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The Amended Proposal for a Directive on Services in the Internal Market and its Potential Impact on the Irish Tourism Industry

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THE AMENDED PROPOSAL FOR A DIRECTIVE ON SERVICES IN THE INTERNAL MARKET AND ITS POTENTIAL IMPACT ON THE IRISH TOURISM INDUSTRY

Bruce Carolan

1. Introduction

On December 12, 2006, at a ceremony in Strasbourg, France, the European Parliament President and a representative of the Finnish Presidency of the Council of the European Union signed Directive 2006/123, on services in the internal market. This is the controversial, so-called European Union Services Directive, first proposed by the European Commission in 2004. The Directive entered into force the day following its publication in the *Official Journal of the European Union*. Member States have until December 28, 2009, to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive.

The European Union Services Directive will bring about a major change in the way of doing business in Ireland, both for Irish-based businesses and for businesses that do business in Ireland but are located in other European Union Member States. It will have a significant impact on businesses involved in Irish Tourism.

The Organisation for Economic Cooperation and Development (OECD 2006), among others, regards Ireland as being relatively 'business friendly.' But gaining authorisation to operate a business in Ireland – particularly in the area of tourism, where there are sensitive consumer protection and national pride issues at stake – can involve dealing with a bewildering array of agencies. The Services Directive will compel Ireland, and other EU Member States, to, essentially, 'rationalise' the procedures by which

such authorisation is obtained, and to review existing national requirements to ensure they comply with the substantive limitations imposed on such conditions by the Services Directive.

The original draft of the Services Directive could have had even more dramatic impacts on government regulation of tourism in Ireland. These impacts have been dampened somewhat in the course of the legislative procedures leading to adoption of the Directive. As originally proposed, the Directive would have forbidden use of an economic test to determine whether to grant authorisation to a cross-border business to operate in Ireland. This would have impacted planning processes for authorising construction of new hotels.

The original Directive proposal would have prevented governments from consulting with potential competitors of the applicant in granting authorisation to do business. This could have affected the procedure used in determining licences and assistance to festival organisers.

The final Directive, as the result of changes made after the second reading of the proposed Services Directive by the European Parliament, allows Ireland to retain discretion in some of the areas relevant to government regulation of tourism. However, the Directive will require Ireland to justify its procedures against a set of criteria specified in the Directive. Certain of Ireland's regulations – particularly requirements that tourism providers maintain offices in the country – are likely to be vulnerable to challenge.

The observations made specifically about Ireland will apply equally to regulations by other European Union member states. Although outside the scope of this article, one suspects that the rapidly expanding tourism markets of central and eastern Europe may be subject to a raft of government regulations that might be challenged under the terms of the new Directive.

Ireland has been known, perhaps somewhat unfairly, for its opaque, nod-and-a-wink, insiders' way of doing business, in tourism and elsewhere. Ireland's reputation as a business culture of unwritten rules, of an 'it's who you know not what you know' approach to business ultimately may give way to a transparent one-stop-shop way of doing cross-border business.¹ But it may be years before the desired transparency and ease of operations envisioned by the Services Directive are achieved.

This article will review the terms of the Services Directive and its likely impact on certain aspects of the tourism industry in Ireland.

Regulatory reform has been on Ireland's agenda for a number of years. (See, e.g., Submission to the Competition Authority by the Pharmacy Review Group, December 2001.) The Services Directive will accelerate the reform efforts. It will also change the nature of regulation in Ireland, in the tourism industry and elsewhere.

2. Overview of the Directive

(a) Introduction

The goal of the Services Directive is to enable a business to set up anywhere in the European Union and offer its services throughout the Union.

(b) Exclusions and Conflicts

It is important to note, at the outset, the activities which are not covered by the Services Directive. Many of these exclusions resulted from amendments proposed by the European Parliament in its first reading.

At the outset, Article 1 of the Services Directive, entitled 'Subject matter,' rules out the application of the directive in a broad range of areas. For example, the directive does not deal with 'liberalisation of services of general economic interest,' nor with 'the abolition of monopolies providing services not with aids granted by Member States which are covered by Community rules on competition.' The subject matter of the directive also 'does not affect labour law...' (Services Directive, Article 1 (1)-(7))

There are more specific exclusions in the following sections. The directive does not apply to services of general interest, nor to financial services such as banking, credit and re-insurance, or pension schemes, investment advice, electronic communication services, transport services, port services, services of temporary work agencies, healthcare services, audiovisual services including radio broadcasting and the cinema, gambling activities, activities connected with the exercise of official authority, social services relating to social housing, childcare and support of families, and private security services. (Services Directive, Article 2(2)(a) - (l))

Parliament had criticised the original proposed directive because it did not, in the Parliament's view, definitively resolve what happened if there were a conflict between the Services Directive and

1 For example, Article 12 of the Services Directive provides that where the number of authorisations must be limited because of scarcity of natural resources or technical capacity, 'Member States shall apply a selection procedure to potential candidates which provides full guarantees of impartiality and transparency, including, in particular, adequate publicity about launch, conduct and completion of the procedure.' This procedure is not followed at the moment with respect to fragile natural resources such as the 5,000-year-old passage tomb at Newgrange, and will dramatically affect the way access to this and other heritage sites is determined.

other directives that touched on the same topic. This has been addressed in the adopted Services Directive, which provides that 'if the provisions of this Directive conflict with a provision of another Community act governing specific aspects of access to or exercise of a service activity in specific sectors or for specific professions, the provision of the other Community act shall prevail and shall apply to those specific sectors or professions.' (Services Directive, Article 3 (1))

These exclusions arguably will diminish the impact of the Services Directive. Law. Banking and even the operation of pharmacies are all areas of potential cross-border activity that are currently subject to extensive national regulation in Ireland. Yet the impact of the foregoing sections will dramatically reduce, if not eliminate, the potential benefits of the Services Directive in these areas, either because they are specifically excluded from the terms of the directive, or because they are subject to competing community law. (See Directive 98/5/EC of 16 February 1998 on free movement of lawyers; Directive 75/319/EEC on medicinal products.) Creative lawyers may in the future trawl existing EU law in order to argue that the application of the Services Directive has been 'pre-empted' by other Community law.

(c) Administrative Simplification

(i) Introduction

The popular press focused on that aspect of the original Services Directive which, it was claimed, would cause a 'race to the bottom' of employment protections. They, and others, have largely ignored some aspects of the Services Directive with significant consequences for Ireland and companies doing business in Ireland. This impact may be especially pronounced in the tourism industry, because of the multiplicity of agencies involved in providing approval for tourism service providers and the substantive requirements for such approval.

The Services Directive will require Member States, including Ireland, to undertake a review of all laws and regulations that might hinder the free movement of services across European Union borders. Many of these laws and regulations will have to be repealed or amended unless they can meet a set of criteria justifying their continuation; some regulations cannot avail of any justification and will have to be eliminated. This requirement alone will require massive resources.

In addition, Member States must provide a single point of contact for a prospective service provider. At this single point of contact must be available all information necessary to complete all the procedures necessary to become a service provider in the Member State. The Services Directive imposes substantive obligations on the information to be provided at these points of contact. It also requires that registration procedures must be accessible at a distance by electronic means.

(ii) Specific Directive Provisions on Administrative Simplification

The obligation to survey existing regulations for their impact on cross-border services appears in Chapter II of the Services Directive, entitled, 'Administrative Simplification.'

The Services Directive provides that 'Member States shall examine and, if need be, simplify the procedures and formalities applicable to access to a service activity and to the exercise thereof.' (Services Directive, Article 5 (1)) (The emphasised language was added to the final Directive in response to the suggestions made by the European Parliament in its readings of the proposed Directive.)

The Services Directive also provides that 'by three years after the entry into force of this Directive,' it must be 'possible for a service provider to complete the following procedures

and formalities' in one location: 'all procedures and formalities needed for access to his service activities,' and 'any applications for authorisation needed to exercise his service activities.' (Services Directive, Article 6(1)(a)-(b)) (Member States have until December 28, 2009, to bring about the legislative changes necessary to bring the Directive into force; therefore, one assumes the outside deadline for creation of a 'single access point' will be December 28, 2012.)

The information available at the point of single contact must include 'requirements applicable to providers established in their territory.' A partial listing of this information includes: formalities necessary to be completed; contact details of competent authorities, particularly those responsible for matters concerning exercise of service activities; 'means of redress *which are generally available*' in the event of a dispute with the competent authorities (emphasised language added in final Directive), and contact details for organisations (other than competent authorities) from which practical advice may be obtained. (Services Directive Article 7(1)(a)-(e)) The Directive also imposes a burden on Member States to offer practical advice on how to comply with registration procedures, including, where appropriate, a step-by-step guide. (Services Directive, Article 7(2)) There is no requirement to provide legal advice. (Services Directive, Article 7(7))

Finally, Member States must ensure that 'all procedures and formalities relating to access to a service activity and to the exercise thereof may be easily completed, and at a distance and by electronic means, at the relevant point of single contact and with the relevant competent authorities.' (Services Directive, Article 8)

(d) Rights of Service Providers/Obligations of Member States

The Services Directive provides a number of rights for (cross-border) service providers. Some of these are affirmative rights, in the sense that an obligation is imposed on the Member State to afford positive benefits to service providers. Others are negative rights, in the sense of restraining a Member State's right to deny authorisation for a service provider to operate in the State. Some are general in nature; some are quite specific. Some rights can be infringed if there is an adequate justification, others cannot. Finally, there are derogations.

For example, Article 16 includes the general language that 'Member States shall respect the right of service providers to provide services in a Member State other than the one in which they are established.' (Services Directive, Article 16, (1)) The Directive forbids outright a requirement that a cross-border service provider 'have an establishment in their territory,' and 'a ban on setting up infrastructure ... which the provider needs to supply the services.' (Services Directive, Article 16, (2) (a) & (c))

The Services Directive further specifies requirements that are prohibited or subject to evaluation. Naturally, there can be no discriminatory requirements based directly or indirectly on nationality, or the location of registered offices. Nor can there be a residency requirement on shareholders or directors. Member States cannot prohibit establishment in more than one Member State. (Services Directive, Article 14(1)-(4)) The Services Directive also prohibits Member States from maintaining rules requiring service providers to exercise a given activity exclusively or which restricts the exercise jointly or in partnership with different activities. (Services Directive, Article 30) There is an exception for the regulated professions, in order

to guarantee compliance with the rules governing professional ethics, *and if the requirement is necessary to ensure their independence and impartiality*. (Services Directive, Article 30(1)(a)) However, the Directive also mandates that Member States ‘remove all total prohibitions on commercial communications by the regulated professions.’ (Services Directive, Article 29)

In addition to the prohibitions contained in the Services Directive, there is also an obligation to ‘evaluate’ certain requirements, against a set of criteria. Where the legal system of a Member State makes access to a service activity subject to compliance with certain (non discriminatory) requirements, then the Member State must verify that these requirements satisfy certain conditions. The conditions are that these requirements are (a) non-discriminatory, (b) necessary, and (c) proportionate. (Services Directive, Article 15(2), (3)) That is, the requirements must be (a) ‘neither directly nor indirectly discriminatory according to nationality or location of registered office’, and (b) ‘justified by an overriding reason relating to the public interest.’ With respect to (c) proportionality, it must be the case that the requirement is suitable for attaining the objective pursued while not going beyond what is necessary to attain that objection. The final condition – that of proportionality – also requires that ‘it must not be possible to replace those requirements with other, less restrictive means which attain the same results.’ (Services Directive, Article 15(c))

The Services Directive also requires that Member States prepare and file a report with the European Commission, which specifies (a) any authorisation systems in place in the Member State, (b) which requirements for authorisation are to be evaluated against the criteria listed in Article 15(c), (c) any remaining limitations on joint activities purportedly allowed by Article 30. (Services Directive, Article 41) The Commission will then forward the reports to the Member

States, which will have six months to submit observations. (Services Directive, Article 41(2)) The Commission will also submit a report to the Council and the Parliament, accompanied where appropriate by proposals for additional initiatives.

(e) Rights of Service Recipients

The Service Directive also provides for the rights of service recipients. (Services Directive, Articles 20–22) In some ways, these rights simply gird the rights of service providers to provide cross-border services.

For example, these protections of service recipients includes a prohibition on Member States restricting the use of a service supplied by a provider in another Member State. A Member State may not oblige a service recipient to obtain authorisation to consume such services. Nor may financial assistance be limited on the basis that the recipient is using service provided from another Member State, or impose fees for such use. (Services Directive, Article 20)

The Member State may not discriminate against a recipient of services on the basis of the recipient’s nationality. Furthermore, the Member State must ensure that recipients can receive via the points of single contact information on the requirements applicable in other Member States relating to access to and exercise of service activities, general information regarding redress available in case of dispute between a service provider and recipient, and contact details of organisations that provide assistance to service recipients. (Services Directive, Article 22)

3. Impact on Ireland, Particularly in a Tourism Context

(a) Introduction

In terms of scope, the Services Directive might be compared to the removal of barriers to the free movement of goods undertaken by the Single

European Act (SEA), 1986. However, the SEA set out to remove remaining barriers to the free movement of goods largely at Community level. It did this by amending the law-making procedures of the European Union to provide for qualified majority voting when a piece of legislation was intended to harmonise law and enhance the free movement of goods guarantees. (Carolan, 2004) The Services Directive sets out to remove or reduce remaining barriers to the free movement of services by imposing obligations at Member State level. These obligations will impose a burden on Member States, who might be anticipated to look for 'wobble room' to retain existing regulations that protect local service providers, including tourism providers.

The requirement for member states to examine and if need be simplify the procedures necessary to provide a cross-border service activity will impose a substantial burden on Member States, including Ireland.

(b) General Obligations and Potential Impact on the Irish Tourism Industry

Three substantive rights contained in the original draft had particular relevance to matters relating to tourism. These have been amended in the final Directive, in such a way as to perhaps reduce this impact.

First, the original Services Directive provided that the grant of authority to provide a service could not be made dependent on a case-by-case application of an economic test making the granting of the authorisation subject to proof of the existence of an economic need or market demand or an assessment of the potential economic effects of the activity, or an assessment in light of the economic planning of the competent authority. (Services Directive, Article 14(5)). This could have dramatically impacted upon planning authorities considering

applications for planning permission to build, e.g. a hotel. (See PL 61.208453 Ardilaun House Hotel.) However, the final Directive contains an amendment providing that *this prohibition does not concern planning requirements which do not pursue economic aims but serve overriding reasons relating to the public interest.* (Services Directive, Article 14(5)) (Emphasised language added in second draft.)

Second, the original draft contained a prohibition on the direct or indirect involvement of competing operators, including within consultative bodies, in the granting of authorisations or in the adoption of other decisions of competent authorities. (Services Directive, Article 14(6)) This might have affected the award of, e.g., festival grants by Tourism Ireland, where input had been sought on criteria for awards from associations of tourism providers, chambers of commerce or other professional associations. However, the final Directive includes the proviso:

This prohibition does not concern the consultation of organisations such as chambers of commerce or social partners on matters other than individual applications for authorisations. (Services Directive, Article 14(6))

Finally, the original draft Services Directive prohibited the requirement for the giving of a financial guarantee provided by the service provider. (Services Directive, Article 14(7)) This could have affected the requirement that tour operators post a bond to protect consumers in the event of bankruptcy. See Commission for Aviation Regulation Guidelines on Tour Operators and Travel Agents Licence. However, the final Directive provides that:

This does not affect the possibility for Member States to require financial guarantees as such, nor does it affect requirements relating to the participation in a collective compensation fund, for

instance for members of professional bodies or organisations. (Services Directive, Article 14(7))

The following section looks at particular aspects of Irish law relevant to the tourism industry and evaluates some of the likely impact of the Services Directive.

(c) Hotels

The amended proposal for a Services Directive, which formed the basis for the final Directive, was accompanied by a statement of 'Practical Examples of the benefits of the Commission's amended proposal for Services Directive'. This statement provided, among other things, 'A business wishing to build and run a hotel ... in another Member State will no longer have to deal with several different authorities at national, regional and local levels.'

Irish law at present requires that a business located in another Member State that wants to build and run a hotel in Ireland must deal with several different authorities. This will have to be changed to comply with the Services Directive.

For example, the Registration and Renewal of Registration Regulations for Hotels 2003, enacted under the Tourist Traffic Acts 1939–2003, set forth requirements for registering in Ireland as a hotel. These Regulations provide for quite detailed specifications that must be met in order for a facility to be deemed a 'hotel.' Perhaps the most distinctive requirement is that, for rural areas, there must be a minimum of 10 bedrooms, each with private en suite bathroom facilities, while if in an urban area, there must be 15 bedrooms, each of which must have a private, en suite bathroom. (2003 Regulations, Section 10.1)

A business in another Member State might be interested in opening a small, boutique 'hotel' in an urban area such as Dublin, which might have

fewer than 15 bedrooms. However, at present, such a business would not be able to do so. This might impact on their ability to market a number of such 'hotels' across Europe in a single advertising campaign. Or they might be required to include an asterisk in their advertising, with a notice to consumers to the effect that, 'Our facility in Dublin is not an 'hotel' but is a guest house that has the same high quality as our other boutique hotels.'

Furthermore, to qualify as a hotel, the facility must offer at least breakfast and dinner, and dinner must consist of at least a hot meal and dessert. (2003 Regulations, Section 4.5) Furthermore, sandwiches, tea and coffee must be available from 7.30 am until 10 pm. (2003 Regulations, Section 4.5)

These requirements will have to meet the Services Directive's dictate that the requirements must be non-discriminatory, necessary to protect an important interest, and proportionate to the (legitimate) goal they seek to achieve. (Services Directive, Article 16) While there is no problem with the first condition, Ireland may have difficulty establishing that the second and third conditions are met. It might be argued that a notice requirement would be more suitable, that is, that Ireland could protect its reputation among prospective tourists by requiring that all advertising indicate, for example, the number of rooms in the facility and the availability of meal service.

One might argue that the requirements of the Irish law on registering hotels violates the Service Directive's ban on prohibiting infrastructure necessary to conduct a business, particularly if the business operates as an hotel in other member states without complying with the conditions set forth in the Irish regulations. (Services Directive, Article 16)

Perhaps a more significant difficulty will arise when Ireland seeks to satisfy the Service Directive's requirement that there be a single point of contact, at which the cross-border service provider can satisfy all of the requirements necessary to provide a service in another Member State.

The designation of a facility as a hotel is the last stop on a round of approvals necessary to do business as a 'hotel.' First, a prospective hotel operator must satisfy a number of conditions related to health and safety, fire safety and planning permission.

For example, under the Planning Development Act, 2000, as amended, it is necessary to apply to the planning authority for planning permission for a development, which is defined as the carrying out of any works on land. The construction of a hotel certainly qualifies as development.

At a minimum, the Irish Government will have to consider how to consolidate the various steps that must be followed in order to 'build and run a hotel' in Ireland. As noted above, the original Draft Services Directive might have severely constrained planning authorities from considering the economic impact of a proposed cross-border service activity such as a new hotel. However, the final Directive seems to allow this.

(d) Tour Operators and Travel Agents

Irish law, particularly the Transport (Tour Operator and Travel Agents) Act 1982, as amended, particularly by the Package Holidays and Travel Trade Act, 1995, imposes requirements on tour operators and travel agents. These requirements will have to be examined against the criteria set out in the Services Directive, as these could amount to requirements that must be satisfied by a business from another Member State planning to do business in Ireland.

The 1982 Act seeks to protect consumers by requiring a licensing system, a bonding scheme and by establishing a travellers protection fund. The Act distinguishes between a tour operator and a travel agent. Generally speaking, a tour operator acts as a principal and arranges travel originating in Ireland to a point outside the island of Ireland. A travel agent acts as an agent and books transport for individuals inside Ireland to points outside Ireland. It is possible for one to be both a tour operator and travel agent, in which case they may be subject to regulations applying to both.

The Commission for Aviation Regulation is responsible for overseeing implementation of the relevant legislation. A tour operator and a travel agent must obtain a licence from the Aviation Regulator. The Aviation Regulator must conduct an examination of the applicant to assure that the applicant can satisfy certain conditions, e.g. the ability to meet current and future financial obligations, before granting a licence. A licence typically is good for 12 months.

Before the Aviation Regulator will grant a licence to a tour operator or travel agent, the licence applicant must satisfy bonding requirements intended to protect consumers in the event the applicant goes out of business. While there used to be an obligation for tour operators to make a contribution to a travellers protection fund (in the event that the bond failed to provide adequate protection), this obligation was suspended in 1987. The Aviation Regulator typically requires that a tour operator have an establishment in Ireland. This requirement is particularly vulnerable to challenge.

All of the foregoing licensing requirements will have to be examined in light of the requirements of the Services Directive that conditions for providing a cross-border service must be non-discriminatory, necessary and proportionate.

4. Conclusion

The Services Directive is going to dramatically alter the way of doing business in Ireland. This will be true particularly in the tourism sector as well as other sectors of the service economy. Lawyers representing tourism businesses interested in doing cross-border business in Ireland would be wise to familiarise themselves with its provisions.

There is little or no awareness of the Services Directive among key informants in areas of

relevance to the tourism industry. The government will have to undertake an educational campaign to ensure compliance. Tourism and travel lawyers can stay ahead of the game by educating their clients about the provisions of the Service Directive.

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