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ARCHITECTS' COUNCIL OF EUROPE
CONSEIL DES ARCHITECTES D'EUROPE

Practice of the Profession

Green Paper on the modernisation of EU Public Procurement Policy

ACE Position

Final

ACE Position on the Green Paper on the modernisation of EU public procurement policy - Towards a more effective European Procurement Market (COM (2011) 15 final)

Introduction
The Architects' Council of Europe (ACE) welcomes the initiative to revise the Public Procurement Directives. ACE fully supports the Europe 2020 strategy for smart, sustainable and inclusive growth and shares the view that Public procurement plays a key role to achieve these objectives.

ACE especially agrees that public procurement regulations have to be amended in a way that framework conditions for business to innovate are improved, that the shift towards a resource efficient and low-carbon economy is supported, e.g. by encouraging wider use of green public procurement, and the business environment is improved, especially for innovative SMEs.

A consequent persecution of these goals will, besides, ensure the most efficient use of public funds and thus consider sufficiently the budgetary constraints and the difficult economic situation in many EU Member States.

From the point of view of ACE there is a strong correlation between the aims clearly pointed out in the Introduction to the Green Book and the general policy of the profession of architects, who have continuously been promoting competition, best value for money and sustainability in public procurement. The postulation to consider life cycle costs and environmental aspects in awarding decisions dates back to the time of the first public initiatives of ACE on the occasion of the discussion of public procurement issues in Europe in the nineties of last century.

As concerns architectural services, the current obstacles in the public procurement directives to achieve the above mentioned aims can be summarized as follows:

1. Access to public contracts in the scope of the directives is for most of the architects in Europe *de facto* not existent. This is not because of a lack of qualification of the majority of service providers to offer appropriate solutions, but of an inadequate use of selection criteria by public authorities. More than 90% of the service providers are organized in structures which are by definition micro-enterprises with less than 5 employees (see annexed statistical data). Comparing this with frequently used *quantitative* selection criteria like minimum numbers of employees within fixed periods and/or minimum turnover requirements the result is an exclusion of most, if not nearly all, of the architects practising their profession in the EU. Start-ups are the first to suffer of this situation.

The consequence is an almost total loss of the benefits, which the enormous innovation capital existing in the planning services sector could bring in the EU. This is not only an economic and cultural wastage, but a serious menace to the competitiveness of the EU.
Planning services are intellectual services which *per definitionem* can not be measured or estimated by quantitative economic criteria. Young professionals and micro-enterprises are not less qualified than any other economic operator in the sector. Innovative solutions can be provided by these services providers unreservedly, as famous buildings like for example the *Berlin Tegel Airport* prove, which was planned by two extremely young architects. We will come back later to the fact that most of these convincing examples are fruits of open design contests.

2. Among the awarding criteria the lowest price still plays a detrimental role. Even if in the awarding of architectural services it is not common to restrict awarding criteria to the price, still life-cycle costs and sustainability and environmental issues do not play a dominant role. This conflicts fundamentally with the respective EU policies.
3. The directives offer a tailored procedure for the awarding of architectural services – the design contest. The enormous advantage of this procedure is that nor quantitative criteria nor reputation influence the awarding decision but only the best solutions have a chance. This is, from our point of view, a precondition to achieve the ambitious goals being defined in the Green Paper. Nevertheless, this instrument is only used rarely, even if the size of contracts which fall within the scope of the directives do not allow for serious objections against this instrument.

Question 2: Do you consider the current structure of the material scope, with its division into works, supplies and services contracts appropriate? If not, which alternative structure would you propose?
We think that it is necessary to keep the division into works, supplies and services. There are so many differences in these categories that it is not appropriate to abolish the division. There should be a special chapter on “intellectual services”
There is a danger that such a change would lead to an increase of pure price competition in cases where this is completely unappropriate - this would be extremely problematic for the procurement of intellectual services as in those cases a pure price competition can never find the best possible procurement outcome (best value for money).
Question 3: Do you think that the definition of „work contracts“ should be reviewed and simplified? If so, would you propose to omit the reference to a specific list annexed tot he directive? What would be the elements of your proposed definition?
A clear separation of contracts for design and works should be laid down in the directive. Arg.: Design services focus on quality (sustainability, innovation etc.), works on financial profit.
Procurement by entities belonging to the state
Question 9: Do you consider that the current approach in defining public procurers is appropriate? In particular, do you think that the concept of “body governed by public law” should be clarified and updated in the light of the ECJ case-law? If so, what kind of updating would you consider appropriate?
The experience has shown that public procurers often develop a lot of legal fantasy and efforts in order to “escape” from the procurement regime. Therefore a broader definition in the Directive would be helpful.
Especially in cases of public-private-partnerships (PPP) this very often happens. Such escape ways have to be closed, otherwise it will be difficult to reach the most important objective of the public procurement policy, namely the increase of efficiency of public spending.
Therefore it is important to clarify that also if only the utilization and maintenance of works are paid/funded by a public authority in any way (leasing /payback etc) the public procurement regime has to be applicable.

Question 15: Do you think that the procedures as set out in the current Directives allow contracting authorities to obtain the best possible procurement outcomes? If not, how should the procedures be improved in order to alleviate administrative burdens/reduce transaction cost and duration of the procedures, while at the same time guaranteeing that contracting authorities obtain best value for money
We don’t think that all the procedures set out in the Directive facilitate the achievement of the best possible procurement outcomes. For the procurement of intellectual services the negotiated procedure with prior publication is – besides the design contest, see below - most appropriate. In view to transparency it would be important to establish an obligation to publish the decision making process / the results for the award of the contract (like the minutes of a jury in the design contest).
In negotiated procedures for architectural services without a prior design contest a selection body (like the jury in a design contest) consisting at least half of members that have the same/equivalent qualification that is required form the participants shall be installed. Especially in complex projects this is the best way to guarantee that the best project can be selected.
All procedures that are only based on price are not appropriate for intellectual services. Even if there is a high percentage of the weight on quality criteria there are many cases in which the set quality requirements are easily reachable for everyone which means that in the end the price is the only decisive criterion.
It is in the nature of intellectual services that contract specifications cannot be established precisely in

advance. So in order to get the best outcome for contracting authorities it is necessary to apply quality orientated procurement procedures only. To ensure cost-efficiency as well as the best technical solution for a project it is necessary to prohibit the lowest-price criteria in procurement procedures for intellectual services and to clarify in the Directive that intellectual services can only be contracted after quality orientated procurement procedures.
As mentioned above we therefore think that the negotiated procedure – with the amendments mentioned above - is the most appropriate procedure and would definitely reduce cost and duration of the procedure and at the same time guarantee best value for money.
For architectural services the best procurement tool is the architectural design contest. It is the only method to combine the best (technical) quality and the highest cost effectiveness with project-orientation directly to the point. Such a contest does not mean any delay in the procedure for the procuring authority but has a huge economizing potential. Therefore measures should be taken in the Directive to further enhance the use of architectural design contests**.**
Nevertheless we would like to suggest the following improvements:
- In other to guarantee the selection of the best project the jury should be composed of at least one half (instead of one third) of members that have the same/equivalent qualification that is required form the participants in the contest.
- It should be clarified in the Directive that anonymity has to be observed until the jury has reached a decision also in the case that candidates are invited to answer questions (Art 74 5.) - otherwise this would contradict the most basic principle of the design competition.
With a view on main priorities of public procurement as set out in the introduction of the Green Paper - developing an economy based on knowledge and innovation; promoting a low-carbon, resource-efficient and competitive economy – the design contest should consequently be defined as the standard procedure for design services.

Question 16: Can you think of other types of procedures which are not available under the current Directives and which could, in your view, increase the cost-effectiveness of public procurement procedures?
Modified negotiated procedure – see Question 15
Question 19: Would you be in favour of allowing more negotiation in public procurement procedures and/or generalising the use of negotiated procedure with prior publication?
As already mentioned we think that the negotiated procedure (in cases of architectural sevices following a design competition) is the most appropriate and quality orientated procedure for the procurement of intellectual services that would reduce cost and duration of the procedure and at the same time guarantee best value for money (see also Question 15).
It is also very attractive for the procuring authority (reduction of candidates), therefore we definitely favour generalising the use of negotiated procedure with prior publication for intellectual services.
But: This cannot be a price-negotiation - only adjusted to the description of objectives and tasks.
Question 20: In the latter case, do you think that this possibility should be allowed for all types of contracts/all types of contracting authorities, or only under certain.
Negotiated procedure with prior publication should be the standard procedure for intellectual services. But it is not appropriate for all types of goods/services.
Question 21: Do you share the view that a generalised use of the negotiated procedure might entail certain risks of abuse/discrimination? In addition to the safeguard already provided for in the Directive for the negotiated procedure, would additional safeguards for transparency and non-discrimination be necessary in order to compensate for the higher level of discretion? If so, what could such additional safeguards be?
The prior publication guarantees transparency and non-discrimination. It is extremely important that a lot of bidders have access, also for the participation of small/young architectural/engineering offices. In view to transparency it would also be important to establish an obligation to publish the decision making process / the results for the award of the contract (like the minutes of a jury in the design contest).
In negotiated procedures for architectural services without a prior design contest a selection body (like the jury in a design contest) consisting at least half of members that have the same/equivalent qualification that is required form the participants shall be installed. Especially in complex projects this is the best way to guarantee that the best project can be selected.

As concerns other sectors where awarding decisions can be based on fixed offers (as for most supplies and works) the open procedure guarantees a maximum of transparency, competition and non-discrimination.

Selection and award

Question 24: Do you consider that it could be justified in exceptional cases to allow contracting authorities to take into account criteria pertaining to the tenderer himself in the award phase? If so, which cases, and which additional safeguards would in your view be needed to guarantee the fairness and objectivity of the award decision in such a system?

The distinction between the selection and the contract award decision should be less strict, it should not explicitly prohibit the taking into account, at the award stage, of criteria which are not linked to the services offered by architects, and hence allows bidder-related criteria to be taken into account. In this cases, the documentation requirements could be increased to guarantee the fairness and objectivity of the award decision.

Question 27: Do you think that the full procurement regime is appropriate or by contrast unsuitable for the needs of smaller contracting authorities? Please explain your answer.

Question 28: If so, would you be in favour of a simplified procurement regime for relatively small contract awards by local and regional authorities? What should be the characteristics of such a simplified regime in your view?

We very well understand that especially for very small procuring entities the application of the full set of rules is indeed difficult. Nevertheless we think that a simplified procurement regime for small contracting authorities could fragment and weaken the procurement regime.

It would also be difficult where and how to draw the line. Additionally it is especially important for small entities to increase the efficiency of their spending and to find the best value for their money. So also for small local projects it makes a lot of sense to make the procuring entities use a procurement procedure that enables them to find the best offer.

Another important aspect is that especially for young architectural/engineering offices (start-ups) which are in a vast amount of cases microenterprises, the local public procurement markets and small public projects are essential. An open market with quality orientated procedures also on local level is therefore extremely important for them.

So in view to intellectual services we think a solution to increase flexibility for smaller entities and at the same time safeguard best possible access for SME and quality orientated procedures, would be to install the negotiated procedure (in case of architectural services following a design contest) as the main procedure for the procurement of intellectual services.

More legal certainty for awards below the thresholds of the Directive

Question 29: Do you think that in the case-law of the Court of Justice as explained in the Commission Interpretative Communication provides sufficient legal certainty for the award of contracts below the thresholds of the Directive? Or would you consider the additional guidance, for instance on the indications of a possible cross-border interest, or any other EU initiative, might be needed? On which point would you deem this relevant or necessary?

We think that regulations for the implementation of the basic principles of the treaty that have to be applied for awards below the thresholds of the Directive would be very helpful. For example in cases of direct awards it would be necessary to establish some basics of transparency like the information of results for all participants who made a price offer. Another mean of transparency in case of direct commissions would be the establishment of an obligation for the procuring authorities to publish a regular list of the results of their direct awards.

The SIGMA (OECD/EU) paper *"Public Procurement in EU Member States – the regulation of contracts below the EU thresholds and in areas not covered by the detailed rules of the EU Directives"* from May 2010 clearly shows that a huge majority of member states has regulations for procurement under the thresholds of the Directive that go further than the principles of the treaty in order to secure an open competition. Contracts under the threshold are an important part of all public procurements and are especially relevant for SME. To balance existing differences and to achieve a European market also below the thresholds it would be important to have a similar regulatory situation in all EU member states.

Question 46: Do you think that EU public procurement rules and policy are already sufficiently SME-friendly? Or, alternatively, do you think that certain rules of the Directive should be reviewed or additional measures be introduced to foster SME participation in public procurement? Please explain your choice.

No, we do not think that procurement rules are sufficiently SME-friendly.

- Eligibility/Selection criteria

It is a huge practical problem that – although Article 44 of the Directive states that the requirements on economic and financial standing and technical and/or professional ability for a specific contract must be related and proportionate to the subject of the contract – selection criteria are in many cases inadequate and excessively high. Also the required references are very often not in proportion to the contract subject.

It is necessary that the procuring authority is able to find a reasonable relation between the total amount of the contract and the requirements. For this it is necessary that the responsible person within the procuring authority is well qualified (additional measures: training, awareness raising measures)

- Financial guarantees

There is a very negative tendency to move the risks from the client to the provider of the architectural/engineering servics. This is of course a problem for SMEs and micro-enterprises.

Disproportional financial guarantees (bank guarantees to cover risks even when they are beyond the control of the architectural/engineering office, retention of resources in the form of participation guarantees should be prohibited.

- Cooperation to provide required capacities

Project-orientated cooperations of bidders should be possible – so no limitations to a certain number.

Enhancing the publication of prior information notices would be helpful in order to give more time and possibility to form such partnerships. Nevertheless this should not be combined with a reduction of deadlines following the publication of a prior information notice. As SMEs and especially Microenterprises have very little capacity to deal with the preparation of tender documents, close time limits are problematic.

- Administrative burdens

The possibilities to reduce administrative burdens for tenderers should be reviewed. We think that self-declaration is a good tool, additionally the use of databases by contracting authorities should be enforced.

Question 47: Would you be of the opinion that some of the measures set out in the Code of best Practices should be made compulsory for contracting authorities, such as subdivision into lots (subjects to certain caveats)?

Planning services and works should be separated into different lots because planning solutions are focused on quality and offers for works are based on profit.

Question 48: Do you think that rules relating to the choice of the bidder entail disproportionate administrative burdens for SMEs? If so, how could these rules be alleviated without jeopardizing guarantees for transparency, non-discrimination and high-quality implementation of contracts?

Self-declarations on all aspects of eligibility are a good solution. Ideally this can be combined with the use of databases with all the relevant information on the eligibility / ability / capacity of bidders. In Austria the database of ANKÖ is already used by quite a number of procuring authorities.

We do not see any problems of reduced reliability in case of self-declaration.

Question 49: Would you be in favour of a solution which would require submission and verification only by short-listed candidates / the winning bidder?

Yes

Question 50: Do you think that self-declarations are an appropriate way to alleviate administrative burdens with regard to evidence for selection criteria, or are they not reliable enough to replace certificates? On which issues could self-declaration be useful (particularly facts in the sphere of the undertaking itself) and on which not?

The self-declaration is useful for all requirements – but the procuring authority has to formulate the request clearly (especially in view to Europe wide participation, as there can be differences in the meaning of certain terms).

Question 51: Do you agree that excessively strict turnover requirements for proving financial capacity are problematic for SMEs? Should EU legislation set a maximum ratio to ensure the proportionality of selection criteria (for instance: maximum turnover required may not exceed a certain multiple of the contract value)? Would you propose other instruments to ensure that selection criteria are proportionate to the value and the subject-matter of the contract?

Yes we fully agree to that.

See also Questions 46 and 47

Question 53: Do you agree that public procurement can have an important impact on market structures and that procurers should, where possible, seek to adjust their procurement strategies in order to combat anti-competitive market structures?
Yes, it definitely has an important impact. Especially in the market for architectural services there are a lot of good examples that show how the implementation of the Directives has actually opened the market and enhanced the access to public procurement.
Question 54: Do you think that European public procurement rules and policy should provide for (optional) instruments to encourage such pro-competitive procurement strategies? If so, which instrument would you suggest?
We think that in principle – with some necessary changes which we have described in answering the questions of the Greenbook - the procurement regime sufficiently encourages pro-competitive procurement.
Nevertheless the European procurement under the thresholds does need further improvement. See answer to question 29.
Additionally there is a need to improve the procurement culture of many public procuring entities, there are still a lot of efforts to circumvent the procurement regime.
Question 65: Do you think that some of the procedures provided under the current Directives (such as competitive dialogue, design contests) are particularly suitable for taking into account environmental, social, accessibility and innovation policies?

The Design contest is perfectly suitable to take these policies into account: It offers a holistic approach that can include the policy aims and it is the perfect method to combine the best (technical) quality and the highest cost effectiveness with concrete project-orientation.
The negotiated procedure with prior publication is also an adequate procedure to take into account policy objectives (please also see the suggested amendments for the procedure in view to transparency in question 15)
Precautions in view to to intellectual property rights are of course important.
The competitive dialogue – especially in these issues - has a strong problem in view to protection of author's rights, as the best ideas of participants are "picked out" in the process. In reality the contracting authorities are in a bind between the obligation to protect the confidential information and on the other hand the need to disclose some information in order to identify solutions. This problem is difficult to solve therefore the competitive dialogue as such is a very problematic method.

Question 68: Do you think that allowing the use of the negotiated procedure with prior publication as a standard procedure could help in taking better account of policy-related considerations, such as environmental, social, innovation, etc.? Or would the risk of discrimination and restricting competition be too high?
We think that the negotiated procedure with prior publication is, in the sector of architectural services, an adequate procedure to take into account policy objectives.
The prior publication guarantees transparency and non-discrimination. It is extremely important that a lot of bidders have access, also for the participation of small/young architectural/engineering offices. In view to transparency it would be important to establish an obligation to publish the decision making process / the results for the award of the contract (like the minutes of a jury in the design contest).
In negotiated procedures for architectural services without a prior design contest a selection body (like the jury in a design contest) consisting at least half of members that have the same/equivalent qualification that is required form the participants shall be installed. Especially in complex projects this is the best way to guarantee that the best project can be selected.
Question 70: The criterion of the most economically advantageous tender seems to be best suited for pursuing other policy objective. Do you think that, in order to take best account of such policy objectives, it would be useful to change the existing rules (for certain types of contracts / some specific sectors / in certain circumstances)?
70.1.1 to eliminate the criterion of lowest price only
Yes, we fully agree that for pursuing other policy objective the MEAT is best suited. Therefore the criterion of lowest price only should be eliminated for such cases (see also details in Questions 62 - 68).
Generally it is important to see that specific criteria related e.g. to climate change issues, sustainability etc can always and only be based on qualitative criteria, as only a holistic approach delivers good

solutions. Simple addition of quantitative properties might even mislead, as adequate holistic solutions can/shall be based on different approaches to the problems.
Therefore these objectives can only be reached by quality orientated procurement procedures that are project-orientated and allow for such a holistic approach (e.g. design contest – see Question 65). The MEAT can be the only possible award criterion.

70.1.2 to limit the use of the price criterion or the weight which contracting authorities can give to the price
Yes, this would be an important step in order to enforce quality instead of price competitions.
Additionally it is also important that criteria are set up adequately. If they are configured in a way that all participants can fulfil them, this leads to a mere price competition even if the weight of the price is very low (this was also mathematically proven by a Finnish study - ATL research and development and others).
70.1.2 to introduce a third possibility of award criteria in addition to the lowest price and the economically most advantageous offer? If so, which alternative criterion would you propose that would make it possible to both pursue other policy objectives?
-
Question 73: In your view, should it be mandatory to take life-cycle costs into account when determining the economically most advantageous offer, especially in the case of big projects? In this case, would you consider it necessary/appropriate for the Commission services to develop a methodology for life-cycle costing?

Yes, see introduction.

Annex:
Extract from ACE Sector Study 2010 (2 pages)

Architecture - the Practice

3

Profile of Architectural Practices

The number of private architectural practices in Europe-23 is estimated to be 133,000. This figure has been estimated by creating a model and then inserting data from the survey. The model is described in Appendix I. Grossing-up this figure to reflect all 33 European countries produces an estimate of 155,000 private architectural practices in Europe, 19 per cent higher than the 2008 estimate of 130,000 practices.

Two thirds (65 per cent) of these practices are one person firms. A further 29 per cent have between 2 and 5 architectural staff. Four per cent of practices have between 6 and 10 architectural staff. Practices with more than ten staff account for a tiny proportion of the total. Thus the profile of architectural practices is skewed very heavily towards small firms.

The two per cent of practices who have more than ten staff between them employ 17 per cent of all architects in private practice. Similarly, the 4 per cent of practices with 6 to 10 staff employ 14 per cent of all private practice architects. By contrast, the 65 per cent of one person firms employ 32 per cent of private practice workforce.

CHART 3-1
Average size of architectural practices

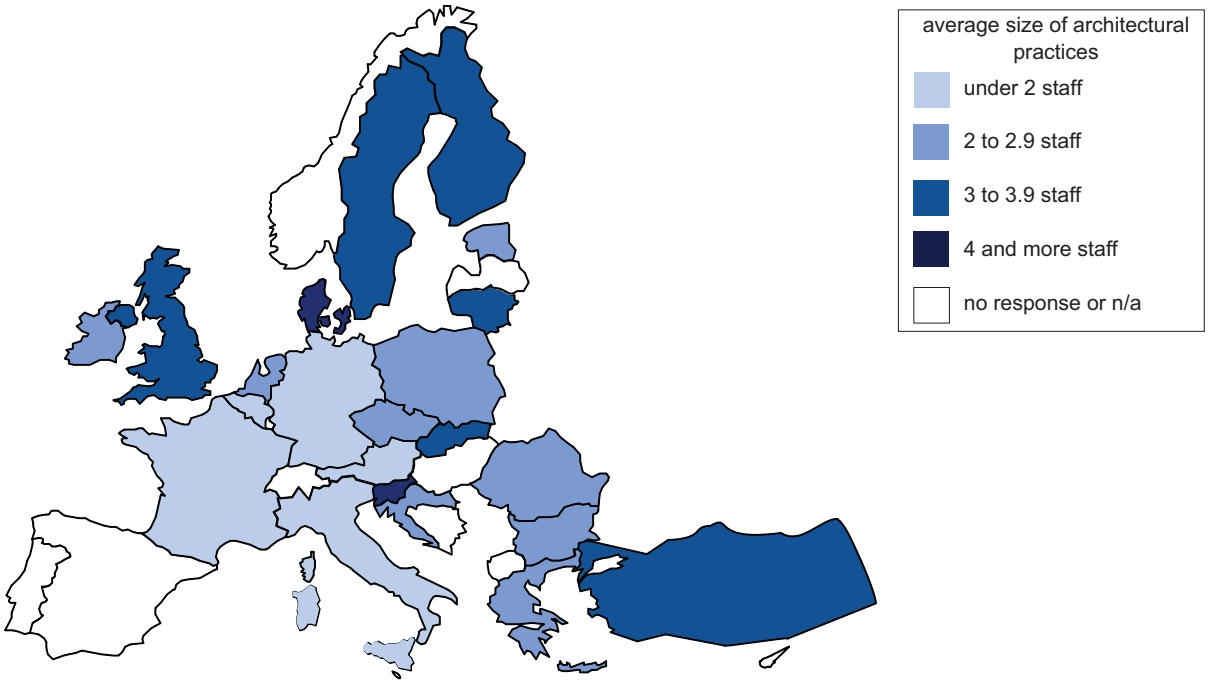

TABLE 3-1
Estimated number and size of architectural practices

	size of architectural practice (number of architectural staff)							TOTAL
number (estimate)	1 staff	2 staff	3 to 5 staff	6 to 10 staff	11 to 30 staff	31 to 50 staff	over 50 staff	
Austria	896	279	222	60	16	1	1	1,476
Belgium	2,641	682	576	192	68	7	1	4,167
Bulgaria *	387	113	189	36	37	0	0	763
Croatia	254	144	156	34	16	1	1	605
Czech Republic	442	144	113	45	10	1	1	756
Denmark	384	122	119	70	53	10	4	762
Estonia *	75	25	23	14	6	0	0	145
Finland	159	72	61	38	31	2	1	363
France	5,386	1,149	1,026	261	67	2	1	7,891
Germany	**22,793**	**6,696**	3,609	1,400	443	60	20	35,021
Greece	1,985	**793**	810	**167**	53	7	3	3,818
Ireland	448	186	133	32	23	1	1	824
Italy *	39,352	5,093	6,901	1,466	219	42	8	53,081
Latvia *	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Lithuania *	103	57	48	66	9	0	0	282
Netherlands	2,058	448	404	213	108	21	2	3,255
Poland	2,221	885	902	266	40	13	2	4,330
Romania	1,026	190	370	82	29	0	0	1,697
Slovakia *	136	30	76	39	11	1	0	294
Slovenia *	75	24	35	25	21	4	1	186
Sweden	646	155	132	77	48	6	3	1,067
Turkey	1,488	1,332	2,101	596	278	29	11	5,836
United Kingdom *	**3,094**	858	957	635	387	71	22	6,024
EUROPE - 23	86,049	19,477	18,963	5,814	1,973	279	83	132,643
per cent of practices	65	15	14	4	1	<1	<1	100
2008 EUR-17	*37,369*	*13,489*	*10,868*	*5,318*	*2,014*	*449*	*344*	*69,851*

'architectural staff' includes principals, partners & directors; associates; salaried architects; technical staff
* caution - small sample

CHART 3-2
Practices analysed by size

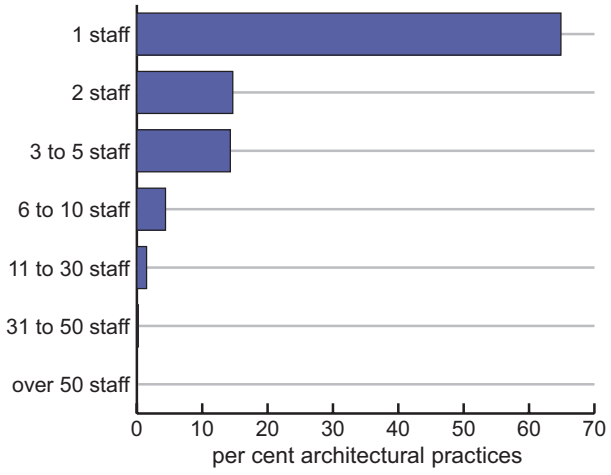

CHART 3-3
Proportion of architects employed in practices of different sizes