

Irish Food Law

*European, Domestic
and International Frameworks*

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History and Development of Irish Food Law

1.1. Introduction

Food law first emerged as an identifiable strand of academic legal inquiry across the European Union (EU) in the late 1990s. Prior to this, there had been some literature in this part of the world related to aspects of the subject.¹ Most of it tended to be based on articles on EU law on the free movement of goods.² Some books had been published. They tended to be guides for practitioners on EU rules, with no significant contextual analysis of the application of these laws at national level, the political environment, social considerations or judicial decision making. ‘Mad cow disease’ changed all of this.

While food laws have existed since ancient times and were well developed by the nineteenth century it was really accession to the EU that most significantly affected Irish law in this area. When Ireland joined the European Economic Community (EEC), as it then was, in 1973, many of the EEC food laws that were transposed into domestic law as part of the *acquis communautaire* tended to be very general in nature and poorly implemented. They dealt with a range of disparate, unrelated and often relatively unimportant issues. It was difficult to identify a coherent body of rules regulating the production and marketing of food at this time. Food law was not really a subject yet in its own right.

A series of well-publicised issues on the relationship between food regulation and human health led to a vastly increased impetus for the creation of a new, more reasoned way of controlling how the food sector operates. The first of these was the crisis involving BSE (bovine spongiform encephalopathy, or ‘mad cow disease’) in the mid to late 1990s. There were two issues here. The first was that a possible link between beef consumption and the human form of BSE (variant Creutzfeldt-Jakob disease (vCJD)) was suggested by scientists. The claim was that people could

¹ It should be noted that food law had already emerged as a subject for examination in the United States of America, where the *Food and Drug Law Journal* (formerly the *Food, Drug and Cosmetic Law Journal*) was first published in 1946.

² See, eg, O Brouwer, ‘Free movement of foodstuffs and quality requirements: Has the Commission got it wrong?’ (1988) 25 *Common Market Law Review* 237; and H von Heydebrand, ‘Free movement of foodstuffs, consumer protection and food standards in the European Community: Has the Court of Justice got it wrong?’ (1991) 16 *European Law Review* 391.

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contract this deadly disease just by eating meat, or even beef products, such as gelatine. People now believed that the consumption of burgers, steaks, prepared puddings and children's sweets, such as jellies, could all kill them. The second issue was that existing laws were shown to be hopelessly inadequate in dealing with a crisis such as this. Because of EU membership, many of the decisions on how to control the spread of the disease were outside the control of Member States. It would be up to the EU institutions to reassure the public that all necessary steps were being taken to safeguard health. On this, they failed. While the disease was most prevalent in British herds, the legal and political response had a significant impact on the sector in Ireland as well. Most significantly, it completely changed the nature of EU and consequently Irish, food law.

The second 'headline-grabbing' issue that acted as a catalyst in the creation of increased interest in the study of food law was the initial regulation of genetically modified organisms (GMOs). Again, it was scientists who sparked public controversy here by making suggestions that the use of genetic modification techniques in food production could damage the intestines of rats and therefore presumably those of humans as well. Outrage ensued, fostered by the fact that the presence of a GMO in food did not have to be stated on the label. Consumer groups protested that the law was again failing to protect them from the potential, or unknown, harms of food consumption.

They were right. A series of loopholes in the legislation allowed genetically modified foods onto the market without adequate disclosure that the foods were in fact genetically modified. The resultant pressure on politicians led to a ban on the approval of new GMOs across the EU. This in turn created difficulties for the EU at the international level, when the World Trade Organization called into question the legality of this prohibition.

These two sagas and other incidents, really brought the way in which the law regulates the food sector into public and consequently increased academic, focus. A plethora of articles and a series of books were published, not just on general issues of food law, but also detailed works on more specific areas, such as genetic modification, food safety, labelling and the precautionary principle. Subject-specific journals such as the *European Food and Feed Law Review* have come into existence and are published several times per year. There have been special issues of the *European Law Journal* and the *European Journal of Consumer Law* dealing exclusively with food law. University students have organised successful postgraduate research conferences where all of the sessions over entire weekends had aspects of this newly discovered subject alone as their central focus. There are academies of food law run every summer across Europe, there are firms that specialise or deal exclusively with food law matters and there are now multiple annual food law conferences organised by a range of bodies across many EU Member States. Food law is taught at undergraduate and postgraduate levels in Ireland and across the EU. Food law has become an established, stand-alone subject, supported by a wealth of peer-reviewed articles, journals and books. Food laws have significant implications for human health, the environment, animal welfare, consumer

satisfaction, sectoral employment and the wider economy. While ‘mad cows’ and ‘Frankenstein foods’ may have been responsible for bringing increased attention to the study of food law, its growth and further establishment as a topic of student, academic and practitioner inquiry is perhaps sustained by the fact that many of the issues assessed are not just interesting to those professionally engaged in the food industry, but also concern matters of fundamental personal importance.

1.2. History of Food Laws

Laws controlling the production and marketing of food have existed since ancient times. The Code of Hammurabi makes several references to grain and cattle stocks, the former often being used as the currency of fines. Ancient Egypt carried laws on the labelling of wines, similar to those in existence today. Details would have to be provided of the name and the location of the producer and the estate, the type of wine, its vintage and an assessment of its quality. Consumer protection laws were introduced in Ancient Rome to minimise fraud and the sale of poor-quality food.³

The Bible makes many references to which foods should and should not be eaten. Leviticus 11:3 permits the eating of ‘clean’ animals: ‘Whatsoever parteth the hoof, and is clovenfooted, and cheweth the cud ... that shall ye eat.’ Pigs, hares and camels are specifically excluded from this category. They are all deemed ‘unclean.’ Fish that have fins and scales may be eaten. Others, such as shellfish, may not. There follows a long list of birds which may not be eaten, including storks, owls, eagles and vultures. Similar references are made in Deuteronomy 14.

Most ancient laws on food dealt with requirements for specific, rather than for all, foodstuffs – also known as ‘vertical’ legislation.⁴ They were general in nature and usually prescribed that a substance could, or could not, be eaten, or that it had to be labelled in a particular way. Another feature of early food law was that it sought to prevent the adulteration of products, which were often laced with cheap ingredients, many of which could be very harmful to human health.

1.2.1. Aspects of Early Irish Food Law

Ancient Irish laws did deal with some matters related to food. The *Bechbretha*, for example, stipulated how disputes over the ownership of fruit that fell onto a neighbour’s land could be resolved. Food grown on A’s land that falls onto B’s land

³FAO and WHO, ‘Origins of the codex alimentarius’ in *Understanding the Codex Alimentarius* (1999), ISBN 92-5-104248-9.

⁴As opposed to ‘horizontal’ legislation, which deals with one aspect, or aspects, of food law but across all foodstuffs. An example of a ‘horizontal’ provision might be food labelling requirements, applicable to all foods. A ‘vertical’ provision, however, might set labelling requirements, but just for one type of food, such as beef or chocolate.

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should be divided equally between A and B for three years. It should all belong to B in year four.⁵

The earliest English food laws to affect Ireland included the Assize of Bread and Ale, introduced during the reign of Henry III in 1266.⁶ It, too, was specific in its content, regulating the quality, weight and price of bread and beer. The price of beer, for example, was to be set according to the price of the raw materials used in its production. Harsh penalties were set to deter bakers from short-changing their customers – often resulting in the inclusion of an extra portion of bread in the customer's order to ensure compliance with minimum weight requirements, hence the expression 'a baker's dozen' referring to the number 13. Acts of Parliament were later introduced to set specific requirements designed to maintain the quality and safety of certain foods and drinks. These included the Adulteration of Tea and Coffee Act 1724 and later the Adulteration of Tea Acts of 1730 and 1776. The latter prohibited the inclusion of sloe, liquorice or previously used leaves in retailed tea. More of this vertical legislation was introduced through the Bread Acts of 1822 and 1836, which stipulated that bread now had to be sold by the pound or a multiple thereof and the Corn, Peas, Beans or Parsnips and Cocoa Act 1822, which established a licensing system for the sale of these foodstuffs. Much of this early legislation continued along these vertical lines. The first significant statutes to set legal requirements for the manufacture and/or sale of food more generally, or 'horizontal' legislation, were the Adulteration of Food or Drink Act 1860 and, perhaps more importantly, the Sale of Food and Drugs Act 1875.

The 1860 Act made it an offence to knowingly sell any foodstuff which endangered health, or which had been adulterated in any way.⁷ Adulteration, in this context, came to mean, quite simply, 'the mixing of other substances with food', but it was not defined in the 1860 Act – one of several reasons underlying its lack of effectiveness in achieving the stated aim. The term 'adulteration' was never specifically defined in any Irish Act of the Oireachtas or in any Statutory Instrument after 1922. However, the Sale of Food and Drugs Act 1875 did provide for the offence of rendering a product 'injurious to health', which could, upon conviction, lead to a sentence of up to six months' imprisonment with hard labour. Article 3 provided that:

[n]o person shall mix, colour, stain, or powder, or order or permit any other person 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 that the same may be sold in that state.

The 1875 Act did not define what was meant by 'injurious to health', despite making several references to it in relation to the sale of both food and drugs.⁸ The Act did

⁵ For more on this see F Kelly, *A guide to early Irish Law* (Dublin, Dublin Institute for Advanced Studies, 1988).

⁶ 51 Hen 3 Stat 1. This was later amended by the Bread Acts of 1822 and 1836, before being repealed by the Statute Law Revision Act 1863.

⁷ Statute Law Revision Act 1863, s 1.

⁸ The word 'injurious' obviously means 'to cause damage or harm'. However, in a legal context it can also be used to describe an act as being 'malicious', such as an 'injurious falsehood', which is also known

clear up some of the confusion that surrounded the application of the possible offence of causing ‘adulteration’ by merely mixing substances together. Article 6(1) provided that an offence was not committed:

[w]here any matter or ingredient not injurious to health has been added to the food ... because the same is required for the production or preparation thereof as an article of commerce, in a fit state for carriage or consumption, and not fraudulently to increase the bulk, weight, or measure of the food or drug, or conceal the inferior quality thereof.

More recently, the English Food Act 1984 had provided that jurisdiction with some guidance on what is meant by ‘injurious to health’ – guidance that did not exist in any equivalent Irish statute. Under this English Act it was made an offence to add any substance to food that would render it ‘injurious to health’,⁹ stating that:

[i]n determining for the purposes of this Act whether an article of food is injurious to health, regard shall be had not only to the probable effect of that article on the health of a person consuming it, but also to the probable cumulative effect of articles of substantially the same composition on the health of a person consuming such articles in ordinary quantities.¹⁰

In English law, therefore, the test of whether an offence has been committed has been based on both immediate and longer-term risks of consumption at ordinary levels. This has had the potential to include foods that are both ‘dangerous’ and ‘harmful’, if we define the former as being those foods which contain something that can make the person unwell in the short term, such as a non-fatal amount of contaminant or toxic substance and, if we define the latter as including those foods which are more likely to have an effect on health over the long term, such as foods of poor nutritional quality. It is not usual to query whether the lawfulness of manufacturing and/or selling the latter is contrary to the test of being ‘injurious to health’. We will return to this important, yet insufficiently considered, distinction between ‘dangerous’ and ‘harmful’ foods later in this book. This distinction highlights how food law has developed in a way that deals with ‘dangerous’ foods, but which, it will be argued, has been negligent in its treatment of ‘harmful’ foods.

Although the term ‘injurious to health’ had not been properly codified in Irish law, there have been indications from the case law as to how it should be defined. A series of cases on immigration, deportation and use of the European Arrest Warrant have identified that consequences can be ‘profoundly injurious’ in

as a ‘malicious falsehood’. There are several references to substances, acts or omissions being ‘injurious to health’ in Irish law, such as that contained in s 20 of the Local Government Act 1925, in relation to structures used for human habitation. Section 92(1) of the Factories Act 1955 refers to places of work being deemed ‘injurious or dangerous to the health of the persons employed therein’. The term ‘injurious to health’ is also referred to in several pieces of Irish food legislation, such as the Health (Official Control of Food) Regulations 1991 (SI No 332/1991) and the European Communities (Hygiene of Foodstuffs) Regulations 1998 (SI No 86/1998) and usually in the context of being ‘unfit for human consumption’. It is relatively clear as to what it is meant to mean, but it remains undefined in any of the relevant legislation.

⁹ Food Act 1984, s 1(1).

¹⁰ *Ibid*, s 1(4).

some circumstances. For example, in *Minister for Justice v Rostas* it was stated by the High Court that the respondent had not shown how surrendering her to the Romanian authorities would ‘have profoundly injurious or extraordinary consequences for her, or her family’.¹¹ Similarly, in *Attorney General v NSS* it was found that there was no reason to believe that the extradition of the respondent would ‘have profoundly injurious or extraordinary consequences for him, or his family [although it] would certainly be distressing and upsetting for them’.¹² This implies that for something to be ‘injurious’ in law it need not necessarily be ‘profound’. The consequences of consuming a foodstuff may therefore be ‘injurious’ if doing so causes damage – either ‘dangerous’ or ‘harmful’. This is further supported by case law taken from elsewhere. In *R v Bristol City Council, ex parte Everett*, the term ‘injurious to health’ was equated with being ‘prejudicial to health’.¹³ It was further stated that ‘the object of concern was plainly the direct effect on people’s health’, in this case of habitation in filthy or unwholesome premises and that the outcome of this would be ‘the risk of illness or disease’. It was also stated here that this did not include protection against accidental physical injury. In *Crowley v Cork Corporation* it was held in the Supreme Court that the conditions causing housing to be dangerous or injurious to health could only be remedied by the demolition of the offending buildings.¹⁴ In *Ryan v Attorney General* it was found that the levels of fluoridation added to public drinking water were not at ‘a concentration [that was] injurious to health’.¹⁵ It is here suggested that the term ‘injurious to health’ had come to refer to anything that could make the recipient unwell. Properly defining this term and identifying the circumstances to which it should be applied, is crucial to determining liability for breaches of Irish food law. This has now happened by the direct application of the General Food Law Regulation in Irish law.¹⁶ This is discussed in much more detail in Chapter 5.

The 1860 Act also contained provisions on the analysis of food for indications of adulteration,¹⁷ as well as setting a legal definition for ‘food and drink’ for the first time. Section 14 provided that this included:

not only all alimentary substances, whether solids or liquids, but also all eatables or drinkables whatsoever not being medical drugs or articles usually taken or sold as medicines.

¹¹ *Minister for Justice and Equality v Magdalena Rostas* [2015] 1 ILRM 1.

¹² *Attorney General v NSS* [2015] IEHC 349.

¹³ *R v Bristol City Council, ex parte Everett* [1999] 2 All ER 193.

¹⁴ *Crowley v Cork Corporation* [1941] 1 IR 92.

¹⁵ *Ryan v Attorney General* [1965] 1 IR 294.

¹⁶ Article 14(4) of Regulation 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety; [2002] OJ L 31/1, states that: ‘[i]n determining whether any food is injurious to health, regard shall be had: not only to the probable immediate and/or short-term and/or long-term effects of that food on the health of a person consuming it, but also on subsequent generations; to the probable cumulative toxic effects; to the particular health sensitivities of a specific category of consumers where the food is intended for that category of consumers’.

¹⁷ Adulteration of Food or Drink Act 1860, ss 3–5.

As stated, the 1860 Act was largely ineffective and was supplemented by two further adulteration acts, in 1862 and 1872. These facilitated the appointment of inspectors who could take food samples for analysis. They also provided a more developed definition of ‘adulteration’, making it illegal to ‘admix, with any article of food or drink any injurious or poisonous ingredient or material to adulterate the same for sale’. Problems persisted. In particular, some producers were prosecuted under the 1872 Act for merely changing foods from their original form by adding non-injurious ingredients. A government select committee, charged with reviewing the Adulteration Acts, heard that there had been cases of prosecution for selling mustard which contained not only mustard seed, but also turmeric and chillies. Over-zealous and often erroneous interpretations of the new legislation led to accusations that the mere addition of other ingredients to food was ‘adulteration’. Difficulties were also reported with the sale of cocoa, when it was mixed with sugar and starches. The select committee reported that consumers were being ‘cheated rather than poisoned’ by adulteration and that most food manufacturing was perfectly safe. The focus of regulation should, therefore, it was stated, be on retailers who tampered with goods in an active attempt to mislead or deceive consumers.¹⁸ The Licensing Act 1872, for example, prohibited the addition of salt to beer, which had been used to induce additional thirst in consumers.¹⁹

Since the eighteenth century, it has also been an indictable offence at common law to provide someone with food that is not fit for human consumption, regardless of whether this was done out of malice or profit-seeking.²⁰ Selling, or being in possession with intent to sell, diseased or unwholesome food is a common law nuisance.²¹ A supplier can be indicted for manslaughter if someone dies from eating diseased meat or contaminated food that he has provided. There can be a conviction on these charges if the evidence shows that it was provided in the knowledge that it was unfit for consumption or if the supplier was guilty of gross negligence in this regard.²²

The recognised need for a change in the Adulteration of Food Acts later materialised through the introduction of the Sale of Food and Drugs Act 1875, which consolidated the more progressive provisions introduced since 1860, along with clearer legal definitions and enforcement mechanisms for those given responsibility for ensuring compliance with the law.

¹⁸ For further discussion on the proceedings before the select committee see J Phillips and M French, ‘Adulteration and food law, 1899–1939’ (1998) 9 *Twentieth Century British History* 350, esp pp 354–356.

¹⁹ Schedule 1 to the Licensing Act 1872. Other substances which could no longer be added to beer under the Act included opium, hemp and tobacco.

²⁰ *R v Treeve* (1796) 2 East PC 821.

²¹ *Shillito v Thompson* (1875) 1 QBD 12. Selling unwholesome food for human consumption was also an offence under Public Health (Ireland) Act 1878, ss 132–133. See also *Dunne v Uden* [1923] ILTR 25.

²² *R v Kempson* (1893) 28 L Jo 477.

1.2.2. Sale of Food and Drugs Act 1875

The Sale of Food and Drugs Act 1875 repealed the Act of 1860,²³ simplifying many of the provisions that had been introduced in this area in the earlier Victorian period. 'Food' was defined simply as including 'every article used for food and drink by man, other than drugs or water'.²⁴ The Act also separated the provisions on adulteration, categorising them according to whether the addition of other substances to food was of a nature that was either (i) injurious to health or (ii) affected the quality of the food concerned. Section 3 provided that:

[no] person shall mix, colour, stain, or powder, or order or permit any other person 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 that the same may be sold in that state, and no person shall sell any such article so mixed [etc.] under a penalty in each case.

Conviction under this provision of the Act was punishable by a fine or up to six months' imprisonment, with hard labour. Section 6 further provided that:

[no] person shall sell to the prejudice of the purchaser any article of food ... which is not of the nature, substance, and quality of the article demanded by such purchaser.

This was qualified by the fact that ingredients that were not harmful to health and the inclusion of which was necessary to make the product, could be added. This would not now be considered 'adulteration' – provided that this was not done 'fraudulently to increase the bulk, weight, or measure of the food ... or conceal the inferior quality thereof'.²⁵ The inclusion of ingredients would now, under the 1875 Act, have to be stated on a label. This would have to be 'distinctly and legibly written or printed on [the packaging of the food]'.²⁶ Despite this, studies undertaken at the time indicated that there was plenty of evidence to show that these adulteration laws were not properly applied in Ireland. Milk was found

²³ Sale of Food and Drugs Act 1875, s 1.

²⁴ *Ibid*, s 2.

²⁵ In *Hotchin v Hindmarsh* [1891] 2 KB 181, the appellant, a foreman of a dairy company, was prosecuted and convicted under the Sale of Food and Drugs Act 1875, s 6 for supplying milk to which water had been added. It was a clear dilution of the 'quality of the article demanded by [the] purchaser'. The seemingly widespread adulteration of milk in Ireland at the turn of the twentieth century also led to the matter being discussed in Parliament, where the level of fines imposed at a petty sessions in County Cork, which were deemed to be merely 'nominal', was discussed. It was also deemed to be an offence under s 6 of the 1875 Act to sell '[...] a pure food and favourably comparable in nutritive value with genuine [in this case cornflour, where this] was not of the same nature, substance and quality as that for which the purchaser had asked'. See *Wicklow County Council and O'Dwyer v Clarke* [1946] 1 Ir Jur Rep 1. It was not, however, an offence to sell oatmeal which contained a number of husks and splinters as the product sold was deemed to be '[...] of the nature, substance and quality demanded'. See *O'Neill v Egan* [1942] 76 ILTR 26. Under s 6 it would have to be shown that the sale was 'to the prejudice of the purchaser', *Cavan County Council v Byrne* [1938] 72 ILTR 114.

²⁶ Sale of Food and Drugs Act 1875, s 8.

to have had fat removed and significant amounts of water added.²⁷ Butter and whiskey were also found to have been fraudulently diluted.

The Sale of Food and Drugs Act 1875 also set out a range of provisions on the role of analysts in certifying the safety and quality of food. These analysts, who were appointed at local authority level,²⁸ could, for a fee, be called upon by any purchaser of food to analyse and certify the safety or otherwise of a product.²⁹ Analysts were also obliged to report quarterly to their appointing authority on the number and outcome of their investigations.³⁰ The analyst's report was also deemed to be the most significant piece of evidence in any resulting prosecution under the Act, although the analyst himself could be cross-examined in court on this.³¹ Those convicted of an offence under the Act could appeal, subject to the satisfaction of certain conditions.³² The main defence available to those charged under the Act was a satisfactory demonstration that they could not have been aware that what they were selling was adulterated, in particular where it could be shown that the offending article had been purchased by them in the same condition as that in which it was subsequently sold.³³ Figures published in the Annual Reports of the Local Government Boards in England and Wales show that between 5 and 10 per cent of purchased food samples were usually found to have been adulterated. In 1899 the figure stood at around 9.4 per cent. The figures for adulteration levels tended to be higher in Scotland, reaching 14.4 per cent in 1899. Evidence from the *Lancet* report of 1903 and from the Annual Reports of the Local Government Board suggests that food adulteration, in particular that of dairy products, remained a significant problem in Ireland in the early part of the twentieth century.

Finally, the 1875 Act also included special provisions on tea. All imported tea was to be subjected to an examination by the customs authorities. This was to be done to ensure that the tea had not been mixed with other, usually cheaper, substances, or that the leaves had not already been used to make tea.³⁴ All products that were deemed after analysis to be unfit for sale as tea were to be forfeited and destroyed.

²⁷ Anon. 'Food adulteration in Ireland' (1903) 162 *Lancet* 1519. This article suggested that milk sold to consumers was '[...] deprived of one-half its fat and with 20 per cent. added water'.

²⁸ Sale of Food and Drugs Act 1875, s 10.

²⁹ *Ibid*, s 12. The *Lancet* article referred to in n 27 above also pointed out that the best way of remedying these widespread cases of adulteration would be to appoint properly qualified analysts and support for them in each county council district.

³⁰ Sale of Food and Drugs Act 1875, s 19.

³¹ *Ibid*, s 21.

³² *Ibid*, s 23.

³³ *Ibid*, s 25. A person who innocently sold food in the same condition as that in which he had bought it from another, not knowing it to be defective and who was subsequently prosecuted under the 1875 Act could recover, from the person from whom he had innocently made the purchase, both damages and costs incurred by him in defending the said prosecution. See *Duffy v Sutton* [1955] 1 IR 248.

³⁴ *Ibid*, s 30.

1.2.3. Acts of the Irish Free State 1922–1937

In the first half of the twentieth century it was widely believed, amongst those charged with regulating the food sector, that the law was not in need of further reform. It was felt that ‘the processes and ingredients of production were essentially sound and in little need of regulation.’³⁵ There was little consideration for consumers’ concerns. The use of chemicals and pesticides was becoming more common in food production, but these were mostly unregulated until the 1920s. Deliberate adulteration still occurred. It may have been more likely to be in a form that posed less of an immediate danger to human health, but, as the discussion above points out, there was clearly still deliberate deception of the purchasing public going on.

The first food act to be introduced after the establishment of the Irish Free State was a piece of vertical legislation, primarily designed to amend aspects of the Sale of Food and Drugs Act related to that most adulterated of foodstuffs – milk.³⁶ The Sale of Food and Drugs (Milk) Act 1935 set out a range of provisions aimed at eliminating instances of fraudulent milk and dairy product adulteration. Section 2 of the Act stated that it was an offence to sell whole milk or low-fat milk that had a lower fat content than that suggested. Cream would also have to have a fat content that was equal to or more than that set out. Similar requirements were set for buttermilk. Selling a product that did not meet these content requirements was contrary to Section 6 of the Sale of Food and Drugs Act 1875. As noted above, this provision of the 1875 Act stipulated that products must be ‘of the nature, substance, and quality of the article demanded.’ Further amendments were also made to procedures for sampling and analysis.³⁷

Several statutory instruments related to the production and marketing of food were also introduced during this period. These included the Public Health (Saorstát Eireann)(Preservatives, Etc, in Food) Regulations 1928,³⁸ the First Schedule to which set out the limitations on and labelling requirements for, preservative use in foods for sale in Ireland. Sausages could contain sulphur dioxide up to a maximum level of 450 parts per million. This could rise to 600 parts per million for non-alcoholic drinks such as cordials and fruit juices. Part II of the First Schedule to the 1928 Regulations prohibited the use of arsenic, cadmium, copper, mercury and lead as food colouring. The Second Schedule set out the labelling requirements for certain foods containing preservatives, including sausages, coffee, pickles, sauces and, where preservative use was at a particularly high level, grape juice and wine. These products would have to include a clear indication on the labelling where they contained preservatives.

³⁵ J Phillips and M French, ‘Adulteration and Food Law, 1899–1939’ (1998) 9 *Twentieth Century British History* 350, which provides a comprehensive account of the history of food law during this period.

³⁶ See n 27 above.

³⁷ Sections 7–9 of the Sale of Food and Drugs (Milk) Act 1935. Further amendments on this were made by the Sale of Food and Drugs (Milk) Act 1936.

³⁸ SI No 54/1928.

Other food legislation introduced during this period included that which established the Sugar Confectionery and Food Preserving Trade Board,³⁹ and the Foot and Mouth Disease Order 1927,⁴⁰ which introduced a number of precautionary measures to be taken before imported meat, or any waste food which had been in contact with imported meat, could be fed to cattle, pigs, sheep or goats. Feeding these substances to animals where they had not been boiled for at least one hour was made an offence, contrary to the Diseases of Animals Act 1894. Finally, there were also efforts made at addressing the ongoing problem with the adulteration of some dairy products through the introduction of the Sale of Food and Drugs (Milk Sampling) Regulations 1936.⁴¹

1.2.4. Food Standards Act 1974

No significant Acts of the Oireachtas on food were introduced between 1937 and Ireland becoming a Member State of the European Economic Community in 1973. Some important secondary legislation was, however, introduced. This included new regulations on the use of colourings,⁴² antioxidants⁴³ and preservatives in the production of food,⁴⁴ as well as those setting out more detail on tolerable levels of arsenic and lead in some food products, such as fish, edible seaweed and hops.⁴⁵

There were signs in the type of legislation that was being introduced during this period that public health matters related to the consumption of food were being taken far more seriously. The Health (Sampling of Food) Regulations 1970 offer a good example of this.⁴⁶ These set out a range of powers for 'authorised officers' to take samples of foods that were suspected to be 'diseased, contaminated or otherwise unfit for human consumption.'⁴⁷ Regulation 6, in particular, provided that authorised officers could take a sample of any food, with or without payment, for analysis by an approved examiner. He could also prohibit the removal of all the suspected food for a period of up to two weeks, until the sample was properly analysed. Any food found to be unfit for consumption, for whatever reason, could then, of course, be dealt with. These Regulations built upon existing safety provisions, such as those that had been introduced by the Food Hygiene Regulations 1950.⁴⁸ Food labelling requirements were initially covered in Ireland by the Sale of

³⁹ SI No 50/1933.

⁴⁰ Foot and Mouth Disease (Boiling of Animal Food) Order 1927. SI No 50/1927.

⁴¹ SI No 312/1936.

⁴² Health (Colouring Mater in Food) Regulations 1972. SI No 41/1972.

⁴³ Health (Antioxidant in Food) Regulations 1972. SI No 42/1972.

⁴⁴ Health (Preservatives in Food) Regulations 1972. SI No 43/1972.

⁴⁵ Health (Arsenic and Lead in Food) Regulations 1972. SI No 44/1972.

⁴⁶ Health (Sampling of Food) Regulations 1970. SI No 50/1970.

⁴⁷ 'Authorised officers', for the purposes of the Regulations, were appointed by the Minister for Agriculture or, more commonly, officers of local health authorities – as set out in the Health Act 1947, s 91.

⁴⁸ SI No 205/1950.

Food and Drugs Acts of 1875 and 1899, although the Sale of Food and Drugs Acts Adaptation Order 1928 (introduced under the terms of the Adaptation of Enactments Act 1922) did enable the making of modifications to these British food law statutes by the Executive Council of Saorstát Éireann.⁴⁹ Food labelling requirements remained relatively unchanged until the introduction of the Food Standards Act 1974 – the first significant piece of food law legislation to be introduced in Ireland after taking up membership of the EEC the previous year – and, more specifically, the introduction of the European Communities (Labelling, Presentation and Advertising of Foodstuffs) Regulations 1982.⁵⁰

1.3. European Integration

As has already been stated, it is membership of the EU which has led to the vast majority of food laws as they stand in Ireland to take their current format and content. This, of course, presupposes a complex relationship between the two systems. Some EU rules have direct applicability. Regulations automatically become part of Irish law on the date stated in the legislation. Significantly, the use of this format for introducing new EU food law has become more commonplace since the turn of the millennium, meaning there is little room for derogation at national level from the rules set out in the regulations – the revised labelling requirements which, for the most part, have been directly applicable in Ireland since December 2014, offers a good example of this.⁵¹ Directives, which had previously been the traditional format for many of the EU rules on food, do require some further implementation by the Member States and will not always, therefore, have ‘direct effect’ – meaning that individuals may not always be able to rely on their provisions until after they have been formally and effectively transposed into Irish law. This is discussed in more detail below. Despite this, it can usually be accepted that secondary legislation adopted by the EU legislative institutions must also be adopted and applied in Ireland. As a result, it is European obligations and some international requirements arising out of this, which now account for the introduction of almost all the laws in Ireland which apply specifically to food. It could be stated, therefore, that the two biggest influences now on Irish food law are

⁴⁹ In this instance, in relation to provisions on margarine. SI No 16/1928.

⁵⁰ SI No 205/1982. These are discussed in more detail in Ch 7, below.

⁵¹ As introduced by Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council and repealing Commission Directive 1987/250/EEC, Council Directive 1990/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004, [2011] OJ L 304/18. Regulation 1169/2011 is incorporated into domestic Irish law by the European Union (Provision of Food Information to Consumers) Regulations 2014, SI No 556/2014. This is discussed in much more detail in Ch 7 below.

(i) the supremacy of European Union law in Ireland and (ii) EU rules on the free movement of food. Both are introduced below.

1.3.1. Supremacy of European Union Food Law

The European Communities Act 1972, which gives internal legal effect to EU law in Ireland, provides that:

the treaties governing the European [Union] and the existing and future acts adopted by the institutions of [the Union] shall be binding on the State and shall be part of the domestic law thereof under the conditions laid down in those treaties.⁵²

This effectively means that any EU legislation which is designed to become part of the domestic law of the Member States must be applied at national level. Directly effective provisions of EU law are thus, under the terms of the European Communities Act 1972, incorporated into Irish law. This includes all Treaty on the Functioning of the European Union (TFEU) provisions, regulations and directives that together form the body of EU food law. The Act further states that:

[a] Minister of State may make regulations for enabling [EU law] to have full effect, regulations under this section may contain such incidental, supplementary and consequential provisions as appear to the Minister making the regulations to be necessary for the purposes of the regulations (including provisions repealing, amending or applying, with or without modification, other law, exclusive of the Act).⁵³

Secondary legislation, such as statutory instruments, can thus be used to give effect to the many EU food directives and to provide the necessary detail and administrative requirements for the practical application of EU regulations.⁵⁴

Although having no formal basis in the original Treaty of Rome, it has long been established that EU law takes precedence over the national laws and national constitutions of EU Member States. This issue is, of course, discussed in much more detail in other books dealing with European Union law and Irish Constitutional law.⁵⁵ However, it is important to make a few brief points about this here.

⁵² European Communities Act 1972, s 2.

⁵³ *Ibid*, s 3.

⁵⁴ Although EU Regulations have direct applicability in Ireland, some domestic provision is often required to ensure the proper incorporation and functioning of the Regulation in the domestic legal system. A good example of this is the need to adopt the European Union (Provision of Food Information to Consumers) Regulations 2014, n 51 above, to tailor the application of the EU Food Information Regulation, also n 51 above, to Ireland. The Irish Regulations 2014 therefore set out, amongst other things, who has responsibility for the enforcement and application of the provisions of the EU Regulation in Ireland, how sampling takes place and how prosecutions are brought against offenders before the domestic courts.

⁵⁵ See, eg, the forthcoming text by O Doyle, *The constitution of Ireland: A contextual analysis*, (Hart, Bloomsbury, 2018) on the Irish Constitutional law issues. For an EU law perspective see, ch 9 of P Craig and G de Búrca, *EU law: Text, cases and materials*, 6th edn (OUP, Oxford, 2015).

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In addition to the European Communities Act 1972, outlined above, Article 29.4.6 of the Constitution of Ireland, *Bunreacht na hÉireann*, provides that:

[n]o provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State, before, on or after the entry into force of the Treaty of Lisbon, that are necessitated by the obligations of membership of the European Union.

It is clear from both the European Communities Act 1972, Article 29 of the Constitution, as well as related case law, that that supremacy of European Union law has been accepted in Ireland.⁵⁶ The vast majority of Irish food laws come directly from the European Union and those which do not are subject to interpretation in a manner that is in harmony with the requirements of EU law. Making it very clear, it has been stated that:

[t]he wording [of Article 29 of the Constitution] is overarching and conclusive, establishing constitutional immunity to European Union laws, measures and acts. Lawmaking powers which had previously vested in the Irish Parliament were now transferred to the Community. The judicial power of the State, which had been sovereign and subject to no appeal, was now, in terms of the interpretation of European instruments, subject to the ultimate ruling in legal disputes before the Court of Justice. Thus, *Costa v ENEL* was given written recognition in the Irish Constitution.⁵⁷

In *Costa v ENEL*,⁵⁸ the Court of Justice had made it clear that EU law should have supremacy over national law. According to the Court, in its deliberations in *Costa*, Member States had, by signing up to the then-named EEC, ‘limited their sovereign rights’ and had ‘thus created a body of law which binds both their nationals and themselves.’ This was followed-up by decisions such as that in *Simmenthal*,⁵⁹ where the Court pointed out that this doctrine of the supremacy of EU law would apply to all national laws – regardless of whether they had been in existence prior to the introduction of the relevant European Union measure. The Irish Supreme Court further clarified the position (that is insofar as it was still necessary to do so) in *Pringle*,⁶⁰ where it was found that the domestic courts could not interfere with foreign policy decisions taken by the Government, including entering into binding international legal obligations such as the Treaty on the Functioning of the European Union or, as in this particular case, the European Stability Mechanism.

All of this makes decisions of the Court of Justice on matters related to food law applicable in Irish law and binding on the Irish courts. We can also normally presume that EU directives and regulations addressed to the food sector will also

⁵⁶ See, eg, *Pigs and Bacon Commission v McCarran* [1978] JISEL 87; *Minister for Fisheries v Schonenberg* [1979] JISEL 35; *Campus Oil Ltd v Minister for Industry and Energy* [1983] IR 82; and *Crotty v An Taoiseach* [1987] IR 713.

⁵⁷ P Charleton and A Cox, ‘Accepting the judgments of the Court of Justice of the EU as authoritative’ (2016) 23 *Maastricht Journal of European and Comparative Law* 204 at 206.

⁵⁸ Case 6/1964, *Flaminio Costa v ENEL* [1964] ECR 585.

⁵⁹ Case 106/1977, *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629.

⁶⁰ *Pringle v Ireland* [2013] 3 IR 1.

be applied, in one way or another, at national level. Sometimes, however, it can be more complicated than this.⁶¹ Where such complications arise, they will be addressed throughout this book.

1.3.2. Free Movement and Food Law

It is difficult to understate the impact that EU rules on the free movement of goods have on Irish food law. They are significant in three main ways. First, the creation of an internal market in goods means that almost all standards related to the production and marketing of food are set at EU level, through the adoption of harmonised rules that are then applied in the Member States, including Ireland. Free movement is facilitated by the application of the same or similar rules in all EU Member States. This is usually done by the introduction of regulations and directives. Second, Treaty provisions prohibiting the application of charges equivalent to customs duties on imported food, as well as those on ensuring that domestic systems of taxation do not directly or indirectly discriminate against non-national food producers, ensure that imported products from other EU Member States can compete more fairly with domestic produce. This is discussed in much more detail in Chapter 4. Finally and perhaps most significantly, the Treaty prohibition on the application of measures equivalent to quantitative restrictions on traded goods ensures that no Member State can maintain any national law which has the effect, whether direct or indirect, of inhibiting to any degree the importation of food from elsewhere in the EU. This has hugely significant consequences for Irish law. It has dictated that certain laws, such as those on the composition of foodstuffs, will not be introduced and that others cannot be introduced, such as those designed to deal with rising rates of obesity or alcohol abuse.

1.4. Conclusion

The food sector is vital to the Irish economy and people. The agriculture and food sectors in Ireland account for almost one-eighth of all exports, while also providing around one in every 11 jobs.⁶² The way in which this sector is managed and regulated is crucial to the maintenance, or possible improvement, of the important position that food and agriculture have in Irish life. This book is designed to provide a broad conspectus of Irish food law. This involves a lot of references to EU law because, as has been made clear already, it is from this source that almost

⁶¹ For discussion on the difficulties that EU supremacy can create for the preservation of food culture and tradition more generally see D Chalmers, 'Food for thought: Reconciling European risks and traditional ways of life' (2003) 66 *Modern Law Review* 532.

⁶² According to the Department of Agriculture, Food and the Marine. Details available at: agriculture.gov.ie.

all domestic legal requirements are now created. As this chapter has identified, this relatively new influence has created a whole series of requirements for the State, for producers and for retailers, as well as introducing additional ways of protecting consumers. However, it should be stressed that in some areas the EU's laws provide insufficient protection, yet the system prevents Member States from initiating local laws to protect their population – most notably in the areas of food standards, obesity and the misuse of alcohol, or as was most evident in the way in which the BSE crisis was mishandled – a mishandling that is discussed in some detail in Chapter 5. EU law prescribes that free movement requirements usually take precedence over domestic initiatives designed to improve or maintain the value, integrity or quality of food.

In its assessment of food law, this book deals with the relevant legislation in a variety of ways. Where EU regulations or directives have been introduced, their key provisions are identified and analysed. In addition to this, the book also indicates the national implementation of these EU legislative requirements, identifying any shortcomings in the domestic transposition. This usually takes place by using statutory instruments. Directives will always require national application through the introduction of a national legislative measure such as this. Regulations, which are directly applicable in Irish law, do not require any implementing measures but usually carry some corresponding national legislation to give full and proper meaning to these, identifying national competent authorities or domestic remedies for example, as they are required to do by the terms of the EU legislation. Interpretation of these measures, both the original EU versions and the domestic implementations, is usually done by the Court of Justice. Relevant domestic cases are also identified where they show some additional point of interpretation on the provisions under review. To summarise, the book identifies the relevant EU legislation, Court of Justice case law on this, national implementing measures and domestic case law where appropriate. It also discusses related policy documents, legislative proposals, codes of conduct, national standards and international conventions where these identify a policy direction or a method of interpretation for existing measures.

The book chapters deal with four key aspects of, or influences on, Irish food law. The first of these, including Chapters 2, 3 and 4, outline and discuss the main sources of food law and the role of those charged with developing and applying legal requirements in this area. This involves an examination of the relationship between national, EU and international law, with specific focus on how this relates to regulation of the food sector. It includes an assessment of the roles of the institutions of the EU in this regard, as well as that of international organisations such as the World Trade Organization, the Codex Alimentarius Commission and the United Nations. At national level, the roles of the main actors in the devising and implementation of food law and policy are all addressed, including the relevant government departments, national competent authorities and local authorities and important statutory bodies, such as the Food Safety Authority of Ireland and the Health Service Executive, as well as others. This first part of the book concludes

with a discussion on the significant influence that EU rules on the free movement of goods exercise on the content and application of both national and EU legal requirements and responsibilities and the restrictions that this can then place on national policy. This is the single biggest influence on national food law.

The next part of the book looks at the important issue of food safety. It was concerns over the spread of disease through the consumption of contaminated beef that really set much of the agenda for EU food law makers over the past couple of decades. It is contended in this book that there has been an overemphasis on safety since the BSE crisis, possibly at the expense of other, often more problematic considerations, such as nutrition and quality. Chapter 5 includes a comprehensive assessment of the key provisions of the Food Standards Act 1974, the Food Safety Authority of Ireland Act 1998 and the directly applicable EU General Food Law Regulation, which together provide the template for all national controls in this area. It also includes an examination of the role of the European Food Safety Authority in preventing the spread of contamination and disease through the production and consumption of food, as well as looking at its other functions and responsibilities. This part concludes with a chapter on the chemical and biological safety of food, which mostly involves an identification of the main provisions related to hygienic production, as well as the controls which have been placed over the use of hormones, pesticides and radiation in the preparation of food.

Food labelling is the main line of communication between producer and consumer. It can be used to clarify details about the content, quality, value and origin of food. It is a key marketing tool, enabling differentiation between products and the palatability, or otherwise, of their characteristics or quality. It can also be manipulated to deceive consumers into believing that a product is better, more wholesome, more local, more environmentally-friendly or more welfare-friendly than is really the case. Chapter 7 identifies existing laws in this area, with a strong emphasis on the changes that have been made by EU regulation from 2014 onwards. It addresses the increasingly important and somewhat controversial issues surrounding the use of nutrition labelling and the making of nutrition and health claims. It assesses the quality requirements that have been introduced for specific foodstuffs. The next chapter focuses on the protection of food names for quality products or for those possessing identifiable characteristics and the extent to which Irish producers are using the newest versions of the geographical indications scheme.

The book concludes with two chapters on the most pressing concerns for many food lawyers. The first of these provides an examination of how the legal regulation of food affects the health and well-being of those that consume it. This involves an assessment of the interplay between national policy on obesity prevention and health protection on the one hand and the requirements of harmonising with EU legislation and free movement of food obligations on the other. It shows how efforts made at national level to deal with a national health crisis are mostly in vain due to the application of the TFEU – including ongoing efforts being made by the Department of Health to minimise the over-consumption of alcohol. It argues

that this will continue to be the case until there is a reassessment of some of the most established rules in this area. Some of the ethical and environmental aspects of food production and marketing are considered, including an assessment of existing rules on organic production, genetic modification and animal welfare, as well as a discussion on the relationship, both existing and potential, between food law and climate change.