

Querist: Architects' Alliance

Re: Building Control (Amendment) Bill 2010

OPINION

Anthony M. Collins

26 November 2010

I. Scope of Opinion

1. By instructions of November 17, 2010, advice is sought as to whether there is any conflict between the provisions of the Building Control (Amendment) Bill 2010¹ and the law of the European Union, notably Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (Text with EEA relevance).²

II. The Act

2. The Long Title of the Building Control Act 2007³ states that it is:

An act to amend and extend the Building Control Act 1990; to regulate the use of the titles “architect”, “quantity surveyor” and “building surveyor”; to implement certain provisions of Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications and to provide for related matters.

3. It follows that the Act serves at least two purposes: to regulate the profession of architect in the State and to implement certain provisions of the Directive, notably those governing that profession.
4. Part 3 of the Act, headed up “*Registration of Architects*” was commenced with effect from May 1, 2008.⁴ So far as appears relevant to these advices, section 13 establishes the Royal Institute of Architects of Ireland⁵ as both the registration body for the purposes of Part 3 and the competent authority for architects for the purposes of the Directive. The RIAI is required to establish an Admissions Board for the purpose of registering persons under Part 3.

¹ Hereafter “the Bill”.

² O.J. L 255, p. 22, hereafter “the Directive”. The amendments to the Directive by Council Directive 2006/100/EC of 20 November 2006 adapting certain Directives in the field of freedom of movement of persons, by reason of the accession of Bulgaria and Romania (O.J. L 363, p. 141) do not appear to have any bearing upon the subject matter of this Opinion.

³ Hereafter “the Act”.

⁴ Building Control Act (Commencement) Order 2008 (S.I. No. 50 of 2008), Article 3.

⁵ Hereafter “RIAI”.

5. Section 14 requires the RIAI to establish a register for architects and describes who is eligible for registration. Whilst all registered professionals are eligible for membership of the RIAI, membership is not a pre-requisite for registration. When the Minister prescribes an educational body or a qualification awarded or conferred by it for the purposes of section 14(2)(a), he must be satisfied that the course leading to the award of that qualification provides the instruction required by Article 46 of the Directive. As discussed at paragraph 31, below, this is a prerequisite for the automatic recognition of the qualifications awarded by the National University of Ireland and the Dublin Institute of Technology in the field of architecture. It may also be observed that the "*relevant list*" for the purposes of section 14(2)(d) consists of a list of persons whom the Minister had proposed to certify under the terms of an amendment that the State had proposed to make to the precursor of the Directive.

6. To the extent to which they seek to transpose the Directive, sections 15 and 16 of the Act contain detailed provisions permitting the registration of persons who meet the requirements of the Directive and for their registration under the Act. Section 18 purports to restrict the use of the title "*architect*" in the State. Sections 21 and 22 provide for the establishment of a Technical Assessment Board to assess applications for registration by persons who had been performing duties commensurate with those of an architect for a period of 10 or more years in the State prior to May 1, 2008.

III. The Bill

7. The principal provision of the Bill is to include amongst those eligible for registration in the register for architects established by section 14 (1) of the Act the following:

A person who, on the date of coming into force of this amendment—

- (i) *is at least 35 years of age, to be confirmed by production of a passport or birth certificate issued by the relevant authority in the country of origin, and*

- (ii) *can show evidence of establishment comprising of having had practical experience of providing services commensurate with those of an architect in the State for 7 years or more, whether— independently;
or with other competent building professionals;
or with persons who were or are eligible to become registered;
or with registered architects;
or in conjunction with architects who were members of the registration body; and*
- (iii) *has presented a portfolio of work undertaken during the relevant period of 7 years or more for quantitative verification purposes to the Admissions Board; and*
- (iv) *has provided a sworn declaration in respect of the age, the evidence of establishment, the practical experience, and the portfolio of work referred to in paragraph (j), (i) to (iii) above,*

8. This amendment would permit the category of persons so described to be included in the register established by section 14 (1) of the Act. On its face it does not appear to offend the principle of non-discrimination on grounds of nationality either directly or indirectly. It does not amend sections 15 and 16 of the Act, which facilitate the registration of persons who meet the requirements of the Directive and establishes their eligibility for registration.

IV. The Directive

9. The Directive can be analysed under three sub-headings: legal basis, purpose and scope, and relevant provisions.

(a) Legal Basis

10. Article 5 of the Treaty on European Union states that the limits of Union competencies are governed by the principle of conferral, under which the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

11. The legal basis for the Directive is Articles 40, 47(1), 47(2) and 55 of the EC Treaty, now Articles 46, 53(1) 53(2) & 62 of the Treaty on the Functioning of the European Union.⁶
12. Article 46 of the TFEU speaks of the adoption of provisions for the purpose of bringing about the free movement of workers generally and of the abolition of obstacles to that process. Article 53(1) of the TFEU provides that:

In order to make it easier for persons to take up and pursue activities as self-employed persons, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons.
13. Article 53(2) of the TFEU states that, in the case of the medical and allied and pharmaceutical professions,⁷ the progressive abolition of restrictions shall be dependent upon coordination of the conditions for the exercise of those professions in the various Member States.
14. Article 62 of the TFEU simply applies Articles 51 to 54, governing the freedom of establishment, to the free movement of services.
15. Articles 46, 53 and 62 of the TFEU seek to facilitate access to the markets in labour and services by permitting individuals to exercise occupations without being restricted by national frontiers and regulations. With the express exception of the medical and allied professions, these Treaty articles do not aim at regulating qualifications on the basis of their intrinsic merits. They rather seek to ensure that Member States recognise qualifications and experience earned in other Member States for the purpose of allowing persons with such qualifications and experience to access and pursue activities on the internal market in labour and services.

⁶ Hereafter the “TFEU”. The amendments made by the TFEU to these provisions of the EC Treaty did not alter their scope.

⁷ Hereafter referred to as “the medical and allied professions”.

16. It is inherent in a system of mutual recognition that those recognising qualifications have the power to establish their own rules as regards the qualifications they themselves establish, apply or operate. Indeed in a system where standards, qualifications, rules *etc.* are determined at a central level, there is no need for mutual recognition, save perhaps in a purely formal sense, as the content of standards *etc.* is the same everywhere.
17. It follows from the foregoing that the provisions of the Treaties that furnish the legal basis for the Directive do not permit the Community legislature to direct the State as to how it regulates the exercise of the occupation of architect, provided such regulations do not breach fundamental principles of Union law, such as non-discrimination on grounds of nationality and facilitate access to and the pursuit of those regulated activities by recognising qualifications and experience obtained in other Member States under the conditions laid down in the Directive. Were it otherwise, it is submitted that an issue might arise as to the validity of the Directive. Fortunately, for the reasons given below, the Directive neither purports to go, nor in fact goes, beyond its legal basis.

(b) *Purpose and Scope*

18. Article 1 of the Directive describes its purpose as follows:

This Directive establishes rules according to which a Member State which makes access to or pursuit of a regulated profession in its territory contingent upon possession of specific professional qualifications (referred to hereinafter as the host Member State) shall recognise professional qualifications obtained in one or more other Member States (referred to hereinafter as the home Member State) and which allow the holder of the said qualifications to pursue the same profession there, for access to and pursuit of that profession.

19. The Directive thus has the express purpose of imposing an obligation on those Member States that make access to or pursuit of a regulated profession in its territory contingent upon possession of specific professional qualifications (in other words, those Member States that have adopted their own rules for that purpose) to recognise professional qualifications obtained in other Member States. No mention is made of requiring Member States either to adopt rules

regulating certain activities or to adapt such rules as they may have made for the purpose of permitting access to or the pursuit of a regulated profession, even in order to facilitate the recognition of professional qualifications obtained in other Member States. All the Directive requires of the Member States is that they recognise those professional qualifications, not on the basis of their inherent merits, but for the purpose of affording access to, and the pursuit of, that profession in that Member State. It is submitted that this interpretation is consonant with the legal basis of the Directive described at paragraph 15, above.

20. These observations are reflected in the definition of the Directive's scope in Article 2(1) as applying "*to all nationals of a Member State wishing to pursue a regulated profession in a Member State, including those belonging to the liberal professions, other than that in which they obtained their professional qualifications, on either a self-employed or employed basis.*"

21. Article 4 of the Directive, headed up "*Effects of recognition*", also reveals the intent of the Community legislature in enacting the Directive. It provides that:

1. *The recognition of professional qualifications by the host Member State allows the beneficiary to gain access in that Member State to the same profession as that for which he is qualified in the home Member State and to pursue it in the host Member State under the same conditions as its nationals.*
2. *For the purposes of this Directive, the profession which the applicant wishes to pursue in the host Member State is the same as that for which he is qualified in his home Member State if the activities covered are comparable.*

22. This provision expressly recognises that it is a matter for the Member States to determine, should they wish to, the scope of the professions exercised on their respective territories and, if so, the qualifications they may demand in order for a person to be permitted to practice the activities covered thereby. Article 4 of the Directive makes it clear, if it was not already, that the Directive seeks to regulate access to and the pursuit of activities in host Member States. Accordingly the Member States' competence to regulate the professions exercised on their territories and the qualifications they may demand of persons seeking to do so must be exercised in such a way as to ensure that the

“*activities*” covered by the professions can be engaged in by persons coming from other Member States where those activities are “*comparable*”.

23. That the scope of the Directive consists of facilitating access to the exercise of the activities consisting of a profession in host Member States is also clear from its recitals. The first recital refers to the aim of abolishing of obstacles to the free movement of persons and services between Member States, including the right to pursue a profession in a self-employed or employed capacity, in a Member State other than the one in which a person has obtained his/her professional qualifications. The third recital speaks of the Directive conferring a guarantee on persons having acquired their professional qualifications in a Member State to have access to the same profession and pursue it in another Member State with the same rights as nationals, without prejudice to compliance by the migrant professional with any non-discriminatory conditions that may be laid down by the latter Member State, provided these are objectively justified and proportionate.

24. The limits on the scope of the Directive are also apparent from its twelfth recital, which circumscribes the extent to which it regulates the recognition by Member States of professional qualifications acquired in other Member States, by expressly acknowledging that the Directive does not concern the recognition by Member States of recognition decisions adopted by other Member States. As a consequence, “*individuals holding professional qualifications which have been recognised pursuant to this Directive may not use such recognition to obtain in their Member State of origin rights different from those conferred by the professional qualification obtained in that Member State, unless they provide evidence that they have obtained additional professional qualifications in the host Member State.*” By making it impossible to rely upon the exercise of rights under the Directive in order to circumvent Member States’ rules, the Directive at least impliedly acknowledges that the Member States are entitled to make and apply their own rules without direction from the Directive.

(c) *Relevant Provisions of the Directive*

25. In so far as it is applicable, the Directive provides for the activities of architects in Title III, Chapters I and III.
26. Chapter I of Title III is headed up “*General system for the recognition of evidence of training*”. Article 10, headed up “*Scope*”, states that Chapter I applies to all professions not covered by Chapters II and III and in those cases where the applicant, for specific and exceptional reasons, does not satisfy the conditions laid down in those chapters.⁸ Sub-paragraph (c) makes specific provision for architects who hold evidence of formal qualifications that do not appear in Annex V, point 5.7. In the case of Ireland, Annex V, point 5.7 of the Directive, headed up “*Evidence of formal qualifications of architects recognised pursuant to Article 46*”, refers to the Degrees of Bachelor of Architecture awarded to graduates of the National University of Ireland and the Dublin Institute of Technology, Bolton Street and to the Certificates of associateship and membership issued by the RIAI.
27. Article 10(c) of the Directive is significant for two reasons. First, it allows any Member State to register persons as architects who do not possess the formal qualifications set out at Annex V, point 5.7 thereof. Had the Directive required Ireland to register as architects only those persons who had attained the qualifications listed at Annex V, point 5.7, Article 10(c) of the Directive would serve no purpose. There is no reason to suppose that Article 10(c) of the Directive does not apply to Ireland in the same way as its other provisions. It is thus suggested that Article 10(c) also acknowledges that the Directive does not purport to govern the manner in which Ireland regulates the exercise of the activities constituting the profession of architect.

⁸ In this context see the seventeenth recital: “*In order to take into account all situations for which there is still no provision relating to the recognition of professional qualifications, the general system should be extended to those cases which are not covered by a specific system, either where the profession is not covered by one of those systems or where, although the profession is covered by such a specific system, the applicant does not for some particular and exceptional reason meet the conditions to benefit from it.*”

28. Second, Article 10(c) of the Directive has the consequence that should Ireland avail of the possibility to register persons as architects who do not possess the formal qualifications set out at Annex V, point 5.7, those persons may be able to obtain the benefit of the Directive provided they can satisfy the requirements contained in Chapter I as transposed into the legal orders of Member States other than Ireland. The Directive alone decides who benefits from Title III, Chapter I and Ireland lacks the legal capacity to confer that benefit upon any person who cannot establish an entitlement to it under its terms. Accordingly the fact of registration in Ireland does not, of itself, create any right of access to the market for the services of the profession of architect in another Member State.

29. The twenty-seventh and twenty-eighth recitals of the Directive, reproduced below, appear to support this interpretation:

- (27) *Architectural design, the quality of buildings, their harmonious incorporation into their surroundings, respect for natural and urban landscapes and for the public and private heritage are a matter of public interest. Mutual recognition of qualifications should therefore be based on qualitative and quantitative criteria which ensure that the holders of recognised qualifications are in a position to understand and translate the needs of individuals, social groups and authorities as regards spatial planning, the design, organisation and realisation of structures, conservation and the exploitation of the architectural heritage, and protection of natural balances.*
- (28) *National regulations in the field of architecture and on access to and the pursuit of the professional activities of an architect vary widely in scope. In most Member States, activities in the field of architecture are pursued, de jure or de facto, by persons bearing the title of architect alone or accompanied by another title, without those persons having a monopoly on the pursuit of such activities, unless there are legislative provisions to the contrary. These activities, or some of them, may also be pursued by other professionals, in particular by engineers who have undergone special training in the field of construction or the art of building. With a view to simplifying this Directive, reference should be made to the concept of "architect" in order to delimit the scope of the provisions relating to the automatic recognition of the qualifications in the field of architecture, without prejudice to the special features of the national regulations governing those activities.*

30. It is submitted that these provisions, notably the final sentence of the twenty-eighth recital, could not be clearer. Rooted in the concept of free movement, the Directive is concerned with affording access to the pursuit of professional activities in the Member States, not how the Member States regulate those activities, should they choose to do so. Given the considerable divergences between national rules regulating the activities that constitute “*the field of architecture*”, the Directive seeks to delimit “*the scope of the provisions relating to the automatic recognition of the qualifications in the field of architecture*”, leaving over a separate category of persons who, whilst they do not benefit from such automatic recognition may be able to bring themselves within the “*general*” system for recognition created by the Directive.
31. Title III, Chapter III describes the system of “*automatic*” recognition. It should be observed that the system of automatic recognition applies to the medical and allied professions and to architects only. It is thus instructive to observe how the Directive applies this system to these two groups. Article 21(1), which is part of the general provisions governing automatic recognition, provides that each Member State shall recognise evidence of formal qualifications giving access to the professional activity of, *inter alia*, architect, listed in Annex V, point 5.7.1, which satisfy the minimum training conditions in Article 46. As a consequence the Member States shall, for the purposes of access to and pursuit of the professional activity, give such evidence the same effect on its territory as evidence of the formal qualifications which it itself issues. The acquired rights to which Article 49 of the Directive refers concern access to this system of “*automatic*” recognition.
32. In addition to the requirements contained in Article 21(1), which also apply to medical and allied professional activities, Article 21(6) requires the Member States to make access to and pursuit of the professional activities of the medical and allied professions subject to possession of evidence of the formal qualifications referred to in Annex V, “*attesting that the person concerned has acquired, over the duration of his training, and where appropriate, the knowledge and skills referred to in Articles 24(3), 31(6), 34(3), 38(3), 40(3) and 44(3).*”

33. Article 21(6) of the Directive thus requires Member States to ensure that a certain basic level of training, knowledge and skills has been imparted to medical and allied professionals seeking access to and the pursuit of their activities in other Member States. This is a consequence of Article 53(2) of the TFEU, which requires the imposition of such minimum standards in order to permit members of the medical and allied professions to access the market for those services in other Member States. Nothing of an even remotely similar nature appears in the provisions governing the recognition of qualifications affording access to, and the pursuit of, the activities of architect.
34. It is, of course, the case that Article 46 of the Directive is expressed in terms similar to those found in Article 21(6). The critical distinction is that those requirements are imposed exclusively for the purpose of facilitating the automatic recognition of the qualifications listed in Annex V, not for the purpose of allowing access to and the pursuit of activities making up the profession of architect in the Member States of the European Union. It follows that the Directive does not require that all persons seeking to access or to pursue the activity of architect in a Member State must have undergone training that meets the requirements of Article 46 of the Directive. Persons who have not undergone such training may benefit from the “*general*” system of mutual recognition if they can come within the requirements of Title III, Chapter I of the Directive. If it is unnecessary to ensure that persons seeking to access or the pursuit of the activity of architect in a Member State must have undergone training that meets the requirements of Article 46 of the Directive in order to benefit from the system thereby, the Directive cannot constitute an obstacle to Ireland seeking to regulate the exercise of the activities constituting the profession of architect as it sees fit.

V. Conclusion

35. For the reasons set out at Part IV, I advise that:

- (a) the scope of the Directive consists of facilitating access to the exercise of the activities consisting of a profession in host Member States;
- (b) the Directive does not purport to direct Ireland as to whether it should regulate the activities consisting of the profession of architect in Ireland and, if so, how that is to be done;
- (c) persons exercising the activities consisting of the profession of architect may benefit from the “*general*” or the “*automatic*” systems of recognition created by the Directive on the condition that they can meet the requirements of Title III, Chapters I or III, as transposed into the laws of the Member States, respectively;
- (d) ensuring that persons holding the qualifications adumbrated at Annex VI, point 5.7 of the Directive benefit from the system of “*automatic*” recognition created by Title III, Chapter III of the Directive has no bearing upon the validity of the Bill.

36. I conclude that there is no conflict between the provisions of the Bill and the law of the European Union, notably the Directive.

Nothing further occurs.

Anthony M. Collins

26 November 2010

*Querist: Architects' Alliance
Re: Building Control (Amendment) Bill
2010*

Opinion

Mr. Michael Cummins,
Society of Chartered Surveyors,
63 St. Mary's Road,
Middleton,
Co. Cork.