

**QUERIST: ROYAL INSTITUTE
OF THE ARCHITECTS OF
IRELAND**

AGENT: HAYES

**RE: BUILDING CONTROL (AMENDMENT)
BILL 2010**

OPINION OF COUNSEL

Preliminary

1. In July 2010 Deputy O'Donoghue published the Building Control (Amendment) Bill 2010 ("the 2010 Bill"). The 2010 Bill seeks to amend the Building Control Act 2007 ("the 2007 Act") by prescribing a further category of persons who would be eligible for registration by the RIAI. The object of the Bill is to provide for a form of "grandfathering" clause whereby persons who are aged 35 years or more can show "evidence of establishment comprising...practical experience of providing services commensurate with those of an architect in the State for seven years or more."

2. The issue which I am called upon to consider is whether such a Bill would be compatible with the Services Directive 2006/123/EC and the Professional Qualifications Directive 2005/36/EC. It must, of course, be recognised that there are many policy objections to such a proposal, not least the fact that it would be unfair to those who invested time and energy in satisfying the existing standards of competence etc. in order to be recognised as an architect. These are matters on which the RIAI are much better positioned to comment on, as I conceive my role is merely to examine whether such a Bill would be compatible with EU law. It is true that, questions of policy aside, the 2010 Bill would, if enacted, amend the 2007 Act. But this is itself irrelevant as a matter of

law unless it can be shown that the Oireachtas could not properly enact such legislation.

3. In this regard, I would also observe that, subject to two major qualifications, the Oireachtas is omnipotent. The first is that all legislation must comply with the requirements of the Constitution, but that nothing of the kind arises here. The second is that, having regard to the supremacy of EU law - a principle itself acknowledged by Article 29.4.6 of the Constitution - an domestic law which is incompatible with EU law would be regarded as inapplicable.¹

4. This issue arises in a particularly acute way with regard to the present Bill, since the EU mutual recognition involves full faith and credit on both sides. As we shall now see, the Professional Service Qualifications Directive ("the PSQ Directive") pre-supposes that architects meet certain particular standards and that Member States police and implement those standards in a realistic manner, so that the supervision of education and professional standards is not just simply a platitude, but is also real.

The Professional Services Qualification Directive and Architectural Qualifications

5. It is clear from the Professional Services Qualification Directive that each Member State is required to ensure that architectural education meets certain standards. Thus, for example, Article 46 of the PSQ Directive provides that:

"Training as an architect shall comprise a total of at least four years of full-time study or six years of study, at least three years of which on a full-time basis, at a university or comparable teaching institution. The training must lead to successful completion of a university-level examination. That training, which must be of university level, and of which architecture is the principal component, must maintain a balance between theoretical and practical aspects of architectural training and guarantee the acquisition of the following knowledge and skills...."

6. Article 46 then enumerates a range of specific sub-disciplines which are required to be studied. Article 47 next provides that "by way of derogation from Article 46" that certain other specific German qualifications for architects provided by their Fachhochschulen ("Vocational High Schools") should be deemed to satisfy the requirements of the Directive.

¹ I.e., unenforceable in the State or through the judicial system.

7. Article 48(2) further provides that:

“2. Nationals of a Member State who are authorised to use that title pursuant to a law which gives the competent authority of a Member State the power to award that title to Member States nationals who are especially distinguished by the quality of their work in the field of architecture shall be deemed to satisfy the conditions required for the pursuit of the activities of an architect, under the professional title of ‘architect’. The architectural nature of the activities of the persons concerned shall be attested by a certificate awarded by their home Member State.”

8. Finally, Article 49(1) provides:

“1. Each Member State shall accept evidence of formal qualifications as an architect listed in Annex VI, point 6, awarded by the other Member States, and attesting a course of training which began no later than the reference academic year referred to in that Annex, even if they do not satisfy the minimum requirements laid down in Article 46, and shall, for the purposes of access to and pursuit of the professional activities of an architect, give such evidence the same effect on its territory as evidence of formal qualifications as an architect which it itself issues.....

2. Without prejudice to paragraph 1, every Member State shall recognise the following evidence of formal qualifications and shall, for the purposes of access to and pursuit of the professional activities of an architect performed, give them the same effect on its territory as evidence of formal qualification which it itself issues: certificates issued to nationals of Member States by the Member States which have enacted rules governing the access to and pursuit of the activities of an architect as of the following dates:

- (a) 1 January 1995 for Austria, Finland and Sweden;
- (b) 1 May 2004 for the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia;
- (c) 5 August 1987 for the other Member States.

The certificates referred to in paragraph 1 shall certify that the holder was authorised, no later than the respective date, to use the professional title of architect, and that he has been effectively engaged, in the context of those rules, in the activities in question for at least three consecutive years during the five years preceding the award of the certificate.”

9. The effect of these provisions are as far as Ireland is clear. By virtue of Article 49(1), no Member State can “look behind” certificates awarded to persons who were using the professional title of architect prior to August 5, 1987², even if the professional training which those persons underwent would *not now* be held to satisfy the requirements of Article 46. There are, as we have seen, other derogations from this date which are specific and particular to other Member States which extend out the relevant date for recognition purposes.

10. The consequence of this is as follows: persons who were not using the title of architect in Ireland *before* August 1987 are not in a position to avail of the Article 49(1) derogation. In the case of persons who qualified in Ireland *after* that date, they *must* satisfy the requirements of Article 46. There is no procedure available whereby such recognition could be granted on a some sort of “short cut” basis.

11. Yet this is precisely what is proposed by the 2010 Bill. It is true that the Bill contemplates that persons coming within its remit would have to satisfy certain requirements of competence and experience. But that it is not really the point, since the net effect of the measure would be, in effect, to create a new and special derogation for Ireland above and beyond the special provisions of Article 49, since it would mean that persons who did not hold themselves out as architects prior to August 1987 could not be so regarded under Irish law, without necessarily having to satisfy the requirements of Article 46 or without demonstrating that they had done so. This is plainly precluded by the PSQ Directive.

12. While it is true that the PSQ Directive is directed at mutual recognition for establishment purposes, it has the effect of governing national laws governing the use of the title architect and the education of architects. One could not plausibly so suggest that Ireland (or any other Member State) was free to recognise additional categories of persons for purely domestic purposes so that they would not be eligible to avail of the Directive for the purposes of mutual recognition for establishment purposes.

13. For these reasons, I am of the view that the 2010 Bill would, if enacted, be contrary to the provisions of EU law.

² And who also have been practising for three out of the last five years.

Conclusions

14. In summary, therefore, I am of the view that:

A. Article 46 of the Directive sets out the education standards which architects who qualified in Ireland *after* August 1987 must attain. Article 49 provides for a derogation in the case of persons qualified before that date, even if their educational qualifications did not otherwise satisfy the requirements of Article 46.

B. If enacted, the 2010 Bill would, in effect, create a new category of persons entitled to be regarded as architects, even though they might not otherwise have satisfied the requirements of Article 46 and would not be in a position to do so, even though they did not hold themselves out as architects prior to August 1987.

C. But the PSQ Directive precludes - certainly by necessary implication - national legislation of this kind, since it sets out the requirements (pre and post August 1987) for the recognition and training of architects. Member States are not, in effect, free to create such a new category of persons, as, post August 1987, all Irish qualified architects must be in a position to satisfy the requirements of Article 46. As the 2010 Bill would allow Ireland to circumvent the requirements of Article 46 and the requirements of the Directive generally, in my view such a measure would plainly be unlawful as contrary to requirements of EU law.

I can advise further if required.

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