for potential sellers from outside the jurisdiction wanting to conduct public sales of greyhounds. They contravene Article 16(2)(a) of the Services Directive insofar as they impose an establishment requirement on sellers from outside the Republic of Ireland.

As regards authorisation schemes, it is important to point out that Ireland does not have an all-encompassing authorisation scheme for wholesale and retail services. The vast majority of the authorisation schemes for the wholesale and retail distribution of goods in this country fall into two main categories: (i) authorisation schemes linked to specific types of trading; (ii) authorisation schemes connected to the wholesale or retail distribution of a specific product.

(i) Specific types of trading: As explained in Section 2.3 *supra*, licences are required in order to engage in either occasional or casual trading in the State (in accordance with the provisions of the Occasional Trading Act 1979 and the Casual Trading Act 1985 respectively). The requirements relating to casual trading are somewhat onerous insofar as the applicant must complete a statutory application form containing details of his/her name, address, phone number, occupation and personal public service number. Companies are obliged to give details of either their tax reference numbers or, in the case of a limited company, its registration number. Although the above requirements are non-discriminatory, doubts must be expressed as to the proportionality of these requirements. Indeed, it is salutary to point out that Germany recently abolished its authorisation scheme for itinerant cross-border sales activities because it was considered unjustified and disproportionate.

There are a number of bye-laws which, *inter alia*, regulate trading on beaches and in harbours. With regard to beaches, both the Wicklow County Council Beach Bye-Laws for the County Health District of Wicklow 2001 and the Kerry County Council (Amended) Beach Bye-Laws 2007 are important. Under bye-law (d) of the 2001 Bye-Laws, traders wishing to sell or hire out goods on Wicklow beaches are obliged to secure the consent of the County Council and comply with the Casual Trading Act 1995. Traders wishing to sell or hire out goods on Kerry beaches are subject to less stringent requirements insofar as they only need to procure the consent of the County Council to engage in such activities.²⁷ However, one of the criteria governing the grant of such permits is the "number of persons already holding permits of the class applied for", so permission is far from automatic. Under bye-law 87 of the Cork County Council Bye-Laws for the Regulation of Harbours on the Coastline of County Cork 2009, trading of any kind is prohibited within the harbour absent the permission of the Harbour Master. The respective Harbour Masters in the different Cork harbours enjoy a substantial measure of discretion insofar as they can designate both the times and location (within the harbour) of such trading.

It is safe to surmise that safety is a paramount consideration in harbours on the coastline of Cork. This would explain why the Harbour Master exercises such a firm degree of control over casual trading taking place within a harbour. Such authorisation schemes are non-discriminatory, seem to be justifiable on public policy, public security and public health grounds and proportionate insofar as the authorisation requirement is suitable for attaining the objective pursued, *viz.*, securing a working environment for the fishing industry (and those working in the harbour) in which safety reigns supreme.

The authorisation schemes governing casual trading on beaches are arguably more difficult to justify on public policy, public security, public health or environmental grounds. Against this,

²⁷ Under bye-law 13 of the 2007 Bye-Laws

however, one of the selling points of the beaches in both Wicklow and Kerry is their unspoilt nature. So measures dedicated to preserving the scenic integrity of Irish beaches might be justifiable on public policy and environmental grounds, even if this requires traders to undergo an authorisation procedure before being allowed to trade on such beaches.

(ii) Specific goods: In Ireland, explosives are regulated under the Explosives Act 1875 and associated Explosives Regulations. The 1875 legislation was introduced to “control the manufacture, keeping, sale, conveyance and importation of explosives for legitimate purposes.” In order to use explosives for legitimate purposes (such as underground mining or demolition work), it is necessary to procure an explosives licence. Although this licence is a form of authorisation requirement, it is probably justifiable on a number of grounds, including public policy, public security and public health.

The Firearms Act 1925 places stringent restrictions on both the importation and exportation of firearms. A licence is required to import firearms,²⁸ whereas exports of firearms require the authorisation in writing of a Garda Superintendent.²⁹ This strict regime effectively precludes firearms dealers from other jurisdictions from trading in Ireland. As is the case in respect of explosives, the authorisation requirements governing firearms are probably justifiable on a number of grounds, including public policy, public security and public health. This restrictive element of public policy is mirrored in the policing methods employed by the Garda Síochána in Ireland. The vast majority of the police force does not routinely carry arms, relying instead on wooden truncheons/ASP extendable batons and pepper spray respectively.

The Irish Film Classification Board (IFCO) is responsible for examining all video/DVD/Blu-ray recordings for sale, hire or distribution in Ireland. Before engaging in the sale, hire or distribution of such products in Ireland, it is necessary to obtain a licence from IFCO. There are a number of criminal offences under the Video Recordings Act 1989 including the importation, possession or supply of wrongly certified videos/DVD/Blu-ray recordings and the sale of same without a licence. Although this authorisation regime is a stringent one, it is probably justifiable on the basis that it is designed to preclude excessively violent or sexually exploitative material (including child pornography) from gaining access to the Irish marketplace.

The 1989 Act defined a video recording as a physical product comprising “any disc or magnetic tape containing information by the use of which the whole or part of a video work may be produced.” More and more video is now made available through online distribution, a development which could not have been envisaged when the Irish legislation was enacted back in 1989. Given that videos distributed online are ethereal – as opposed to physical – products, they are not subject to the provisions of the Video Recordings Act 1989.

2.5 Conclusions for retail sector

As explained earlier, the Retail Planning Guidelines 2005 are currently under review by the Department of Environment, Community and Local Government. These Guidelines could prove problematic for Ireland in the long run insofar as they are difficult to reconcile with the provisions of Articles 14(5), 15(2)(a) and 16(2)(c) respectively of the Services Directive. It would make sense – arguably from an economic perspective and certainly from an EU law compliance perspective – for Ireland to remove the 3,500 and 3,000 square metre floor caps currently applicable in respect of large retail food-stores.

It may appear necessary to regulate both occasional and casual trading. However, from a cross-border perspective, the authorisation requirements in respect of casual trading in Ireland are quite onerous. This raises the question of whether the Irish regime is disproportionate. The Irish regulatory regime is

²⁸ Under Regulation 17 of the 1925 Act

²⁹ Regulation 16

difficult to reconcile with the principle of proportionality, especially in an era in which the freedom to provide services is gaining an ever increasing purchase in the European Union marketplace.

Another important issue which arose was whether the Irish liquor licensing regime – encapsulated in the Intoxicating Liquor Acts of 2000 and 2008 respectively – amounted to a quantitative restriction. In other words, could the “old licence for new licence” requirement (underpinning the Irish licensing system) make it much more difficult for foreign retailers of alcohol to gain access to the Irish retail marketplace? Which begs the question of whether Ireland should introduce a more proportionate licensing regime for liquor which would make the market more accessible to foreign retailers of alcohol whilst, at the same time, ensuring that alcohol is used more responsibly in this jurisdiction.

This section of the Report also examined the authorisation requirements applicable to casual sales concluded on beaches or in harbours. Although these regulatory regimes appeared, on an initial analysis, *prima facie* in breach of the provisions of the Services Directive, it would seem that such requirements, all of which were non-discriminatory, could be justified on a number of different grounds, including public policy, public security, public health and the protection of the environment. In relation to the regulatory regimes applicable to explosives and firearms respectively, both systems would probably be justifiable on the basis of a trinity of grounds: public policy, public security and public health. Finally, the licensing system for videos is most probably justifiable on public policy grounds, insofar as it is designed to prevent excessively violent and sexually exploitative videos from circulating in the Irish marketplace.

3. Tourism

3.1 Overview

In order to establish the extent to which legislation and administrative guidelines applicable to the tourism sector are compatible with the Services Directive, the following national provisions were examined and evaluated:

- Hotel Proprietors Act 1963³⁰
- Transport (Tour Operators and Travel Agents) Act 1982
- Tour Operators (Licensing) Regulations 1993³¹
- Travel Agents (Licensing) Regulations 1993³²
- Package Holidays and Travel Trade Act 1995³³
- Package Holidays and Travel Trade Act 1995 (Occasional Organizers) Regulations 1995³⁴
- Package Holidays and Travel Trade Act 1995 (Bonds) Regulations 1995³⁵
- Aviation Regulation Act 2001³⁶
- Tourist Traffic Acts 1939 to 2003 Restatement³⁷
- National Tourism Development Authority Act 2003³⁸
- Commission for Aviation Regulation, Guidelines on Tour Operators and Travel Agents Licenses – January 2008³⁹
- Travel Agents (Licensing) (Amendment) Regulations 2010⁴⁰
- Tour Operators (Licensing) (Amendment) Regulations 2010⁴¹
- Commission for Aviation Regulation, Revised arrangements for the provision of audited accounts in the travel trade sector – January 2011⁴²

3.2 Prohibited requirements - Article 14 analysis

Article 14 checklist

Reference	Prohibited requirements	Finding		Notes
		Situation pre-implementation	Situation post-implementation	
14(1)	Requirements based directly or indirectly on nationality or residency	√	√	None identified
14(2)	Requirements limiting the establishment of service providers to one Member State	√	√	None identified
14(3)	Requirements limiting the choice of the service provider between	√	√	None identified

³⁰ See <http://www.irishstatutebook.ie/1963/en/act/pub/0007/index.html>

³¹ S.I. No. 182 of 1993

³² S.I. No. 183 of 1993

³³ See <http://www.irishstatutebook.ie/1995/en/act/pub/0017/index.html>

³⁴ S.I. No. 236 of 1995

³⁵ S.I. No. 271 of 1995

³⁶ See <http://www.irishstatutebook.ie/2001/en/act/pub/0001/index.html>

³⁷ See http://www.attorneygeneral.ie/slr/Restatement_Tourist_Traffic_Acts_1939_to_2003.PDF

³⁸ See <http://www.irishstatutebook.ie/2003/en/act/pub/0010/index.html>

³⁹ See

http://www.aviationreg.ie/_fileupload/22%2001%2010%20TTL_Guidelines_2010%20with%20amended%20levy.pdf

⁴⁰ S.I. No. 659 of 2010

⁴¹ S.I. No. 660 of 2010

⁴² See http://www.aviationreg.ie/_fileupload/CN1%202011_18_01_11.pdf

	principal and secondary establishment			
14(5)	Economic tests	√	√	None identified
14(7)	Obligations to obtain financial guarantees or insurances from operators established in the same Member State	X	X	Under the Package Holidays and Travel Trade Act 1995 (Bonds) Regulations 1995, bonds shall be secured only with: (i) insurance companies authorised to carry out surety ship business in accordance with the European Communities (Non-Life Insurance) Framework Regulations 1994 or (ii) banks duly licensed under the Central Bank Act 1971. The second of these provisions appears to be contrary to Article 14(7) of the Services Directive. As explained below, banks in possession of the 'single passport' should also be entitled to issue bonds to tour operators and travel agents in Ireland.

Findings with respect to the Article 14 prohibitions

In Ireland, the bonding requirement set out in both the Transport (Tour Operators and Travel Agents) Act 1982 and the Package Holidays and Travel Trade Act 1995 (Bonds) Regulations 1995 require tour operators or travel agents to enter into a bond before a licence can be granted by the Commission for Aviation Regulation. The rationale for this particular requirement is succinctly explained in Holiday Law in Ireland:

“The primary purpose of the bond...is to provide that in the event of the liability or failure of the tour operator or travel agent concerned to meet his financial or contractual obligations in relation to overseas travel contracts, a sum of money would become available to the...[Commission for Aviation Regulation]... to be applied for the benefit of any customer of the tour operator or travel agent concerned who has incurred loss or liability because of such inability or failure to meet financial or contractual obligations.”⁴³

The Package Holidays and Travel Trade Act (Bonds) Regulations 1995 ensure that the Third Non-Life Insurance Framework Directive (92/49/EEC) has full force and effect within the travel and tourism sector. This Directive introduced a single authorisation system for insurance undertakings operating throughout the European Union. Under this system, insurance undertakings transacting business on either a cross-border or branch basis are subject to the overall supervisory control of the competent authority where their head office is located. It is important to point out in this context that tour operators and travel agents based in Ireland are not restricted to obtaining insurance from operators established in Ireland. It is also open to them – courtesy of the Third Non-Life Insurance Framework Directive - to procure insurance from insurance undertakings doing business on either a cross-border or branch basis in Ireland.

The 1995 Bonds Regulations also stipulate that tour operators or travel agents taking out bonds with banks must use the services of banks “duly licensed under the Central Bank Act 1971”. This runs counter to the Second Banking Directive of 1992⁴⁴ under which a bank authorised in any European

⁴³ Jonathan Buttimore, *Holiday Law in Ireland* (Blackhall Publishing, Dublin, 1999) p. 113.

⁴⁴ Council Directive 89/646/EEC on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions, OJ L 386 of 30 December 1989, p.1. Note that

Union Member State is free to provide banking services in any other Member State without requiring additional authorisation. This is what is known as the ‘single passport’ in banking which permits banks in one Member State to offer services in another on a cross-border or branch basis. It would seem that the 1995 Bonds Regulations needs to be amended to reflect the fact that banks enjoying the benefit of the ‘single passport’ should be able to offer bonds to both Irish tour operators and travel agents.

3.3 Requirements to be evaluated - Article 15 analysis

Article 15(2) checklist

Reference	Requirements to be evaluated	Finding	Notes
15(2)(a)	Quantitative or territorial restrictions	√	None identified
15(2)(g)	Obligations to apply fixed minimum or maximum tariffs	√	None identified

Findings with respect to the Article 15 elements for evaluation, including justification analyses

For the most part, Irish legislation and administrative provisions in the travel and tourism sector seem to be in line with Article 15(2) and (3) of the Services Directive. None of the requirements listed in the checklist above were found in the Irish legislation. However, an Article 15(2)(c) shareholding requirement was identified. There are capital thresholds contained in the Commission for Aviation Regulation Guidelines on Tour Operators and Travel Agents Licences, January 2008. Travel Agents are obliged to have a minimum capital investment in their businesses amounting to the greater of either € 25,000 or 5% of their annual licensable turnover. The corresponding capital requirements for tour operators are the greater of either € 38,000 or 5% of their annual turnover. Given that tour operators and travel agents are also expected to take out bonds in respect of the provision of tourist services, the capital requirements appear to be excessive and contrary to both the principles of necessity and proportionality.

3.4 Restrictions to the freedom to provide services - Article 16(2) analysis

Article 16(2) checklist

Reference	Prohibited requirements	Finding	Notes
16(2)(a)	Obligation to have an establishment in the territory where the service is provided	√	None identified
16(2)(b)	Obligation to obtain an authorisation or a registration	X	Tour operators and travel agents operating in Ireland, but involved in the provision of tourism and travel services to overseas destinations and to Northern Ireland, are obliged to hold licences issued by the Commission for Aviation Regulation. ⁴⁵ As explained below, this licensing requirement is <i>prima facie</i> in contravention of Article 16(2)(b) of the Services Directive. In an era in which many European Union countries - in regulating travel and tourism services - are substituting notification requirements for authorisation requirements, the current Irish licensing system appears to be unduly restrictive, disproportionate and contrary to the principle of proportionality. Furthermore, given that Article 5 of the Package Holidays Directive imposes strict liability on tour operators and travel agents in respect of either the non-performance or improper performance of their contractual

this Directive was amended substantially by Directive 2000/12/EC which, in turn, was re-cast by Directive 2006/48/EC.

⁴⁵ In this context, see especially the Tour Operators Licensing Regulations 1993 (S.I. No. 182 of 1993), the Travel Agents Licensing Regulations 1993 (S.I. No. 183 of 1993) and the Aviation Regulation Act 2001.

			<p>obligations, and that Irish-based consumers are also protected, in any event, by Article 7 of that Directive, insofar as bonds must be taken out by tour operators and travel agents in their respective Member States of Establishment (as security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency), a case could probably be made for replacing the licensing system with a notification system instead.</p> <p>In addition, operators or agents who offer tourist accommodation within Ireland and who want to describe the accommodation as a hotel, guesthouse, holiday hostel, youth hostel, holiday-camp, motor hotel or caravan and camping site, must comply with both the registration requirements and the quality standards set out in the Tourist Traffic Acts 1939-2003. The National Tourism Development Authority (known as Fáilte Ireland) is the competent authority responsible for the operation of this registration system.</p>
16(2)(c)	Ban on setting up an infrastructure	√	None identified
16(2)(d)	Application of specific contractual arrangements between the service provider and the recipient restricting the provision of the service by the self-employed	√	None identified
16(2)(e)	Obligation to possess a specific identity document	√	None identified
16(2)(f)	Requirements affecting the use of equipment	√	None identified
16(2)(g)	Restrictions on recipients	√	None identified

Findings with respect to the Article 16(2) prohibitions, including justification analyses

In Ireland, both tour operators and travel agents require licences before they can become involved in the travel and tourism business.⁴⁶ Under Section 2 of the Transport (Tour Operators and Travel Agents) Act, 1982, a “tour operator” is defined as “a person, other than a carrier, who arranges for the purpose of selling or offering for sale to the public, accommodation for travel by air, sea or land transport to destinations outside Ireland....either solely or in association with other accommodation, facilities or services.” Under the same provision, a “travel agent” is defined as “a person, other than a carrier, who, as agent, sells or offers to sell to, or purchases or offer to purchase on behalf of the public, accommodation on air, sea or land transport to destinations outside Ireland....either solely or in association with other accommodation, facilities or services.” In order to be issued with a licence, a tour operator or a travel agent must apply to the Commission for Aviation Regulation. The following prerequisites are central to all applications:

- An application form two months in advance of commencing trade;
- Company financial statements;⁴⁷

⁴⁶ The key legal provisions relating to the granting of licences are: the Transport (Tour Operators and Travel Agents) Act 1982, the Tour Operators Licensing Regulations 1993 (S.I. 182 of 1993), the Travel Agents Licensing Regulations 1993 (S.I. No. 183 of 1993) and the Aviation Regulation Act 2001.

⁴⁷ Until recently, an applicant for a licence was obliged to produce an audited set of accounts. But this requirement was relaxed in 2010 in respect of private limited companies with a turnover of less than € 7.3 million and assets of less than € 3.65 million at the end of the financial year. Such companies can produce financial statements instead of audited accounts. (See the Travel Agents Licensing (Amendment) Regulations 2010 (S.I. No. 659 of 2010) and the Tour Operators Licensing (Amendment) Regulations 2010 (S.I. No. 660 of 2010) respectively.) To qualify for this exemption from the obligation to produce a set of audited accounts, the company concerned must also have less than 50 employees and must not be a parent company or a subsidiary company. See http://www.aviationreg.ie/_fileupload?CN1%202011_18_01_11.pdf, p. 4, fn. 3.

- Bank statements;
- Evidence of share capital as per Companies Office documentation;
- Financial projections of future tour or travel agency business;
- In the case of new applicants for licences, details of the market research carried out in arriving at the above financial projections;
- In the case of an applicant for a travel agent's licence, a breakdown of projected turnover in respect of scheduled air travel, package holidays, boat and rail tickets and other forms of income;
- Proof of competent and experienced staff;
- Documentary evidence that arrangements for a bond are in place;
- An annual fee based on company turnover.⁴⁸

Tour operators and travel agents from countries outside Ireland also require the appropriate Irish licence if they wish to sell, or offer for sale, travel from Ireland to destinations outside the State. This can be doubly burdensome for cross-border tour operators and travel agents respectively insofar they may also be obliged to hold an equivalent licence in their Member State of establishment. Against this, however, tour operators and travel agents from outside Ireland are not required to maintain either a contact address or an office in Ireland.

So, in Ireland, tour operators and travel agents face substantial scrutiny by the Commission for Aviation Regulation. Not only are they obliged to produce a raft of financial and other documentation in support of their licence applications, they are also obliged to meet certain capital thresholds in respect of the amounts they have invested in their respective firms, as well as taking out bonds to cover the exigencies which could arise if their businesses were unable to meet their contractual or financial obligations. This 'triple lock' which the Commission for Aviation Regulation exerts over the travel and tourism business appears to contravene Article 16(2)(b) of the Services Directive. Admittedly, these regulatory requirements are not discriminatory. But they do seem to bear the hallmarks of a system which is inconsistent with the principles of proportionality and necessity. Given that Article 5 of the Package Holidays Directive⁴⁹ imposes strict liability on tour operators and travel agents in respect of either the non-performance or improper performance of their contracts, and that Irish consumers are also protected, in any event, by Article 7 of that Directive insofar as bonds must be taken out by tour operators and travel agents in their Member State of establishment (as security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency), the Irish system may not be proportionate. Similarly, the capital requirements do not seem consistent in the light of the comprehensive bonding requirement (which is in place as a direct result of both the Transport (Tour Operators and Travel Agents) Act 1982 and the Package Holidays and Travel Trade Act 1995⁵⁰).

In Ireland, the National Tourism Development Authority⁵¹ is the competent authority charged with the promotion of tourism, the development of tourism facilities and services, as well as the regulation, registration and control of accommodation available for tourists. Under section 25(a) of the Tourist Traffic Acts 1939 to 2003 Restatement, the Authority can prescribe the "general character, the type of accommodation and the other qualifications" which are prerequisites to the registration of a premises as a hotel in the register of hotels. The Authority is also the competent authority in relation to the registration and designation of guest houses, holiday and youth hostels, holiday camps, motor hotels, caravans, camping sites, holiday homes and cottages, as well as holiday and tourist apartments. Under section 33 of the Tourist Traffic Acts 1939 to 2003, it is a criminal offence for the proprietor of any

⁴⁸ For tour operators this fee ranges between €300 (for businesses with a turnover of € 635,000 or less) to € 7,800 (in respect of turnover figures of € 25,400,000).

⁴⁹ Council Directive 90/314 of 13 June 1990 on Package Travel, Package Holidays and Package Tours OJ 1990, L158/59.

⁵⁰ The 1995 legislation transposed Council Directive No. 90/314/EEC on package travel, package holidays and package tours into Irish law. For the text of the Directive, see OJ L 158/59, 23.6.1990.

⁵¹ The Authority was established under the National Tourism Development Authority Act 2003. The Authority is more commonly known as Failte Ireland: see www.failteireland.ie

premises to describe it as a hotel, guest house or any other form of accommodation unless the premises in question is registered in the appropriate register for such accommodation and complies with the qualitative requirements prescribed by the Authority. Failing which, the Authority has the power to apply to the Circuit Court to “prohibit the continuance of the contravention”.

The registration requirements in respect of tourist accommodation in Ireland appear to operate as a restriction on the freedom to provide services, contrary to Article 16(2)(b) of the Services Directive. In effect, these requirements would make it more difficult, for example, for a German or Italian company, wishing to run a holiday camp in Ireland for three or four months in the summertime, to gain access to the Irish marketplace. Although the stringent requirements applicable to the provision of accommodation in Ireland are probably motivated by the desire to protect consumers, such registration requirements could be seen as disproportionate and unnecessary.

3.5 Conclusions for tourism sector

The Irish tourism sector appears to be over-regulated. This is especially true of the travel business insofar as both tour operators and travel agents are subject to a stringent licensing system.

The registration requirements in respect of tourist accommodation in Ireland also appear to be outdated and outmoded. Most of these requirements date back to the year 1939, when the European Union did not exist and Europe was on the brink of World War II. Given the advent of the Services Directive and its emphasis on the opening up of the European marketplace for the provision of services, tourism providers from outside Ireland should be afforded easier access to the Irish market for holiday accommodation.

4. Food and beverages

4.1 Overview

The Food Safety Authority of Ireland (FSAI)⁵² is responsible for ensuring that food and beverages produced in the State meet the highest standards of food safety and hygiene. To this end, the FSAI monitors food and beverages to ensure compliance with legal requirements and, if appropriate, recognised codes of practice.

Food law in Ireland has a lengthy provenance, dating back to the early nineteenth century. Of the earlier legislation which is still in force, the main provisions are comprised of the following acts and statutory instruments:

- Sale of Foods and Drugs Act 1875
- Sale of Food and Drugs (Amendment) Act 1879
- Sale of Goods Act 1893
- Sale of Food and Drugs (Amendment) Act 1879
- Margarine Act 1907
- Sale of Food and Drugs (Milk) Act 1935
- Sale of Food and Drug (Milk) Act 1935 (Section 2, Appointed Day) Order 1936⁵³
- Sale of Food and Drugs (Milk Sampling) Regulations 1936⁵⁴
- Sale of Food and Drugs (Milk Sampling) (Amendment) Regulations 1941⁵⁵
- Sale of Good and Supply of Services Act 1980

The Food and Drugs legislation was designed to protect the consumer against adulteration and fraud. The principal sections of the 1875 Act make it a criminal offence to mix, colour, stain or powder any article of food with any ingredient or material so as to render the article injurious to health with intent to sell the article in that state, or to sell “to the prejudice of purchasers” any article of food which is not of the nature, substance and quality of the article requested. The Sales of Goods Acts 1893-1980 impose certain terms as to correspondence with description, merchantability and fitness for purpose into contracts concluded by consumers for the purchase of goods (including contracts for food and beverages). Food and beverages which, unknown to the seller are unsound at the time of sale, are categorised, under Irish law, as lacking in merchantable quality and being unfit for their purpose. The case underpinning this particular principle is neatly analysed in the following terms

“In the leading Irish case of *Wallis v. Russell*⁵⁶ the plaintiff’s grand-daughter asked the defendant fishmonger for “two nice fresh crabs for tea”. The defendant replied that he had no live crabs but that boiled ones were available; he selected two for the plaintiff’s grand-daughter who took them home. Both the plaintiff and her agent – the grand-daughter – suffered food poisoning as a result of eating the crabs. The defendant indicated that he had inspected the crabs himself and would normally be able to detect (by their weight) if anything was wrong with them. Both the Court of Kings Bench and the Court of Appeal found for the plaintiff. Section 14(1) of the 1893 Act was not to be confined to manufactured goods; the intimation that the crabs were to be eaten was sufficient information disclosed to the defendant to signify the particular purpose for which they were

⁵² Established under the Food Safety Authority of Ireland Act 1998; see: <http://www.irishstatutebook.ie/1998/en/act/jib/0029/index.html> . See also the Authority’s highly useful website: www.fsai.ie.

⁵³ S.I. No. 78 of 1936; see <http://www.irishstatutebook.ie/1936/en/si/078.html>

⁵⁴ S.I. No. 312 of 1936; see <http://www.irishstatutebook.ie/1936/en/si/0312.html>

⁵⁵ S.I. No. 246 of 1941, see <http://www.irishstatutebook.ie/1941/en/si/0246.html>

⁵⁶ [1902] 2 Irish Reports 585

required and it was no defence to say the defect was latent and could not be discoverable by inspection”.⁵⁷

But the above case stemmed from Private law insofar as it involved a contractual arrangement to purchase crabs for supper. However, recent decades have witnessed a plethora of public-oriented regulatory legislation in the food sector. Today, the vast majority of the food legislation in the State is attributable to Ireland’s membership of the European Union. This explains why the regulatory regime operated by the FSAI seems to be largely in compliance with the provisions of the Services Directive.

However, before evaluating the Irish food and beverages regime fully in the light of the Services Directive, it is necessary, as a preliminary, to afford the reader a thumbnail sketch of the principal regulatory provisions applicable to the food and beverages sector. It should also be borne in mind that the retail sale of alcoholic beverages is largely regulated under a separate licensing regime (examined in Section 2.3 *supra*).

In Ireland, the legislative linchpin of the regulatory regime for food is derived from the European Union. Regulation (EC) No 178/2002⁵⁸ is pivotal insofar as it established a common basis for Food law in all of the Member States, including common definitions, general provisions, and specific requirements in relation to unsafe food, traceability, risk analysis⁵⁹ and the precautionary principle. This Regulation also established the European Food Safety Authority and prescribed the procedures to be observed in matters of food safety. It was designed to achieve a high level of consumer protection whilst also taking into consideration the protection of animal health and welfare, plant health and the environment.

Regulation (EC) No 178/2002 is virtually all pervasive insofar as it sets out the general requirements of food law, including not only food safety requirements, but also the responsibilities of both food and feed business operators and the Member States themselves. This Regulation established the important principle that primary responsibility for ensuring compliance with Food law rests with the food business operator.

Regulation (EC) No 178/2002 was transposed into Irish law by a series of statutory instruments:

- European Communities (General Food Law) Regulations 2007⁶⁰
- European Communities (Food and Food Hygiene) Regulations 2009⁶¹
- European Communities (General Food Law) (Amendment) Regulations 2010⁶²

Before the European regulatory regime for food was introduced, the cornerstone of Irish legislation had been the Food Hygiene Regulations 1950-1989.⁶³ Although this legislation remains on the Irish statute book, it has been largely superseded by Regulation (EC) No 178/2002 and the legal instruments which transposed that Regulation into Irish law.

Ireland is exempt from control at EU level in respect of emergency slaughter outside slaughterhouses, and in relation to marginal, localised and restricted activity in butcher shops. These exemptions were granted to Ireland on the basis that the national rules in these sectors ensured the achievement of EU objectives. These national rules are set out in:

⁵⁷ Robert Clark, *Contract Law in Ireland* (Round Hall Sweet & Maxwell, Dublin, 1998).

⁵⁸ OJ L 31, 1.2.2002, pp. 1-24 ; for a consolidated version of the 2002 Regulation (as amended and re-cast in 2008), see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2002R0178:20031001:EN:PDF>

⁵⁹ The technical term is HACCP analysis (hazard analysis and critical control point).

⁶⁰ S.I. No. 747 of 2007, see <http://www.irishstatutebook.ie/2007/en/si/0747.html> .

⁶¹ S.I. No. 432 of 2009, see <http://www.irishstatutebook.ie/2009/en/si/0432.html> .

⁶² S.I. No. 498 of 2010, see <http://www.irishstatutebook.ie/2010/en/si/0498.html> .

⁶³ See especially the Food Hygiene Regulations 1950 (S.I. No. 205 of 1950): <http://www.irishstatutebook.ie/1950/en/si/0205/html>; and the Food Hygiene (Amendment) Regulations 1989: <http://www.irishstatutebook.ie/1989/en/si/0062/html> .

- the Abattoirs Act 1988 (Veterinary Examination and Health Mark) No. 2 Regulations 2009⁶⁴
- the Health (Definition of Marginal, Localised and Restricted Activity) (Butcher Shop) Regulations 2010⁶⁵

Finally, reference should be made to the Shellfish Safety Monitoring Programme. In order to protect the health of consumers, Ireland introduced this programme to ensure that shellfish containing bio-toxins (which are naturally produced by phytoplankton in seawater) are not harvested and placed on the market. Given that shellfish are filter feeders, they have the capacity to accumulate bio-toxins in their flesh, thereby causing illness to consumers if eaten. The Shellfish Safety Monitoring Programme is co-ordinated by the Sea-Fisheries Protection Authority and the Marine Institute under a service contract with the FSAI. Samples of both farmed and wild shellfish are collected from harvesting areas around the coast of Ireland and tested rigorously for the presence of various bio-toxins potentially harmful to human health. This programme has important implications for the shellfish industry insofar as the presence of bio-toxins in shellfish can lead to the temporary closure of shellfish farms or indefinite interruptions to shell-fishing in certain areas.

4.2 Prohibited requirements - Article 14 analysis

Article 14 checklist

Reference	Prohibited requirements	Finding		Notes
		Situation pre-implementation	Situation post-implementation	
14(1)	Requirements based directly or indirectly on nationality or residency	√	√	None identified
14(5)	Economic tests	√	√	None identified

Findings with respect to the Article 14 prohibitions

The existing Irish regime for the regulation of the food sector does not contain any of the prohibited requirements listed in Article 14 of the Services Directive.

4.3 Requirements to be evaluated - Article 15 analysis

Article 15(2) checklist

Reference	Requirements to be evaluated	Finding	Notes
15(2)(a)	Quantitative or territorial restrictions	X	Under the Intoxicating Liquor Acts 2000 and 2008, it is not possible to acquire a licence to sell alcohol unless a previous licence has been extinguished. As explained in Section 2.3 <i>supra</i> , this requirement can be classified as a quantitative restriction and is also contrary to the principle of proportionality.

Findings with respect to the Article 15 elements for evaluation, including justification analyses

There is an overlap between the retail and food and beverages sectors. Alcohol (examined at an earlier juncture of this Report) is classifiable as a beverage. As explained in Section 2.3 of this Report, the restrictive licensing regime – in respect of the retail sale of alcohol in Ireland - is classifiable as a quantitative restriction. Although public health is one of the main motivations for the operation of such a restrictive licensing regime (whereby new licences are only granted in return for the extinction of old

⁶⁴ S.I. No. 373 of 2009, see <http://www.irishstatutebook.ie/2009/en/si/0373.html>.

⁶⁵ S.I. No. 340 of 2010, see <http://www.irishstatutebook.ie/2010/en/si/0340.html>.

licences), it is probably disproportionate insofar as there presumably are other, less restrictive ways to deal with alcoholism whilst, at the same time, affording cross-border service providers access to the Irish marketplace for the retail sale of alcohol.

4.4 Restrictions to the freedom to provide services - Article 16(2) analysis

Article 16(2) checklist

Reference	Prohibited requirements	Finding	Notes
16(2)(a)	Obligation to have an establishment in the territory where the service is provided	√	None identified
16(2)(b)	Obligation to obtain an authorisation or a registration	X	The restrictive licensing regime applicable to the retail sale of alcohol in Ireland makes it more difficult for cross-border retailers of alcohol to penetrate the Irish marketplace.
16(2)(c)	Ban on setting up an infrastructure	√	None identified
16(2)(d)	Application of specific contractual arrangements between the service provider and the recipient restricting the provision of the service by the self-employed	√	None identified
16(2)(e)	Obligation to possess a specific identity document	√	None identified
16(2)(f)	Requirements affecting the use of equipment	√	None identified
16(2)(g)	Restrictions on recipients	√	None identified

Findings with respect to the Article 16(2) prohibitions, including justification analyses

The restrictive licensing regime applicable to the retail sale of alcohol in Ireland makes it more difficult for cross-border retailers of alcohol to penetrate the Irish marketplace. This licensing requirement appears to be contrary to the provisions of Article 16(2)(b) of the Services Directive.

4.5 Conclusions for food and beverages sector

The origins of virtually all modern-day food legislation in Ireland can be traced directly to the European Union. Given the close parallel between the EU and Irish regulatory regimes in the food sector, it is scarcely surprising that – with the sole exception of the rules governing the retail sale of alcohol – the Irish law in this area would appear to be in line with the Services Directive.

5. Real Estate

5.1 Overview

It is important to comment at the outset on the relevant terminology. In the past in Ireland, there was a clear cut dichotomy between house agents and land agents. In recent generations, however, both types of property agents have come to be described collectively as ‘estate agents’. Despite this designation, however, the term ‘property business’ is used in Ireland in preference to ‘real estate’ (which is an American term of art). In the interests of uniformity, however, the term ‘real estate’ will be used throughout this section of the Report.

It is also important to explain, at the outset, that there are several different types of surveyors in Ireland.⁶⁶ Not all surveyors are involved in the real estate business. Two types, in particular are associated with the construction industry: quantity surveyors and building surveyors. A quantity surveyor advises on the costs of developing all types of building and infrastructure. A building surveyor carries out building surveys and provides management and design-style consultancy services. Both quantity surveyors and building surveyors are regulated under the Building Control Act 2007.⁶⁷ Under that legislation, the Society of Chartered Surveyors Ireland has been designated as the competent authority for the registration of the title of ‘Quantity Surveyor’ and ‘Building Surveyor’ in Ireland. These two categories of regulated surveyors will be explored in greater detail in Section 7 of this Report.

There are also four different categories of surveyors fitting the description of ‘land surveyor’ in Ireland. First of all, a rural surveyor values, manages and sells agricultural land including forestry. Secondly, a geomatics surveyor maps the built and natural environment to provide accurate spatial data which facilitates planning, development and conservation. Thirdly, a planning and development surveyor manages the proposals to develop new or refurbish existing buildings. Fourthly, a minerals surveyor provides expertise in the full life cycle of mineral development.

Of the four different categories of land surveyors described above, the first three are involved, to varying degrees, in the real estate business in Ireland. During the mutual evaluation process, land surveyors were mistakenly identified as being a ‘regulated profession in Ireland’. Although many individuals designating themselves as ‘land surveyors’ are highly qualified professionals, there is no legislative framework in existence in Ireland for the regulation of land surveyors, nor is there any statutory prohibition on the unauthorised use of the term ‘land surveyor’.⁶⁸

Finally, there is another unregulated category of surveyors, this time falling under the catchall term of ‘property surveyors’. These include residential and commercial agency surveyors involved in providing professional expertise in respect of the valuation, management, letting and sale of residential and commercial property respectively. Valuation surveyors also come with this designation insofar as they provide professional expertise in relation to the valuation, acquisitions, disposals, investments and rent reviews for all types of property.

Given the absence of regulatory controls in respect of both land surveyors and property surveyors in Ireland, their activities will not be subjected to any further scrutiny in the context of this Report.

There are, however, two other important players in the real estate business in Ireland: auctioneers and house agents. Under existing Irish law, both auctioneers and house agents are required to be licensed

⁶⁶ The website of the Society of Chartered Surveyors Ireland provides a clear exposition of the different types of surveyors operating in Ireland. See www.scsco.ie

⁶⁷ See <http://www.irishstatutebook.ie/2007/en/act/pub/0021/index/html>

⁶⁸ As explained earlier, however, both quantity surveyors and building surveyors are regulated under the Building Control Act 2007.

under the Auctioneers and House Agents Acts 1946 to 1973. Though the term ‘auctioneer’ is not defined in this legislation, the term ‘house agent’ is defined in some detail as:

“a person who, as agent for another person and for or in expectation of reward, purchases, sells, lets or offers for sale or letting, or invites offers to purchase or take a letting of, or negotiation for the purchase, sale or letting of a house otherwise than by auction or attempts to effect such purchase, sale or letting.”⁶⁹

Note that ‘house agents’ are subject to the licensing requirement, whereas ‘land agents’ are exempt from the provisions of the House Agents Acts 1946 to 1973. House agents are obliged to apply to the District Court for a licence. The following documents are essential prerequisites to securing a licence:

- Certificate of qualification (note that house agents do not need to possess academic qualifications: essentially this certificate is obtainable from the court following fulfilment of a notification requirement whereby the applicant places a notice of intention in a newspaper circulating in the area in which the house agency business will be located;
- Certificate of deposit: the applicant is required to lodge a fidelity guarantee bond of €12,700⁷⁰ in the High Court. Once the deposit is made, a certificate of deposit will be issued to the applicant by the High Court;
- Tax clearance certificate: a certificate must be obtained from the Revenue Commissioners.

Once all of the above documents are in place, the Revenue Commissioners issue the house agent’s licence in return for an excise payment of €250. Virtually identical licensing requirements are applicable in respect of auctioneers.

Although house agents (and auctioneers) are both obliged to secure licences from the District Court, the process is a straightforward one and this aspect of the real estate business is lightly regulated in Ireland. It is, however, important to point out that the law in this area is set to change in the future. There is a piece of draft legislation, the Property Services (Regulation) Bill 2009⁷¹ which is designed to regulate the real estate sector in a much more cohesive manner. The explanatory memorandum to this Bill gives a lucid insight into its comprehensive nature:

“A Bill to provide for the establishment of a body to be known as the Property Services Regulatory Authority, to control and supervise the providers of property services, to cause any complaints against those providers to be investigated and to adjudicate on any such complaints, to provide for the establishment of the Property Services Appeal Board to hear and determine appeals against certain decisions of the Authority, and to provide for taking account of Directive 2006/123/EC insofar as it relates to property services, to provide for the consequential repeal or amendment of certain enactments and the revocation of a statutory instrument, and for related matters.”

But this Report is about the current state of play in relation to the regulation of the real estate sector in Ireland. So – in the schematic analysis which follows in the checklists below – the emphasis will be placed on the House Agents Acts 1946 to 1973 (and not the Property Services Regulation Bill 2009, which has yet to see the light of day as a piece of enacted legislation in this jurisdiction).

⁶⁹ Auctioneers and House Agents Act 1947, section 2 (1). For the full text of this legislation, see <http://www.irishstatutebook.ie/1997/en/act/pub/0010/index.html>

⁷⁰ See section 3 of the Auctioneers and House Agents Act 1973. The text of this Act is available at <http://www.irishstatutebook.ie/1973/en/act/pub/0023/index.html>

⁷¹ For the text of this draft legislation, see: <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2009/2809/document1.htm>

5.2 Prohibited requirements – Article 14 analysis

Article 14 checklist

Reference	Prohibited requirements	Finding		Notes
		Situation pre-implementation	Situation post-implementation	
14(1)	Requirements based directly or indirectly on nationality or residency	√	√	None identified
14(2)	Requirements limiting the establishment of service providers to one Member State	√	√	None identified
14(7)	Obligations to obtain financial guarantees or insurances from operators established in the same Member State	√	√	None identified

Findings with respect to the Article 14 prohibitions

The existing Irish regime for the regulation of the real estate sector does not contain any of the prohibited requirements listed in Article 14 of the Services Directive.

5.3 Requirements to be evaluated - Article 15 analysis

Article 15(2) checklist

Reference	Requirements to be evaluated	Finding	Notes
15(2)(b)	Obligation for the service provider to take a specific legal form	√	None identified
15(2)(c)	Requirements relating to the shareholding of companies	√	None identified

Findings with respect to the Article 15 elements for evaluation, including justification analyses

The existing Irish regime for the regulation of real estate services does not contain any of the suspect requirements identified in Article 15(2) of the Services Directive.

5.4 Restrictions to the freedom to provide services - Article 16(2) analysis

Article 16(2) checklist

Reference	Prohibited requirements	Finding	Notes
16(2)(a)	Obligation to have an establishment in the territory where the service is provided	√	None identified
16(2)(b)	Obligation to obtain an authorisation or a registration	X	In Ireland, both auctioneers and house agents are obliged to secure licences from the District Court. In addition, auctioneers and house agents are also obliged to deposit a fidelity guarantee bond of €12,700 in the High Court (a substantial sum of money) prior to securing a licence. The grant of a licence to auctioneers and house agents is also subject to the production of a tax clearance certificate and the payment of an excise fee of €250.
16(2)(c)	Ban on setting up an infrastructure	√	None identified
16(2)(d)	Application of specific contractual arrangements between the service provider and the recipient restricting the provision of the service by the self-employed	√	None identified
16(2)(e)	Obligation to possess a specific identity	√	None identified

	document		
16(2)(f)	Requirements affecting the use of equipment	√	None identified
16(2)(g)	Restrictions on recipients	√	None identified

Findings with respect to the Article 16(2) prohibitions, including justification analyses

In Ireland, both auctioneers and house agents are obliged to secure licences from the District Court. In addition, auctioneers and house agents are also obliged to deposit a fidelity guarantee bond of €12,700 in the High Court (a substantial sum of money) prior to securing a licence. The grant of a licence to auctioneers and house agents is also subject to the production of a tax clearance certificate and the payment of an excise fee of €250.

In relation to the real estate business, the objective of protecting the consumer/recipient of services is the overriding reason of general interest most commonly given to justify licensing/authorisation requirements. Reasons of public policy have also been put forward as justifications for the regulation of the real estate business. Under Article 16(3) of the Services Directive, consumer protection is not one of recognised grounds of derogation from Article 16(2)(b). It might, however, be possible to argue that the licensing requirements exist for public policy reasons, viz., to protect against fraudulent behaviour on the part of auctioneers and house agents respectively.

5.5 Conclusions for real estate sector

As explained above, many of the participants in the real estate sector are immune from regulation. However, both auctioneers and house agents are subject to licensing requirements which may probably be justifiable on public policy grounds but may not be proportionate.

6. Education

6.1 Overview

In order to establish the extent to which legislation, by-laws and training systems applicable to the education sector are compatible with the Services Directive, the following national provisions were examined and evaluated:

- Vocational Education Act 1930⁷²
- Labour Services Act 1987 (which established *An Foras Aiseanna Saothair*, the Training and Employment Authority, known colloquially as FAS)⁷³
- Higher Education Authority Act 1971⁷⁴
- Regional Technical Colleges Act 1992⁷⁵
- Dublin Institute of Technology Act 1992⁷⁶
- Universities Act 1997⁷⁷
- Education Act 1998⁷⁸
- Qualifications (Education and Training) Act 1999⁷⁹ (which established the National Qualification Authority of Ireland (NQAI), the Further Education and Training Awards Council (FETAC) and the Higher Education and Training Awards Council (HETAC) respectively)
- The Royal College of Surgeons (Charters Amendment) Act 2003⁸⁰
- Education for Persons with Special Educational Needs Act 2004⁸¹
- Institutes of Technology Act 2006⁸²
- Safety Health and Welfare at Work (General Application) Regulations 2007⁸³
- Beach Bye-Laws for the Administrative Area of Clare County Council 2008⁸⁴ (tuition in surfing or other water sports activity)
- Recognition of Professional Qualifications (Directive 2005/36/EC) Regulations 2008⁸⁵
- Road Traffic (Driver Instructor Licensing)(No. 2) Regulations 2009 (driving lessons)⁸⁶
- Donegal County Council Regulation and Control of Certain Beaches Bye-Laws 2009 (tuition in surfing or other water sports activity)⁸⁷
- *Guidelines on the New Manual Training System – 2010 Revision*⁸⁸

⁷² See <http://www.irishstatutebook.ie/1930/en/act/pub/0029/index.html>

⁷³ See <http://www.irishstatutebook.ie/1987/en/act/pub/0015/index.html>

⁷⁴ See <http://www.irishstatutebook.ie/1971/en/act/pub/0022/index.html>

⁷⁵ See <http://www.irishstatutebook.ie/1992/en/act/pub/0016/index.html>

⁷⁶ See <http://www.irishstatutebook.ie/1992/en/act/pub/0015/index.html>

⁷⁷ See <http://www.irishstatutebook.ie/1997/en/act/pub/0024/index.html>

⁷⁸ See <http://www.irishstatutebook.ie/1998/en/act/pub/0051/index.html>

⁷⁹ See <http://www.irishstatutebook.ie/1999/en/act/pub/0026/index.html>

⁸⁰ A privately initiated piece of legislation, not available on www.irishstatutebook.ie; for an explanation of the significance of this legislation, however, see the Royal College of Surgeons website: www.rcsi.ie.

⁸¹ See <http://www.irishstatutebook.ie/2004/en/act/pub/0030/index.html>

⁸² See <http://www.irishstatutebook.ie/2006/en/act/pub/0025/index.html>

⁸³ See <http://www.irishstatutebook.ie/2007/en/si/0299.html>

⁸⁴ See: http://www.clarecoco.ie/Accessible_HTML/waste_water_environment/Beach_Bye_Laws/Clare_Beach_Bye_Laws.html

⁸⁵ See <http://www.irishstatutebook.ie/2008/en/si/0139.html>

⁸⁶ See <http://www.irishstatutebook.ie/2009/en/si/0146.html>

⁸⁷ See <http://www.donegalbeachholidays.com/UpLoads/Siteimages?BEACHES5%20BYE-LAWS5%202009%20.pdf>

⁸⁸ Published jointly by FETAC and the Health and Safety Authority ('HAS'). Full text available at http://hsa.ie/eng/Publications_and_Forms/Publications/FeaturedPublications/Guidance_on_the_Manual_Training_System_-_2010_revision.31017.shortcut.html

- Qualifications and Quality Assurance (Education and Training) Bill 2011⁸⁹ (which will establish the Qualifications and Quality Assurance Authority of Ireland, amalgamating the NQAI, FETAC and HETAC into a single Authority)

The Irish education system is currently in a state of flux. The Minister for Education and Skills recently took the decision to disband FAS (the Training and Employment Authority)⁹⁰ and to replace it with another organisation to be known as ‘Solas’.⁹¹ This decision will have major implications for vocational education in Ireland:

“The new Solas mandate will be to ensure the provision of 21st century high-quality further education and training programmes to jobseekers and other learners.... Solas will also ensure that there is a shift away from skills provision for traditional occupations like construction which have seen a huge fall in employment, and it will have a greater focus on training and education programmes which prepare jobseekers and other learners **for occupations in growth areas like services,**⁹² ICT,⁹³ medical devices and food and bio-pharmaceutical sectors.”⁹⁴

There has also been another hugely significant development insofar as the Minister has just introduced a Qualifications and Quality Assurance (Education and Training) Bill. Publishing the Bill, the Minister explained its importance in terms of ensuring a cohesive approach to qualifications and quality assurance in education and training, as well as enhancing Ireland’s reputation in this field. The Bill is also innovatory insofar as it provides for a Code of Practice in respect of the provision of educational services to international students. Education and training providers measuring up to the standards of the new Code will be able to apply for an international education mark.⁹⁵

6.2 Prohibited requirements - Article 14 analysis

Article 14 checklist

Reference	Prohibited requirements	Finding		Notes
		Situation pre-implementation	Situation post-implementation	
14(1)	Requirements based directly or indirectly on nationality or residency	√	√	None identified
14(2)	Requirements limiting the establishment of service providers to one Member State	√	√	None identified
14(3)	Requirements limiting the choice of the service provider between principal and secondary establishment	√	√	None identified
14(4)	Conditions of reciprocity	√	√	None identified
14(5)	Economic tests	√	√	None identified
14(6)	Involvement of competing operators in the decisions of competent authorities	√	√	None identified

⁸⁹ Published by the Minister for Education and Skills on 28 July, 2011 ; the full text of this Bill is available at: http://www.education.ie/servlet/blobServlet/pr_qualifications_quality_assurance_bill_2011.pdf

⁹⁰ FAS (the Irish word for “growth”) was also disbanded on account of financial irregularities (including a raft of inflated expenses claims within the organisation itself) and because of the failure of some of the training services – which FAS had contracted out to other service providers – to measure up to the requisite standards.

⁹¹ An Irish word meaning ‘light’.

⁹² Emphasis added.

⁹³ Information and communications technology

⁹⁴ Department of Education and Skills, Press Release, 27 July 2011.

⁹⁵ The full text of this Bill is accessible via a link published in footnote 90 above.

Findings with respect to the Article 14 prohibitions

The existing Irish regime for the regulation of educational services does not contain any of the prohibited requirements listed in Article 14 of the Services Directive. This is scarcely surprising given that the prohibited requirements in Article 14 are reproduced, almost *verbatim* in Regulation 20 of the European Union (Provision of Services) Regulations 2010⁹⁶ (which transposed the Directive into Irish law).

6.3 Requirements to be evaluated - Article 15 analysis

Article 15(2) checklist

Reference	Requirements to be evaluated	Finding	Notes
15(2)(b)	Obligation for the service provider to take a specific legal form	√	None identified
15(2)(c)	Requirements relating to the shareholding of companies	√	Nine identified

Findings with respect to the Article 15 elements for evaluation, including justification analyses

The existing Irish regime for the regulation of educational services does not contain any of the suspect requirements identified in Article 15 (2) of the Services Directive.

6.4 Restrictions to the freedom to provide services - Article 16(2) analysis

Article 16(2) checklist

Reference	Prohibited requirements	Finding	Notes
16(2)(a)	Obligation to have an establishment in the territory where the service is provided	√	None identified
16(2)(b)	Obligation to obtain an authorisation or a registration	X	<p>Under the universities legislation, the use of the term “university” is subject to Ministerial approval. This authorisation process is probably justifiable on public policy grounds insofar as it is designed to ensure that only high calibre institutions can describe themselves as universities. There is a similar provision in respect of both “institutes of technology” and “regional technical colleges” respectively in clause 75(1) of the newly published Qualifications and Quality Assurance (Education and Training) Bill 2011.</p> <p>With regard to vocational education, under the <i>Manual Handling Training Standards</i> related to instructor training (operated by both the Health and Safety Authority (HSA) and HETAC), putative instructors are obliged to register with FETAC and to attend a training programme run by a FETAC-approved instructor. This authorisation regime makes it much more difficult for Foreign Training Providing Organisations to secure access to the Irish market. The new system (introduced in 2010) might be justifiable on health and safety grounds, this is arguably an area in which proportionality would be an issue.</p> <p>In both Clare and Donegal, surfing and water sports instructors are subject to a licensing requirement. The Clare authorisation requirement</p>

⁹⁶ See footnote 1 above, where a link to the 2010 Regulations is available.

			appears to be more proportionate than its Donegal counterpart insofar as possession of a qualification from the Irish Water Safety organisation (or equivalent body) is a prerequisite to the grant of a licence in Clare. On 30 April 2009, Ireland introduced a rigorous licensing system for driving instructors. This authorisation system is probably justifiable on public health and safety grounds.
16(2)(c)	Ban on setting up an infrastructure	√	None identified
16(2)(d)	Application of specific contractual arrangements between the service provider and the recipient restricting the provision of the service by the self-employed	X	The requirement to register with FETAC and attend a course run by a FETAC-approved instructor amounts to the imposition of specific contractual requirements on Foreign Training Providing Organisations thereby restricting their access to the Irish marketplace. Although Ireland would seek to justify this training arrangement on public health and safety grounds, a question which arises is whether such arrangement is proportionate.
16(2)(e)	Obligation to possess a specific identity document	X	As explained earlier, driving instructors are obliged to possess driving instructors' licences with photographic identification inside. This statutory measure is probably justifiable on public health and safety grounds.
16(2)(f)	Requirements affecting the use of equipment	√	None identified
16(2)(g)	Restrictions on recipients	√	None identified

Findings with respect to the Article 16 (2) prohibitions, including justification analyses

In Ireland, universities are publicly funded and – at least in relation to the education of students – provide non-economic services of a general interest. So these academic activities are not covered by the provisions of the Services Directive. But the Universities Act 1997, nevertheless, carries some significance for cross-border providers of educational services insofar as it provides that:

“Except in relation to an educational institution established and described as such [before the coming into force of this legislation] a person shall not, without the approval of the Minister, use the word “university” to describe an educational establishment or facility”.⁹⁷

Indeed the Minister for Education and Skills is empowered to apply to the High Court for an injunction to restrain any person from using the word “university” without ministerial consent. In effect this prohibition on the use of the word “university” could create problems for newly-established private universities wanting to provide cross-border educational services in Ireland. But this authorisation requirement is probably justifiable on public policy grounds insofar as the title of “university” should only be bestowed on reputable institutions of a high academic calibre. The strong probability, of course, is that this particular provision of the Universities legislation was also enacted in the interests of both consumer protection and fair trading.

With regard to vocational training, the Health and Safety Authority (HSA) has worked with FETAC to develop *Manual Handling Training Standards* for instructors. As explained in the Safety Health and Welfare at Work Regulations 2007,⁹⁸ an employee will be at risk if he/she does not have an adequate or appropriate knowledge of training in manual handling tasks. The two bodies have agreed a process whereby registration with FETAC is a prerequisite for Training Provider Organisations wanting to

⁹⁷ Section 52 (1) of the Universities Act 1997; the link to this legislation is accessible in footnote 78 above. There is a similar provision, applicable to both “institutes of technology” and “regional technical colleges” respectively in the Qualifications and Quality Assurance Bill 2011, the link to which is provided at footnote 90 above.

⁹⁸ S.I. No. 299 of 2007; see <http://www.irishstatutebook.ie/2007/en/si/0299.html>

develop instructor training in respect of manual handling training standards. All new instructors will have to attend an institutional training programme,⁹⁹ delivered by a FETAC-approved training instructor, which meets the requirements of the new standards. This new system effectively precludes foreign Training Providing Organisations from participating in this particular educational market in the absence of instruction from a FETAC-approved training instructor. This scheme operates as a *prima facie* infringement of the Services Directive. Against this, however, this derogation from the freedom to provide services principle may be justifiable on public safety grounds.

Turning to less formal categories of training, private education involves not only higher education services and vocational training, but it also encompasses leisure pursuits such as surfing classes and driving lessons. During the mutual evaluation process, Ireland notified authorisation schemes for the provision of tuition in respect of surfing and other water sports on the beach or in the sea. So, for example, in County Donegal, there is a bye-law in existence which precludes the giving of tuition in water sports unless a licence is obtained from the Council in advance.¹⁰⁰ In County Clare, proof of compliance with the standards of the Irish Water Safety organisation (or equivalent body) is a prerequisite to the grant of a licence by the Council.¹⁰¹ The second of these bye-laws seems more proportionate and necessary than the first insofar as safety clearly appears to be the paramount concern in County Clare.

On 30 April 2009, Ireland introduced a licensing system for driving instructors. The authorisation process is a rigorous one. The applicant for the licence must, first of all, produce a trainee driving instructor's licence and the record of instruction that he/she has given under supervision. Alternatively, the applicant can rely on an "attestation of competence or formal qualification" within the meaning of the Recognition of Professional Qualifications (Directive 2005/36/EC) Regulations 2008.¹⁰² The applicant is also obliged to produce two photographs for identification purposes and a current tax clearance certificate. Finally, the applicant must agree to submit to the vetting procedure operated by the Garda Síochána. Although this licensing system is open to question under Article 16 (2)(b) of the Services Directive, it is probably justifiable on public security and health grounds.

6.5 Conclusions for education sector

For the most part, the regulation of the education sector in Ireland appears to be in conformity with the Services Directive. There are, however, a number of authorisation/registration requirements in force in the education sector that have the capacity to interfere with access to the market by cross-border educational service providers. These relate to the requirement of Ministerial permission in order to use the terms "university", "institute of technology" or "regional technical college"; the necessity for foreign Training Providing Organisations to register with FETAC and attend courses run by FETAC-approved instructors, the requirement that surfing and water sports instructors should possess licences in counties Clare and Donegal respectively, and the stringent licensing regime applicable to driving instructors. As explained in the schematic table above, however, most of these authorisation requirements can probably be justified on public policy or health and safety grounds. Arguably, the sole exception to this is the *Manual Training Handling Standards* and the manner in which instruction courses in respect of same are inextricably linked to registration with FETAC and FETAC-approved instructors.

⁹⁹ See the link in footnote 87 to secure access to the *Guidelines on the New Manual Training System 2010 Revision*.

¹⁰⁰ For a link to the text of the Donegal bye-laws, see footnote 86 above.

¹⁰¹ For a link to the text of the Clare bye-laws, see footnote 84 above.

¹⁰² S.I. No. 139 of 2008; see <http://www.irishstatutebook.ie/2008/en/si/0139.html>. A third option open to the applicant is reliance on other evidence of qualifications of instructional experience (together with an application for their recognition).

7. Crafts, construction and certification services

7.1 Overview

In Ireland, there is a distinct overlap between construction services, crafts and the regulated professions. This is inevitable given that construction involves not only the building work itself, but also the planning and surveillance of construction projects (involving services provided by members of the regulated professions including architects, construction engineers and quantity surveyors), and also the services of craftsmen (such as plumbers, plasterers, electricians, carpenters, glaziers and roofers), as well as the manual labour provided by relatively unskilled workers.

In contrast to the legal position governing architects, construction engineers and quantity surveyors respectively, it is rare for craftsmen and women to be regulated by either statute or administrative provisions in Ireland. In November 2008, however, regulatory regimes were introduced in respect of both electricians and gas installers. This was imperative given that safety is paramount in the context of both electrical wiring and the installation and servicing of gas-fired boilers and heating systems.

There is another category of less-skilled building workers without either professional qualifications or the skills of those involved in the crafts sector. In Ireland, most of these workers sign up for training programmes such as the Construction Skills Certification Scheme and the Quarries Skills Certification Scheme. Failure to participate in these schemes effectively precludes them from being able to work legitimately on a building site or quarry in Ireland. During the mutual evaluation process, Ireland notified the Construction Skills Certification Scheme (which, as stated earlier, is mainly designed to meet the needs of unskilled workers) as a scheme which would have to be examined in the light of the Services Directive. Against this, however, workers (as opposed to service providers) are not covered by the Services Directive:

“...‘service’ means any self-employed economic activity, normally provided for remuneration as referred to in Article 50 of the Treaty”¹⁰³

So to the extent this scheme applies to workers and not to companies hiring them there is probably no need to scrutinise the Construction Skills Certification Scheme against the yardstick of the Services Directive. For the same reason, the Quarry Skills Certification Scheme could be probably also immune from scrutiny under the Directive.

In order to establish the extent to which legislation, certification schemes and standards applicable to the crafts, construction and certification services sector are compatible with the Directive, the following national provisions were examined and evaluated:

- Building Control Act 1990¹⁰⁴
- Building Control Regulations 1997¹⁰⁵
- Electricity Regulation Act 1999¹⁰⁶
- Electricity Regulation Act 1999 (Schedule, Paragraph 16) Levy Order 2000¹⁰⁷
- Building Control (Amendment) Regulations 2000¹⁰⁸
- Irish Standard EN 13015: 2001
- Gas (Interim) Regulation Act 2002¹⁰⁹

¹⁰³ See Services Directive, Article 4(1); note that post-Lisbon, Article 57 of the Treaty on the Functioning of the European Union (TFEU) is the equivalent provision.

¹⁰⁴ See <http://www.irishstatutebook.ie/1990/en/act/pub/0003/index.html>

¹⁰⁵ S. I. No. 496 of 1997; see <http://www.irishstatutebook.ie/1997/en/si/0496.html>

¹⁰⁶ See <http://www.irishstatutebook.ie/1999/en/act/pub/0023/index.html>

¹⁰⁷ S.I. No. 447 of 2000, see <http://www.irishstatutebook.ie/2000/en/si/0447.html>

¹⁰⁸ S.I. No. 10 of 2000, see <http://www.irishstatutebook.ie/2000/en/si/0010.html>

- Building Control (Amendment) Regulations 2004¹¹⁰
- Energy (Miscellaneous Provisions) Act 2006¹¹¹
- Safety Health and Welfare at Work (Construction) Regulations 2006¹¹²
- Construction Skills Certification Scheme
- Building Control Act 2007¹¹³
- Safety Health and Welfare at Work (Quarries) Regulations 2008¹¹⁴
- Quarry Skills Certification Scheme
- Safety Health and Welfare at Work (Construction) (Amendment) (No.2) Regulations 2008¹¹⁵
- Building Control (Amendment) Regulations 2009¹¹⁶
- Building Control Act 2007 (Commencement) Order 2009¹¹⁷
- Electro-Technical Council of Ireland ('ETCI') Fourth Edition of the Irish National Wiring Rules – September 2009
- Petroleum (Exploitation and Extraction) Safety Act 2010¹¹⁸
- Electricity Regulation Act 1999 (Liquefied Petroleum Gas Works) Regulations 2011¹¹⁹

7. Prohibited requirements - Article 14 analysis

Article 14 checklist

Reference	Prohibited requirements	Finding		Notes
		Situation pre-implementation	Situation post-implementation	
14(1)	Requirements based directly or indirectly on nationality or residency	√	√	None identified
14(3)	Requirements limiting the choice of the service provider between principal and secondary establishment	√	√	None identified
14(6)	Involvement of competing operators in the decisions of competent authorities	√	√	None identified
14(7)	Obligations to obtain financial guarantees or insurances from operators established in the same Member State	√	√	None identified
14(8)	Obligations to have been previously registered or to have previously exercised the activity for a given period in the same Member State	√	√	None identified

Findings with respect to the Article 14 prohibitions

The existing Irish regime for the regulation of crafts, construction, and certification services does not contain any of the prohibitions listed in Article 14 of the Services Directive. In any event, Regulation

¹⁰⁹ See <http://www.irishstatutebook.ie/2002/en/act/pub/0010/index.html>

¹¹⁰ S.I. No. 85 of 2004, see <http://www.irishstatutebook.ie/2004/en/si/0085.html>

¹¹¹ See <http://www.irishstatutebook.ie/2006/en/act/pub/0040/index.html>

¹¹² S.I. No. 504 of 2006, see <http://www.irishstatutebook.ie/2006/en/si/0504.html>

¹¹³ See <http://www.irishstatutebook.ie/2007/en/act/pub/0021/index.html>

¹¹⁴ S.I. No. 28 of 2008, see <http://www.irishstatutebook.ie/2008/en/si/0028.html>

¹¹⁵ S. I. No. 423 of 2008, see <http://www.irishstatutebook.ie/2008/en/si/0423.html>

¹¹⁶ S. I. No. 351 of 2009, see <http://www.irishstatutebook.ie/2009/en/si/0351.html>

¹¹⁷ S. I. No. 352 of 2009, see <http://www.irishstatutebook.ie/2009/en/si/0352.html>

¹¹⁸ See <http://www.irishstatutebook.ie/2010/en/act/pub/0004/index.html>

¹¹⁹ S. I. No. 299 of 2011, see <http://www.irishstatutebook.ie/2011/en/si/0288.html>

20 of the European Union (Provision of Services) Regulations 2010¹²⁰ also outlaws the requirements listed in the table above. In the unlikely event of a conflict between a piece of domestic sector-specific legislation and the 2010 Regulations, the Regulations would take precedence.

7.3 Requirements to be evaluated - Article 15 analysis

Article 15(2) checklist

Reference	Requirements to be evaluated	Finding	Notes
15(2)(b)	Obligation for the service provider to take a specific legal form	√	None identified
	Requirements relating to the shareholding of companies	√	None identified
15(2)(g)	Obligations to apply fixed minimum or maximum tariffs	√	None identified

Findings with respect to the Article 15 elements for evaluation, including justification analyses

The existing Irish regime for the regulation of crafts, construction and certification services does not contain any of the suspect requirements identified in Article 15(2) of the Services Directive.

7.4 Restrictions to the freedom to provide services - Article 16(2) analysis

Article 16(2) checklist

Reference	Prohibited requirements	Finding	Notes
16(2)(a)	Obligation to have an establishment in the territory where the service is provided	√	None identified
16(2)(b)	Obligation to obtain an authorisation or a registration	X	<p>Under the Building Control Act 2007, there is a registration system in operation in respect of the use of the titles of “Architect”, “Quantity Surveyor” and “Building Surveyor” respectively (with provision for recognition of professional qualifications from other EU Member States). In the final analysis, this registration requirement is probably justifiable on public health and security as well as public policy grounds insofar as it is designed to ensure that only recognised professionals are involved in the planning and surveillance of construction projects.</p> <p>There is a voluntary system of registration in operation in respect of both electricians and gas installers. However, as explained in the notes below, the system is almost compulsory insofar as many cross-border service providers may be coerced into registering with one of the supervisory bodies. The system seems to be justifiable on health and safety grounds.</p> <p>During the mutual evaluation process, Ireland notified the Construction Skills Certificate Scheme, which could pose problems for cross-border workers insofar as the absence of a certificate can prevent them from working on Irish building sites. As explained in the notes, however, the Services Directive does not cover the activities of workers.</p>
16(2)(c)	Ban on setting up an infrastructure	√	None identified
16(2)(d)	Application of specific contractual	√	None identified

¹²⁰ See footnote 1 above, where a link to the 2010 Regulations is provided.

	arrangements between the service provider and the recipient restricting the provision of the service by the self-employed		
16(2)(e)	Obligation to possess a specific identity document	√	None identified
16(2)(f)	Requirements affecting the use of equipment	√	None identified
16(2)(g)	Restrictions on recipients	√	None identified

Findings with respect to the Article 16(2) prohibitions, including justification analyses

This Section will focus on the authorisation and/or registration requirements applicable to three different categories of service providers/workers engaged in the construction industry: (i) regulated professionals; (ii) craftsmen and women; and (iii) unskilled workers.

- (i) Regulated professionals

The Building Control Act 2007 provides that the use of the titles of “Architect”, “Quantity Surveyor” and “Building Surveyor” will be confined to persons with recognised qualifications, training and experience whose names are entered on a statutory register. The competent authorities responsible for the maintenance of the registers are: the Royal Institute of Architects in Ireland (RIAI) in respect of architects; and the Society of Chartered Surveyors (SCS) in respect of both Quantity Surveyors and Building Surveyors. It is important to point out that the legislation extends beyond Irish professionals insofar as it also provides for the recognition of professional qualifications possessed by Architects, Quantity Surveyors and Building Surveyors from other Member States by transposing Directive 2005/36/EC (on the mutual recognition of professional qualifications) into Irish law insofar as it applies to those professions.

Ireland did not notify the Building Control Act 2007 during the mutual evaluation process. However, justifications for registration schemes in the construction sector are generally based on public safety, consumer protection and – to a certain extent – environmental protection. It is in the interests of both public policy and public safety that qualified professionals of a high calibre are involved in both the planning and surveillance of construction projects.

- (ii) Craftsmen and women

Very few categories of craftsmen and women are regulated under Irish law. For example, service personnel involved in the maintenance of lifts and escalators are not subject to either a registration or a licensing requirement. Instead, they are expected to observe Irish Standard EN 13015 (the Irish version of the European Standard in this area) which sets out details of the maintenance instructions, risk assessments, rescue operations and the use of relevant markings, signs and warnings in respect of lifts and elevators. This standard does not operate as a barrier to lift/escalator maintenance personnel from other EU Member States wishing to exercise their freedom to provide services in Ireland. By complying with the Irish Standard, however, they are following best practice in relation to lift and escalator maintenance.

In recent years, however, both electricians and gas installers have been subjected to a greater degree of regulation. In Ireland, the Commission for Energy Regulation (CER)¹²¹ is the competent authority for the regulation of the electricity and natural gas sectors.¹²² Under the Energy (Miscellaneous Provisions) Act 2006, the CER was entrusted with the task of regulating the activities of both

¹²¹ The Commission for Electricity Regulation was established under the Electricity Regulation Act 1999. The functions of the Commission for Electricity Regulation, along with its name, were changed by the Gas (Interim) Regulation Act 2002. Under the latter legislation, the remit of the Commission was expanded to include the regulation of the natural gas sector and its name was changed to the ‘Commission for Energy Regulation’.

¹²² Under the Petroleum (Exploration and Extraction) Safety Act 2010, the Commission for Energy Regulation is also given the role of overseeing the activities of petroleum undertakings from a safety perspective.

electrical contractors and gas installers with regard to safety. To this end, the 2006 legislation provides for the appointment by the Commission of Energy Regulation of designated bodies responsible for safety. There are two electrical safety supervisory bodies: Electrical Contractors of Ireland Limited (RECI Ltd.) and Electrical Contractors Safety and Standards Association (Ireland) Limited (ECCSA Ltd.). There is one gas safety supervisory body: RECI Ltd, which straddles both the electricity and gas sectors in Ireland. In the gas sector, RECI Ltd. has formed a company called the Register of Gas Installers of Ireland (RGII) which is responsible for regulating gas installers with regard to safety.

In the electrical sector, electrical contractors and electricians registered with either RECI Ltd. or ECCSA Ltd. are obliged to meet the highest standards of safety and to comply with current Electro-Technical Council of Ireland wiring standards. Members of both of these organisations are subject to regular inspections of their work. Although it is open to cross-border electrical service providers to operate in Ireland, the absence of either the RECI or ECCSA logos would make their services much less appealing to Irish consumers. Similarly, in the gas sector, operators registering with RGII can describe themselves as “registered gas installers”, a designation which is highly important from a business perspective. The regulation of gas installers is also reinforced by legislation insofar as it is a criminal offence for any person to carry out domestic gas work on Liquefied Petroleum Gas (LPG) appliances or installations unless they are registered as a Registered Gas Installer with RGII.¹²³

There are two key points to bear in mind about the regulatory system for electricians and gas installers. First of all, the registration requirement is not a compulsory one. However, unregistered electricians or gas installers will find it difficult to secure business in Ireland. So, in the final analysis, they may find themselves coerced into registration. Secondly, unless they are willing to risk the imposition of criminal sanctions, cross-border gas installers can no longer carry out domestic gas work on LPG appliances unless they are registered as a Registered Gas Installer with RGII. But, even if the registration arrangements are *prima facie* in breach of Article 16(2)(b) of the Services Directive, they are most probably justifiable on public security grounds.

- (iii) Unskilled workers

During the course of the mutual evaluation process, Ireland notified the Construction Skills Certificate Scheme (CSCS) as having the potential to create barriers to entry for prospective cross-border service providers. Inspired and underpinned by occupational health and safety law,¹²⁴ the CSCS restricts the ability of individuals to work on construction sites in the absence of evidence of a certified, minimum level of competence. The CSCS is a training programme for construction workers in relation to specific tasks including, for example, scaffolding, slinging and signalling, tower crane operation, articulated dumper operation and wall cladding/sheeting.

To obtain a CSCS card, workers must have either:

- (i) successfully completed and been issued with a FETAC award under the CSCS, or
- (ii) acquired an equivalent award approved by a body in a Member State of the EU recognised by FAS as equivalent to a FETAC award under the CSCS and be in possession of CSCS registration cards.

Persons who successfully complete an approved CSCS Training and Assessment Programme (or its recognised equivalent) are awarded a FETAC certificate and are eligible to apply for a CSCS card from FAS. The scheme makes it much more difficult for cross-border building workers to secure

¹²³ Electricity Regulation Act 1999 (Liquefied Petroleum Gas Works) Regulations 2011 (S.I. No. 299 of 2011); the link to the text of this instrument is available in footnote 119 above.

¹²⁴ See Safety Health and Welfare at Work Construction Regulations 2006 (S.I. 504 of 2006) at <http://www.irishstatutebook.ie/2006/en/si/0504.html>; and Safety Health and Welfare at Work (Construction) (Amendment) (No.2) Regulations (S.I. No. 423 of 2008) at <http://www.irishstatutebook.ie/2008/en/si/0423.html>

employment on Irish building sites. There is also a similar scheme, the Quarry Skills Certification Scheme (QSCS) which is available to quarry workers. The latter scheme was not notified by Ireland.

As pointed out earlier, Ireland may have been mistaken in notifying the CSCS during the course of the mutual evaluation process. The vast majority of the individuals availing of the CSCS are unskilled **workers** not covered by the provisions of the Services Directive. In any event, even if a small minority of cross-border service providers (as opposed to workers) found themselves handicapped by the lack of a CSCS card, there is still scope for the recognition of qualifications equivalent to the CSCS secured in other EU countries. Admittedly, however, in the case of service providers without recognisable equivalent qualifications from their home countries, this deficit would preclude them from working on Irish building sites. But, arguably, this derogation from the principle of freedom to provide services could be justifiable on health and safety grounds.

7.5 Conclusions for construction/crafts sector

There are a number of authorisation and registration requirements applicable to the construction and crafts sector in Ireland. One of these requirements – the Construction Skills Certificate Scheme - was probably mistakenly included in the mutual evaluation process by Ireland insofar as it appears to be applicable to workers (as opposed to service providers). In any event, however, all of the requirements could probably be justifiable on the basis of health and safety considerations. There is no evidence that these requirements are discriminatory, disproportionate or unnecessary.

8. Regulated Professions

8.1 Overview

This Section will focus on six different regulated professions in Ireland: lawyers, accountants, architects, engineers, tax advisers and patent attorneys. It is important to point out at the outset that the legal profession in Ireland is divided into two different branches, solicitors and barristers. The distinction between these two different categories of legal professionals is explained in *Byrne and McCutcheon on the Irish Legal System*:

“One essential starting point is that, in the vast majority of cases, a person with a legal problem must first consult a solicitor for legal advice. A barrister is not permitted to take instructions directly from a member of the public, except in a small number of specific instances.... Again, broadly speaking, the solicitor tends to specialise in legal work which involves the preparation of cases for court rather than for advocacy in court. The barrister is, generally speaking, regarded as specialising in the preparation of cases for court as well as advocacy in court itself.”¹²⁵

It is also important to state, at this introductory juncture, that the vast majority of the tax advice in this country is given by accountants. Admittedly, there is a minor degree of involvement in the provision of such advice by both solicitors and barristers. But the preponderance of advice given in this field emanates from the members of the accountancy profession. So, for the most part, there is an overlap between the regulation of accountants and tax advisers respectively, given that most of the tax advisers operating within this jurisdiction are chartered accountants and are accordingly regulated by Chartered Accountants Ireland.

It is worth making one final point before examining all six of these professions in the light of the Services Directive. Although most of the professions evaluated in this Section have experienced a lengthy history of regulation, the profession of architect is different insofar as it remained largely immune from regulation prior to the enactment of the Building Control Act 2007. As stated earlier, that particular piece of legislation changed the regulatory environment for architects insofar as it provided that the use of the title of “architect” should be confined to persons with recognised qualifications, training and experience whose names are entered on a statutory register.

In order to establish the extent to which legislation and internal codes of conduct applicable to the six regulated professions (listed earlier) are compatible with the Services Directive, the following legislative provisions and regulatory codes were examined and evaluated:

- Solicitors Act 1954¹²⁶
- The Institute of Chartered Engineers of Ireland (Charter Amendment) Act 1960¹²⁷
- Solicitors (Amendment) Act 1960¹²⁸
- The Institute of Chartered Engineers of Ireland (Charter Amendment) Act 1969¹²⁹
- European Communities (Freedom to Provide Services)(Lawyers) Regulations 1979¹³⁰
- Register of Patent Agents Rules 1992¹³¹
- Patents Act 1993¹³²

¹²⁵ Byrne & McCutcheon (with Bruton & Coffey), *Byrne and McCutcheon on the Irish Legal System* (Bloomsbury Professional, Dublin, 2009) page 65.

¹²⁶ See <http://www.irishstatutebook.ie/1954/en/act/pub/0036/index.html>

¹²⁷ See the “1960” Acts in www.irishstatutebook.ie to access a hyperlink to this private legislation.

¹²⁸ See <http://www.irishstatutebook.ie/1960/en/act/pub/0037/index.html>

¹²⁹ See the “1969” Acts in www.irishstatutebook.ie to access a hyperlink to this private legislation.

¹³⁰ S.I. No. 58 of 1979; see <http://www.irishstatutebook.ie/1979/en/su/0058.html>

¹³¹ S. I. No. 180 of 1992; see <http://www.irishstatutebook.ie/1992/en/si/0180.html>

¹³² See <http://www.irishstatutebook.ie/1992/en/act/pub/0001/index.html>

- Solicitors (Amendment) Act 1994¹³³
- Regulations Entitled European Communities (Second General System for the Recognition of Professional Education and Training) Regulations 1996¹³⁴
- Solicitors (Amendment) Act 2002¹³⁵
- A Guide to Professional Conduct of Solicitors in Ireland (Law Society, 2nd edition, 2002)¹³⁶
- European Communities (Lawyers' Establishment) Regulations 2003¹³⁷
- Code of Ethics – the Institute of Engineers in Ireland (November 2003)
- European Communities (Patent Agents) Regulations 2006¹³⁸
- Patents Amendment Rules 2006¹³⁹
- Audit Regulations and Guidance Institute of Chartered Accountants in England and Wales, Institute of Chartered Accountants in Scotland, Institute of Chartered Accountants in Ireland (ICAI) (as amended by the ICAI on 7 March, 2007)¹⁴⁰
- Building Control Act 2007¹⁴¹
- Code of Conduct for the Bar of Ireland (July 2010)¹⁴²

8.2 Prohibited requirements - Article 14 analysis

Article 14 checklist

Reference	Prohibited requirements	Finding		Notes
		Situation pre-implementation	Situation post-implementation	
14(1)	Requirements based directly or indirectly on nationality or residency	√	√	None identified
14(2)	Requirements limiting the establishment of service providers to one Member State	√	√	None identified
14(7)	Obligations to obtain financial guarantees or insurances from operators established in the same Member State	√	√	None identified
14(8)	Obligations to have been previously registered or to have previously exercised the activity for a given period in the same Member State	√	√	<p>In cases in which the lawyer from another EU Member State wishes to practise law in Ireland under his/her home state title, there are no <u>general</u> obligations to have been previously registered or to have previously practised as a barrister or solicitor in Ireland.</p> <p>To be allowed to practise under the title of “solicitor” or “barrister”, however, the applicant must establish that he/she “effectively” and “regularly” pursued</p>

¹³³ See <http://www.irishstatutebook.ie/1994/en/act/pub/0027/index.html>

¹³⁴ S. I. No. 135 of 1996; see <http://www.irishstatutebook.ie/1996/en/si/0135.html>

¹³⁵ see <http://www.irishstatutebook.ie/2002/en/act/pub/0019/index.html>

¹³⁶ See <http://www.lawsociety.ie/Documents/committees/conduct2.pdf>

¹³⁷ S. I. No. 732 of 2003; see <http://www.irishstatutebook.ie/2003/en/si/0732.html>

¹³⁸ S. I. No 141 of 2006; see <http://www.irishstatutebook.ie/2006/en/si/0141.html>

¹³⁹ S. I. No. 142 of 2006; see <http://www.irishstatutebook.ie/2006/en/si/0142.html>

¹⁴⁰ See [http://www.carb.ie/Documents/Rules%20and%20Regulations/Audit/Audit%20Regulations%20and%20Guidance%20\(RoI\).pdf](http://www.carb.ie/Documents/Rules%20and%20Regulations/Audit/Audit%20Regulations%20and%20Guidance%20(RoI).pdf)

¹⁴¹ The link to this legislation is available at footnote 105 above.

¹⁴² See <http://www.lawlibrary.ie/documents/memberdocs/CodeofConductAdopted050710.pdf>.

				<p>professional activities in Ireland, under his/her home state title, for a period of at least three years. (This requirement is in line with EU law).</p> <p>However, although the Irish regulations which implement the Establishment Directive¹⁴³ afforded both barristers and solicitors a general right of audience in the courts using their home State titles, there is a recognised exception to the effect that the lawyer concerned appear in some cases with another lawyer specialising in a particular area, such as criminal procedure (this approach was envisaged by the Lawyers Establishment Directive itself).</p> <p>In addition, there are other exceptions, in relation to either conveyancing or the grant of Probate, which is provided for in the Irish statutory instrument which implemented the Lawyers' Services Directive in Ireland.¹⁴⁴</p>
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Findings with respect to the Article 14 prohibitions

The Irish statutory instruments and legislation – which originally implemented the respective Directives dealing with freedom to provide legal services in Ireland and freedom of establishment for lawyers – were sufficiently broad-ranging to ensure compliance, several years later, with the provisions of Article 14 of the Services Directive. The liberal approach adopted by Ireland in this regard is explained in *Byrne and McCutcheon on the Irish Legal System* in two illuminating paragraphs of analysis:

“The European Communities (Freedom to Provide Services)(Lawyers) Regulations 1979 also provide for limited recognition of professional qualifications in law in respect of any EC Member State. The 1979 Regulations provide that any lawyer qualified in an EC Member State has the right of audience in the courts, though this must be exercised in conjunction with a qualified barrister or solicitor of this jurisdiction. The Regulations do not permit such a person to provide conveyancing services or to prepare the documents required to obtain title in order to administer the estate of a dead person.

Further significant changes were required to facilitate implementation of a 1998 Establishment Directive. This Directive provides that the relevant bodies, namely the Law Society and King's Inns, must make provision to facilitate practice by a lawyer on a permanent basis

¹⁴³ Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained; OJ L 77 of 14.3.1998, page 3; implemented in Ireland by the European Communities (Lawyers' Establishment) Regulations 2003 (S. I. No. 732 of 2003; see link provided at footnote 139 above).

¹⁴⁴ Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services; OJ 1977, L 78, page 17 ; implemented in Ireland by the European Communities (Freedom to Provide Services) (Lawyers) Regulations 1979 (S. I. No. 58 of 1979 ; see link provided at footnote 132 above).

where that person has qualified in any other Member State. In general, the lawyer may retain his or her title from his or her home state and may, in Ireland, give advice on the law of his or her home state, on European Community law, on international law and on the law of Ireland. While a general right of audience in the Irish courts is granted under the 1998 Directive, some exceptions are permitted, including the power to require that such a lawyer appear in some cases with a lawyer specialising in a particular area, such as criminal procedure. The 1998 Directive was implemented by s. 20 of the Solicitors (Amendment) Act 2002 and the European Communities (Lawyers' Establishment) Regulations 2003.¹⁴⁵

Where a registered lawyer has “effectively and regularly” pursued professional activities in the State, under a home professional title, for a period of at least three years, he/she can then apply to the relevant competent authority (either the Law Society for solicitors or the King's Inns for barristers) for admission to practice under the professional title of barrister or solicitor.

8.3 Requirements to be evaluated - Article 15 analysis

Article 15(2) checklist

Reference	Requirements to be evaluated	Finding	Notes
15(2)(b)	Obligation for the service provider to take a specific legal form	X	<p>In Ireland, a “barrister” means a person who has been called to the Bar of Ireland and who complies with the requirements of the Bar Council as to professional practice. The term “solicitor” means a “Solicitor of the Courts of Justice” (see the European Communities (Lawyer's Establishment) Regulations 2003 and the definition of “solicitor” in section 3(1) of the Solicitors Act 1954).</p> <p>Although it is clear from the above definition that a legal form requirement exists in respect of the profession of barrister, it does not preclude lawyers from other EU Member States from practising as barristers in Ireland. Provided their legal qualifications are recognised as being equivalent to those possessed by barristers in Ireland, then EU lawyers can practise within the jurisdiction under their home state title. Once they have practised in this manner for at least three years, they can subsequently practise law under the title of “barrister” in Ireland.</p>
15(2)(c)	Requirements relating to the shareholding of companies	X	<p>Audit rules in Ireland are governed by Statutory Instrument 220 of 2010 which transposed the Statutory Audit Directive (2006/43/EC). Under rule 2.03 of the Audit Regulations and Guidance of the Institute of Chartered Accountants in Ireland, auditors with “an appropriate qualification, registered auditors, European Economic Area (EEA) auditors, EEA audit firms, or a combination of these <u>must hold at least a majority of the voting rights</u> or hold such rights under the firm's constitution to direct its overall policy or alter its constitution. In addition to this, auditors holding the same “appropriate qualification”, registered auditors, EEA auditors. EEA audit firms or a combination of these are obliged to <u>hold at least a majority of the voting rights in the management board</u> or hold such rights under the firms' constitution to enable them to direct its overall policy or alter its constitution.</p> <p>Section 59 of the Solicitors Act 1954 prohibits</p>

¹⁴⁵ Byrne and McCutcheon, op. cit., chapter 3, pages 104-105.

			<p>solicitors from acting as agents of unauthorised persons to enable the latter to either act as solicitors or profit from the profession of solicitor. The effect of this provision is to preclude solicitors from entering into a partnership with anyone other than another solicitor. This type of requirement contravenes Article 15(2)(c) of the Services Directive.</p> <p>The Guide to the Professional Conduct of Solicitors in Ireland provides (in Chapter 9, paragraph 94) that only solicitors holding practising certificates, retired partners of a firm or dependants or retired partners or deceased partners can form service companies necessary to carry out services in connection with the running of a practice. Once again, this provision appears unduly restrictive, disproportionate and contrary to Article 15(2)(c) of the Services Directive.</p>
15(2)(g)	Obligations to apply fixed minimum or maximum tariffs	√	None identified. In the past junior counsel charged two thirds of the professional fees charged by senior counsel in cases in which both were involved. But this provision of the Code of Conduct for the Bar of Ireland was removed some years ago.

Findings with respect to the Article 15 elements for evaluation, including justification analyses

There is a legal form requirement in respect of barristers insofar as only those called to the Bar and in compliance with the Bar Council requirements are entitled to describe themselves as “barristers”. Against this, however, the European Communities (Freedom to Provide Services) Regulations 1979 and the European Communities (Lawyers’ Establishment) Regulations 2003 have opened up the Irish legal marketplace to such an extent that lawyers from other EU Member States can eventually practise under the title of “barrister” after they have been engaged in practice under their home title for at least three years in Ireland.

The Audit Regulations and Guidance of the Institute of Chartered Accountants in Ireland stipulate that each principal in a firm must be a registered auditor or equivalent; auditors with relevant qualifications must hold at least a majority of the voting rights (or equivalent) and must also hold at least a majority of voting rights in the management board. These Regulations and Guidance are in line with the Audit Directive¹⁴⁶ insofar as it provides, in relevant part, that:

- the natural person who carries out the statutory audit on behalf of an audit firm must be of good repute;
- a majority of the voting rights in an entity must be held by audit firms which are approved in one Member State or by a natural person who is a qualified and approved auditor;
- a majority – up to a maximum of 75% - of the members of the administration or management body of the entity must be comprised of approved audit firms or auditors who are natural persons.

It is also important to point out, in this context, that auditors from anywhere within the EEA can comprise part of the majority required in respect of the voting rights in the firm itself, as well as the majority in the management board of the firm.

There is a restrictive requirement in Section 59 of the Solicitors Act 1954 which effectively precludes solicitors from forming partnerships with anyone other than solicitors themselves. The arrangements in relation to service companies designed to meet the needs of law firms are similarly restrictive. In the wake of the transposition of the Services Directive into Irish law, serious consideration will need to be

¹⁴⁶ Directive 2006/43/EC of the European Parliament and Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts OJ 2006, L 157/87.

given to how solicitors firms can be opened up to other professionals to encourage the foundation of multi-disciplinary practices.

8.4 Restrictions to the freedom to provide services - Article 16(2) analysis

Article 16(2) checklist

Reference	Prohibited requirements	Finding	Notes
16(2)(a)	Obligation to have an establishment in the territory where the service is provided	√	None identified
16(2)(b)	Obligation to obtain an authorisation or a registration	X	<p>Patent agents from other Member States, wishing to practise in Ireland, require the authorisation of the Minister for Jobs, Enterprise and Innovation (under the provisions of the Patents Act 1992 and associated regulations). The key issue here is whether an authorisation is a proportionate requirement.</p> <p>There is also a registration requirement in relation to architects insofar as the lawful use of the term “architect” is restricted to suitably qualified persons whose names are entered on a statutory register (in accordance with Part 3 of the Building Control Act 2007). This particular restriction is probably justifiable not only on public policy grounds, but also on environmental grounds insofar as the skills and abilities of architects are capable of having a major impact on the aesthetic qualities of the built environment. There is also a public safety perspective, insofar as their plans and blueprints are usually designed with the health and safety of users in mind.</p>
16(2)(c)	Ban on setting up an infrastructure	√	None identified
16(2)(d)	Application of specific contractual arrangements between the service provider and the recipient restricting the provision of the service by the self-employed	√	None identified
16(2)(e)	Obligation to possess a specific identity document	√	None identified
16(2)(f)	Requirements affecting the use of equipment	√	None identified
16(2)(g)	Restrictions on recipients	√	None identified

Findings with respect to the Article 16(2) prohibitions, including justification analyses

Section 106(3) of the Patents Act 1992 (together with the European Communities (Patent Agents) Regulations 2006) require that a person, established in a Member State of the Union (other than Ireland) who is not a registered patent agent in Ireland, but who is qualified to act under the law of that State as a patent agent, may be permitted by the Minister for Jobs, Enterprise and Innovation, to act on behalf of others in relation to patents. The Patent Amendment Rules 2006 prescribe the evidential requirements which such a person is obliged to provide to the Controller of Patents, Designs and Trade Marks. Section 107 of the Patents Act 1992 provides that a person who resides in Ireland or another Member State of the EEA, has a place of business in the EEA, and possesses the prescribed educational and professional qualifications will be eligible (should they choose this option) to register with the Controller of Patents, Designs and Trade Marks.¹⁴⁷ The registration process may involve a written examination in the Law and Practice of Patents.

¹⁴⁷ Rule 7 of the Register of Patent Agents Rules 1992 governs the entitlement of any individual to entry on the register.

The question which arises in respect of the registration requirements just described - in respect of patent agents aspiring to practise in Ireland – is whether the existing regulatory mechanism is proportionate.

Finally, Part 3 of the Building Control Act 2007 provides for statutory protection of the title of “architect” by restricting its lawful use to suitably qualified persons whose names are entered on a statutory register. This Part also specifies criteria for automatic eligibility for admission to the architects register. Section 13 of the 2007 Act designates the Royal Institute of Architects of Ireland (RIAI) as the registration body and as the competent authority under Directive 2005/36/EC on the recognition of professional qualifications.¹⁴⁸ Section 14 sets out the eligibility criteria for admission to the architects register for persons holding approved qualifications, including nationals of EU Member States, the EEA, the Swiss Confederation and Third Countries. It also provides that membership of the RIAI is not a prerequisite for registration and that the same registration fee will apply to members and non-members of that body. Section 15 sets out the detailed criteria for the registration of persons who are nationals of EU Member States and the EEA in accordance with EU obligations. Section 16 provides for applications for recognition of qualifications by a further category of persons from other Member States who are eligible to apply to the Admission Board in accordance with Directive 2005/36/EC.

As explained above, the registration requirements in the Building Control Act 2007 are probably justifiable not only on public policy grounds, but also on environmental grounds insofar as the skill and abilities of architects are capable of having a major impact on the quality of the built environment. There is also a public safety perspective, insofar as their plans and blueprints are designed with health and safety considerations to the forefront of their minds. It is also salutary to point out that Part 3 of the Building Control Act transposes Directive 2005/36/EC into Irish law insofar as it designates the Royal Institute of Architects of Ireland as the competent authority for the registration of architects in Ireland.

8.5 Conclusions for the regulated professions

The legislation governing architects appears to be in conformity with the Services Directive. The same is largely true of the Audit Regulations and Guidance of the Institute of Chartered Accountants in Ireland. Nor are there any difficulties in the two pieces of legislation and single statutory instrument which regulate the engineering profession. The legislation governing patent agents raises some concerns as regards its proportionality. Of the two branches of the legal sector, however, the solicitors’ profession seems ill equipped to promote the freedom of legal services in Ireland. This is mainly because the prohibition on solicitors forming partnerships with non-solicitors has remained steadfastly in place since 1954. The Guide to Professional Conduct of Solicitors in Ireland recognises that solicitors can form services companies linked to their practices. Once again, however, there is a restrictive element to such companies insofar as membership is limited to “partners of the firm, solicitors holding practising certificates, retired partners of the firm or dependants of retired or deceased partners.”

¹⁴⁸ O J 2005, L 255, page 22

9. Conclusions

The European Union (Provision of Services) Regulations 2010 faithfully transposed the Services Directive into Irish law. Unfortunately, however, Ireland did not conduct a review of sector-specific services legislation prior to implementing the Directive. The end result is that questionable legislation and administrative practices remain in force notwithstanding the importance of the objectives which need to be realised under the Services Directive.

This Report focused on seven different sectors of the Irish economy: Retail, Tourism, Food and Beverages, Real Estate, Education, Crafts, Constructions and Certification Services and the Regulated Professions. The conclusions reached in respect of each of these different sectors will be discussed in the paragraphs which follow.

Turning, first of all to the retail sector, it is important to reiterate that the Retail Planning Guidelines 2005 are currently being reviewed by the Department of Environment, Community and Local Government. The floor-space caps imposed by the Guidelines effectively operate as a quantitative restriction which prevents hypermarkets from entering the Irish marketplace. This appears as a major restriction on the freedom to provide services.¹⁴⁹ Liquor retailers also encounter difficulties in Ireland because there are quantitative restrictions on the amount of liquor licences which can be issued in Ireland (insofar as a new licence will only be issued after an old one has been extinguished). The manner in which the retail trade in alcohol is regulated in Ireland should be re-examined. Finally, both occasional and casual trading are subject to the dictates of licensing regimes which do not seem to be proportionate.

With regard, secondly, to the tourism sector, the main finding was that the travel business appeared to be over-regulated insofar as tour operators and travel agents are subject to both a stringent licensing system and certain capital requirements. There is also a question mark in relation to the registration system which the National Tourism Development Authority¹⁵⁰ oversees in respect of the provision of tourist accommodation in the State.

Thirdly, save for the liquor licensing regime, no problems were identified in respect of the food and beverages sector. Given that the origin of modern Irish Food law can be traced directly to the European Union, it is not surprising that the vast majority of the Irish regulatory regime for food and beverages appears to be in line with the Services Directive.

Fourthly, with regard to the real estate sector, many of the participants in the Irish property market are currently immune from regulation. However, both auctioneers and house agents are subject to a lightweight licensing regime under the Auctioneers and Houses Agents Acts 1946 to 1973 (which does not appear to be problematic when viewed from the perspective of the Services Directive). If, however, the Property Services Regulation Bill 2009 is ever enacted into Irish law, a much more stringent licensing system will apply to auctioneers, house agents and property management agencies respectively. Although the Bill made reference to the Services Directive in the Explanatory Memorandum, the provisions of the Bill might conceivably cause problems for auctioneers, house agents and property management agencies from other EU Member States.

Turning, fifthly, to education, no significant problems were identified in relation to the manner in which mainstream education is regulated in Ireland or the extent of access enjoyed by education providers from other EU Member States to the Irish educational marketplace. Whenever restrictions

¹⁴⁹ As at December 2011, an action plan has been agreed with the Irish authorities to raise some ceilings on retail spaces in urban areas by between 14% and almost 17% in a bid to enable economies of scale and thus lower prices.

¹⁵⁰ Also known as *Faite Ireland*: see www.failte.ireland.ie.

were identified in the education sector, they related mainly to educational activities of a peripheral nature which, in most cases, seemed justifiable.

Sixthly, all of the authorisation and registration requirements relating to the construction/crafts/certification services sector seem to be justifiable on the basis of health and safety considerations. There is no evidence that these requirements are discriminatory, disproportionate or unnecessary.

Seventhly and finally, most of the professions examined in the context of this Report (including architects, accountants and tax advisers, engineers) are subject to regulatory regimes which may appear to be in line with the Services Directive and are designed to comply with EU law on the recognition of professional qualifications. The legislation governing patent agents raises some concerns as regards its proportionality. Of the two branches of the legal profession, however, there are potential problems in relation to the manner in which the solicitors' profession is regulated. The ban on solicitors participating in partnerships with non-solicitors operates as a brake on the formation of multi-disciplinary practices, and this is problematic for solicitors and other professionals (from both Ireland and the other EU Member States) wanting to broaden the range of the services they provide.

ANNEX I List of national legislation

This list includes national legislation and administrative provisions (including Acts of the Oireachtas (Parliament), draft legislation (Bills), Statutory Instruments, Bye-Laws, Codes of Conduct, Administrative Guidelines, Schemes and Arrangements, as well as Industrial Standards)

- Electricity Regulation Act 1999 (Liquefied Petroleum Gas Works) Regulations 2011 (S.I. No. 299 of 2011)
- Qualifications and Quality Assurance (Education and Training) Bill 2011 (not numbered)
- Commission for Aviation Regulation, Revised arrangements for the provision of audited accounts in the travel trade sector – January 2011
- Tour Operators (Licensing) (Amendment) Regulations 2010 (S.I. No. 660 of 2010)
- Travel Agents (Licensing) (Amendment) Regulations 2010 (S.I. No. 659 of 2010)
- European Communities (Court Orders for the Protection of Consumer Interests) Regulation 2010 (S.I. No. 555 of 2010)
- European Union (Provision of Services) Regulations 2010 (S.I. No. 533 of 2010)
- European Communities (General Food Law) (Amendment) Regulations 2010 (S.I. No. 498 of 2010)
- The Health (Definition of Marginal, Localised and Restricted Activity) (Butcher Shop) Regulations 2010 (S.I. No. 340 of 2010)
- Guidelines on the New Manual Training System – 2010 Revision
- Petroleum (Exploitation and Extraction) Safety Act 2010 (No. 4 of 2010)
- Code of Conduct for the Bar of Ireland (July 2010)
- European Communities (Food and Food Hygiene) Regulations 2009 (S.I. No. 432 of 2009)
- The Abattoirs Act 1988 (Veterinary Examination and Health Mark) No. 2 Regulations 2009 (S.I. No. 373 of 2009)
- Building Control Act 2007 (Commencement) Order 2009 (S. I. No 352 of 2009)
- Building Control (Amendment) Regulations 2009 (S. I. No. 351 of 2009)
- Employment Agency Regulation Bill 2009
- Road Traffic (Driver Instructor Licensing)(No. 2) Regulations 2009 (driving lessons) (S.I. No. 146 of 2009)
- Electro-Technical Council of Ireland ('ETCI') Fourth Edition of the Irish National Wiring Rules – September 2009
- Cork County Council Bye-Laws for the Regulation of Harbours on the Coastline of County Cork 2009
- Property Services Regulation Bill 2009 (no longer numbered)
- Donegal County Council Regulation and Control of Certain Beaches Bye-Laws 2009
- Safety Health and Welfare at Work (Construction) (Amendment) (No.2) Regulations 2008 (S. I. No. 423 of 2008)
- Quarry Skills Certificate Scheme (circa 2008)
- Safety Health and Welfare at Work (Quarries) Regulations 2008 (S.I. No. 28 of 2008)
- Intoxicating Liquor Act 2008 (No. 17 of 2008)
- Commission for Aviation Regulation, Guidelines on Tour Operators and Travel Agents Licenses – January 2008
- Beach Bye-Laws for the Administrative Area of Clare County Council 2008
- Recognition of Professional Qualifications (Directive 2005/36/EC) Regulations 2008 (S.I. No. 139 of 2008)
- European Communities (General Food Law) Regulations 2007 (S.I. No. 747 of 2007)
- Building Control Act 2007
- Kerry County Council Amended (Beach) Bye-Laws 2007

- Safety Health and Welfare at Work (General Application) Regulations 2007 (S.I. No. 299 of 2007)
- Audit Regulations and Guidance Institute of Chartered Accountants in England and Wales, Institute of Chartered Accountants for Scotland, Institute of Chartered Accountants in Ireland (U.K. version published in 2008 with amendments up-to-date to 2011)
- Building Control Act 2007 (No. 21 of 2007)
- Constructions Skills Certificate Scheme (circa 2007)
- Energy (Miscellaneous Provisions) Act 2006 (No. 40 of 2006)
- Patents Amendment Rules 2006 (S. I. No. 142 of 2006)
- European Communities (Patent Agents) Regulations 2006 (S. I. No 141 of 2006)
- Safety Health and Welfare at Work (Construction) Regulations 2006 (S.I. No. 504 of 2006)
- Guidelines issued by the Minister for Enterprise, Trade and Employment for Local Authorities for the carrying out of their functions under the Casual Trading Act 1995 (published by the Department of Enterprise, Trade and Employment in July 2006)
- Institutes of Technology Act 2006 (No. 25 of 2006)
- Retail Planning Guidelines 2005 (published by the Department of Environment, Community and Local Government)
- Gas (Interim) Regulation Act 2002 (S.I. No. 85 of 2004)
- Building Control (Amendment) Regulations 2004 (S.I. No. 85 of 2004)
- Education for Persons with Special Educational Needs Act 2004 (No. 30 of 2004)
- Residential Tenancies Development Act (No. 27 of 2004)
- Tourist Traffic Acts 1939 to 2003 Restatement (certified by the Attorney-General on 17 May, 2004)
- European Communities (Lawyers' Establishment) Regulations 2003 (S. I. No. 732 of 2003)
- The Royal College of Surgeons (Charters Amendment) Act 2003 (Private Act)
- National Tourism Development Authority Act 2003 (No. 10 of 2003)
- Code of Ethics – the Institute of Engineers in Ireland (November 2003)
- Solicitors (Amendment) Act 2002 (No. 19 of 2002)
- A Guide to Professional Conduct of Solicitors in Ireland (Law Society, 2nd edition, 2002)
- Local Government Act 2001 (No. 37 of 2001)
- Aviation Regulation Act 2001 (No. 1 of 2001)
- Wicklow County Council Beach Bye-Laws for the County Health District of Wicklow 2001
- Irish Standard EN 13015: 2001
- Electricity Regulation Act 1999 (Schedule, Paragraph 16) Levy Order 2000 (S.I. No. 447 of 2000)
- Building Control (Amendment) Regulations 2000 (S.I. No. 10 of 2000)
- Intoxicating Liquor Act 2000 (No. 17 of 2000)
- Electricity Regulation Act 1999 (No. 23 of 1999)
- Qualifications (Education and Training) Act 1999 (No. 26 of 1999)
- Education Act 1998 (No. 51 of 1998)
- Building Control Regulations 1997 (S. I. No. 496 of 1997)
- Universities Act 1997 (No. 24 of 1997)
- Casual Trading Act 1995 (Forms) Regulations 1996 (S.I. No. 146 of 1996)
- Regulations Entitled European Communities (Second General System for the Recognition of Professional Education and Training) Regulations 1996 (S. I. No. 135 of 1996)
- Package Holidays and Travel Trade Act 1995 (Bonds) Regulations 1995 (S.I. No. 271 of 1995)
- Package Holidays and Travel Trade Act 1995 (Occasional Organizers) Regulations 1995 (S.I. No. 236 of 1995)
- Bye-Laws made under the Casual Trading Act 1995 by Cork County Council and Dublin City Council respectively
- Casual Trading Act 1995 (No. 19 of 1995)

- Package Holidays and Travel Trade Act 1995 (No. 17 of 1995)
- Solicitors (Amendment) Act 1994 (No. 27 of 1994)
- Travel Agents (Licensing) Regulations 1993(S.I. No. 183 of 1993)
- Tour Operators (Licensing) Regulations 1993 (S.I. No. 182 of 1993)
- Patents Act 1992 (No. 1 of 1992)
- Register of Patent Agents Rules 1992 (S. I. No. 180 of 1992)
- Regional Technical Colleges Act 1992 (No. 16 of 1992)
- Dublin Institute of Technology Act 1992 (No. 15 of 1992)
- Building Control Act 1990 (No. 3 of 1990)
- Video Recordings Act 1989 (No. 22 of 1989)
- Food Hygiene (Amendment) Regulations 1989 (S.I. No. 62 of 1989)
- Labour Services Act 1987 (No. 19 of 1987)
- Transport (Tour Operators and Travel Agents) Act 1982 (No. 3 of 1982)
- Sale of Goods and Supply of Services Act 1980 (No. 16 of 1980)
- Occasional Trading Act 1979 (No. 35 of 1979)
- European Communities (Freedom to Provide Services)(Lawyers) Regulations 1979 (S.I. No. 58 of 1979)
- The Auctioneers and House Agents Acts 1946 to 1973 (collective citation)
- Higher Education Authority Act 1971 (No. 22 of 1971)
- The Institute of Chartered Engineers of Ireland (Charter Amendment) Act 1969 (Private Act)
- Hotel Proprietors Act 1963 (No. 7 of 1963)
- The Institute of Chartered Engineers of Ireland (Charter Amendment) Act 1960 (Private Act)
- Solicitors (Amendment) Act 1960 (No. 37 of 1960)
- Solicitors Act 1954 (No. 36 of 1954)
- Food Hygiene Regulations 1950 (S.I. No. 205 of 1950)
- Bray Promenade, Esplanade and Seashore Bye-Laws 1942
- Sale of Food and Drugs (Milk Sampling) (Amendment) Regulations 1941 (S.I. No. 246 of 1941)
- Sale of Food and Drugs (Milk Sampling) Regulations 1936 (S.I. No. 312 of 1936)
- Sale of Food and Drug (Milk) Act 1935 (Section 2, Appointed Day) Order 1936 (S.I. No. 78 of 1936)
- Sale of Food and Drugs (Milk) Act 1935 (No. 3 of 1935)
- Vocational Education Act 1930 (No. 29 of 1930)
- Firearms Act 1925 (No. 17 of 1925)
- Margarine Act 1907 (7 Edward 7, Ch. 21)
- Sale of Goods Act 1893 (56 & 57 Victoria Ch. 71)
- Sale of Food and Drugs (Amendment) Act 1879 (38 & 39 Victoria Ch. 69)
- Explosives Act 1875 (38 & 39 Victoria Ch. 17) and associated legislation and regulations
- Sale of Foods and Drugs Act 1875 (38 & 39 Victoria Ch. 63)

ANNEX II Sources of information

European Union source:

Commission Staff Working Paper on the process of mutual evaluation of the Services Directive, accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – *Towards a better functioning Single Market for services – building on the results of the mutual evaluation process of the Services Directive*.

National sources:

The Irish Statute Book website is an invaluable source of the complete texts of both Acts of the Oireachtas (Parliament) and Statutory Instruments:

www.irishstatutebook.ie.

In addition to the above website, two other electronic sources proved useful:

www.attorneygeneral.ie

www.education.ie

Byrne and McCutcheon on the Irish Legal System (Bloomsbury Professional, 2009) provides detailed insights into fundamental aspects of the Irish legal system.