An ACE Document on Competition Policy and Professional Practice of Architects

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0. Foreword

ACE has noted that EU Competition Policy was focusing on the liberal professions, and that there has been a number of European Court decisions on regulations governing professions, which professions considered as relating to core professional issues. While at a national level competition authorities in some Member States, for example UK and Sweden, have prevented professional bodies from publishing any form of fee scales, recent EU decisions and activity at parliament and commission level could indicate an evolution of policy from the strictest interpretation of competition law towards a consideration of the concept of a general interest, providing an opportunity to re-examine and to discuss with the EU-Commission issues which under classical competition law might be considered as anti-competitive. The presentation to European Institutions can take into account changes in competition law while respecting general interest and consumer rights.

ACE considers it important to identify areas of professional policy which could be in conflict with competition law and to demonstrate which professional rules seem to be in accordance with commission criteria concerning the work of professionals and which are not in accordance with competition laws.

There are several reasons to consider the matters set out in this paper. The first being a possible change in the competition environment indicated above and the second being the fact that ACE needs to decide on policy in these areas.

Competition Law needs in addition to be considered because according to EU Treaty (arts 81/82), EU-Commission and the European Court of Justice, individual Architects are individual enterprises and are therefore subject to European rules on competition.

The future of professional organisations will depend to a considerable measure on the way in which the community institutions apply Competition Law to decisions taken and made by professional organisations.

The intention of this document is to summarise the main approaches, to present a series of conclusions and to give a platform for external discussions on the following matters:

- systems providing information to customers/clients on costs of the services provided by architects
- advertising
- group practice
- registration
- intellectual property.

The whole document is a "living document". It will be adjusted according to the progress of the discussions, concerning the subjects covered by this paper, and according to the development of the EU Legal Framework.

1. Situation and Professional Concerns

Construction policy at EU-level: The European Parliament draft opinion answering the commission (rule 147/1998) considers it important to promote mechanisms to compensate firms for the burdens inherent in guaranteed quality, not least in order to make SMEs more successful rather than causing discrimination against them. The European Parliament understands that the construction sector has special characteristics with regard to quality management and requires specific legislation to take account of company size and the specific field of activity (design and production of buildings).

The ?communication on the competitiveness" of the construction industry (Com/97/0539-C4-0597/97) seeks to improve employment conditions and the image of the sector providing stable employment patterns, identifiable career prospects, a better working environment and job security.

The cultural approach: The European culture consists of diverse and manifold cultures. Building is not only an international exchange of ideas and methods, but also consists of preserving regional and national traditions and developing these for the future. The tendency to limit the purpose of building to economic and market related concerns misses important elements such as durability, aesthetics and environment. Information-on-costs-systems and ethical codes give to liberal professions the freedom and independence to develop concepts for the build environment that can meet these concerns and to assume the responsibility for long term issues. The council resolution (February 12, 2001) affirms that ?architecture is a fundamental feature of the history, culture and fabric of life of each of the European countries".

The quality discussion and the consumer?s and industry?s interest: The above discussions are on different levels as there is the employment issue and more importantly still the quality discussion. This problem is strongly linked to the architectural professions survival in the future. When architects no longer promote the quality aspect of their work, there will be no need for them any more. Information-on-costs-systems, among free professions are known as instruments to estimate intellectual performance before it is finished. They therefore give transparency in the costs of engaging architects, as the normal market regulative offer and demand can?t produce, in this case, the necessary transparency.
Information on costs can prevent a situation where the quality of the planning and the quality of services of the architect deteriorate when the construction industry, on a national or international level, is working at depressed cost levels.
To counter the argument that information-on-costs-systems provide a high income to the profession, the example of the economic case of Germany shows that even a legally enforced minimum scale has not resulted in significant incomes for architects. They remain in this case below the level of other liberal professions.
The disciplinary provisions, laid down in the codes of conduct, guarantee to the client that he can bring complaint to the architects organisations in order to check the quality of work delivered by the architect.
Information differences: Information problems that consumers may face in the market for building design and related services are typical of the information deficiencies found in markets for services where the provider also acts as adviser and agent. That is, consumers may know broadly what they want when seeking a provider of building design services; for example, a house renovation. However, they may not know how it should be done or who is best qualified to provide it. In addition, it may be difficult for consumers to identify faults until long after work has been completed and, indeed, other parties (for example, subsequent owners) may bear these costs.
The degree of information asymmetry in this market is likely to differ according to the type of consumer. Consumers in the commercial and government sectors are more likely to be frequent users of the services and have the resources and knowledge to research and evaluate the merits of building design providers. Inexperienced and uninformed customers/clients are likely to be more prevalent in the residential and lower value commercial sectors of the market.
Only the relatively small group of individual customers/clients who directly hire providers of building design and related services in the residential sector are likely to have the time and incentive, given the size and importance of the purchase, to investigate the capabilities and credentials of potential service providers. In particular, the reputation of providers is likely to play an important role. Service providers "inform" customers/clients by developing and advertising their reputation, possibly bolstered by membership of a professional association which itself establishes a reputation and credible certification procedures.
However, though the market may operate effectively for many transactions, in same cases, the potential harm generated by the occasional inadvertent selection by a consumer of an incompetent or unethical provider may be considered unacceptably high by the community. For a number of reasons, this may warrant intervention of some form.
First, structural and other building defects can cause catastrophic damage and injury and, in extreme cases, even death. More generally, they are likely to require expensive repairs. Even if such occurrences in an unregulated market were likely to be infrequent, the community may not be prepared to tolerate even a low level of risk.
Second, the purchase of building design and related services usually involves a relatively large financial investment. Any significant delays or cost overruns in construction can have serious financial ramifications for customers/clients.
Finally, the cost of poor design aesthetics and functionality may also be significant for consumers, both financially - if adjustments need to be made after initial construction, for example - and in non-financial terms - living with an "imperfect" design -. However, information problems in relation to these aspects of design are likely to be less severe. While customers/clients may find it difficult to assess the quality of construction, they usually know what they like in design and will search for a provider whose design style suits their tastes and needs. Nonetheless, it is feasible that regulation could improve the availability and quality of information about the technical competence of designers, and thus reduce consumer risks still further.
Control of activities of the professional: Although the requirement of affiliation with a professional association, registration, or licence to practice architecture may constitute an obstacle to competition, as it restricts the access to the professional market, the requirement for registered professional practice may

be justified by general interest, as regards security and public order matters, and the need to protect clients, to guarantee the professional technical capacity and a clear system of responsibility, and professionals, to avoid professional infiltration.
It is also necessary to have a collective body able to assure compliance with the rules included in a professional deontologic code (code of ethics) under the supervision of superior organs whose decisions can be controlled by Courts.
Advertising: Professional freedom of advertising is useful, first of all, to the consumer (because of the informative function). Moreover, advertising exercises a technical and deontologic control of professionals, acting as a guarantee of fair competition in the Internal Market. Some restrictions to advertising may be justified by the need to protect the customers/clients and other professionals - particularly, new entrants - avoiding a dishonest or unfair use of advertising, acting as a barrier to a free access to the market. Some limits are also essential in order to assure some principles and general and superior legal values.
Copyright: First of all, ACE must state that copyright (author?s licence) cannot be sold, only a license for use transferred. And this cession of use is carried out by a contractual relationship with the public entities in charge of awarding a public contract or with the particulars; so that its limits remain at the discretion of the will of the parts. So, professionals can grant the use of the copyright without material or temporal limits, but logically, if the cession is unlimited , the economic return should be sufficient. However, ACE considers that some limits should be justified, even if they are barriers to trade and competition. More particularly, we are referring to the following conditions, namely:
- limiting the use of a project during a certain period, that is, controlling the use of a project to the execution of a concrete public or private contract and
-avoiding the possible changes that the project may suffer introduced by other architects.

2. General Conclusion concerning the Legal Situation

It is clear that the different case law coming from the European Court of Justice is not enough for legal certainty for professional organisations. The architects profession needs of objective criteria for the application of article 81 EC to the decisions of the professional organisations that we all accept that, in some situations, should be considered as decisions of associations of undertakings, within the scope articles concerning European competition law.
The first conclusion, after analysing the recent case law of ECJ, is that ACE should possibly not seek legal cover of some professional rules. Certainly, it is clear that for the ECJ the first step is considering an exemption from the application of competition rules is that of legal exemption. Other Community institutions should be moving in the same direction, trying to escape from the collapse produced by the current system of individual administrative authorisations (that is the way new solutions presented by the European Commission in its recent Communication presenting its ideas to modify regulation 17, concerning procedures for applying article 81).
Nevertheless, a legal authorisation is also a difficult complex system and it depends on the techniques used by the legislators whether the professionals and their associations would or would not be placed in difficult situations of legal uncertainty, as worrying as those caused by the system of administrative authorisations. For example, a legal authorisation, without limits, without conditions, and without requirements concerning the contents of the professional regulation, is not a certain legal framework, because in this case the regulation would have many difficulties in proving that the final objective is the protection of the general interest. The European institutions and more specifically ECJ are looking for laws that not only authorise the regulation but, going forward, control and impose limits to the concrete decisions coming from the professional organisations, defining the general interest.
So, it would be important to consider, to summarise, in which conditions we might reach the maximum of legal certainty:
1) if there is a legal instrument for architects as legal base for the professional regulations;
2) if the contents of the law itself provide the system with a procedure assuring that the conditions of the general interest are fulfilled;
3) if the concrete contents of the general interest are also described, and finally
4) if all social and economic sectors concerned are represented in the regulating bodies.

3. Charges / Tariffs

***Background*:** In the past months, the activity of the European institutions in relation to these questions has developed towards a deeper consideration of the general interest in the application of competition rules. This has forced ACE to re-open the debate, seeking a more sensible approach, comprehensive with the specificity of the architectural sector when applying the EC Treaty.

The European Parliament in its recent Resolution of 5 April 2001, in point 9 has stated that: "only compulsory tariffs established by professional bodies or associations of all Members of a given profession may, according to circumstances, be regarded as decisions adopted by associations of undertakings submitted to the competition rules".
The legal situation concerning this matter has changed in the last months. On 29 November 2001, the European Court of Justice has stated that now binding fees may not affect competition and, consequently, should be not forbidden by European law (ECJ, 29 November 2001; Case C-221/99; *Conte/Rossi*; not yet published). So, when fees are non binding, there are no effects on competition or the effects are very insignificant ones and the ECJ has decided that this kind of professional decision should not be judged within the scope of article 81 EC.
More recently, concerning binding charges fixed for lawyers in Italy, the ECJ has stated that: "the fact that a member State requires a professional organization to produce a draft tariff for services, thus not automatically divest the tariff finally adopted of the character of the legislation" (Case C-35/99; *Arduino*; not yet published; point 36). So, concerning binding fees covered by law and elaborated by the professional organization, the ECJ has opened the door for some kind of exclusions from the scope of article 81 EC. Hereafter ACE should try to explore under which conditions the exclusions should apply.
The classic approach is to fix fee scales, whether mandatory or not, related to missions of architects. More recent concepts consider the necessary resources for each architectural service to be provided and the appropriate reimbursement. This can be done by fixing a money value per unit of time or other kind of input criteria and finalised by relating the necessary resources of all people involved in a project to meet the clients goals with the final price needed for the service. No matter how the system is conceived, ACE agrees that all systems can have effects on competition.
Apart from the legal discussion within the EU, most of the fee information systems help the average customer purchasing intellectual services and so architectural services. As he has no specific skills and/or expertise about the service himself, he needs information systems containing information on average service?price relations for specific objects of the services contract. The main function of a market is to give information to the customer about price?value combinations for required goods and services. This vital market function cannot work if the customer is unable to assess the value offered to him. Therefore access to fee information helps the client to make a judgement on the architects offer.

A. Legal Situation

As a consequence of the subordination of the professional sector to the free competition system laid down in the EC Treaty, the prerogative for professional associations to establish fees schedules is being limited among the EU member States. This practice is considered as an *agreement by an association of undertakings having as effect the distortion of competition* (ECJ decisions:
C-41/90, 19/61, C-35/96 (customs agents), and Commission decision COAPI) within the meaning of article 81 (former Article 85 ECT) and not open to any kind of individual or collective exemption within the meaning of article 81.3. European and national authorities, as well as the ECJ, are very strict when applying competition rules to these practices since there is certain analogy between fees established by professional associations and agreements on prices which are expressly prohibited in the Treaty.
Article 81, in conjunction with article 10 (former article 5) of the Treaty, requires member States not to introduce measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings (ECJ case law *Van Eykc* 267/86, *Reiff* C-185/91 and *Delta* C-151/93. Concerning lawyers fees in Italy, see the recent Case C-35/99; mentioned here above; Points 34 and 35). This implies that competition rules apply not only to private undertakings but also when the State, through legislative measures or by delegation of its powers to private operators, promotes, authorises or provoke the establishment of fees. This prohibition, according to the ECJ, affects professional associations establishing fees under supervision of public authorities. Nevertheless, the ECJ, in the last Case C-221/99, mentioned above, has stated that "? having regard to the freedom thereby left to each practitioner to set the relevant fee, national legislation such as that at issue in the main proceedings is not such as to promote the creation of anti-competitive agreements" (Point 27. See also Points 42, 43 and 44 of Case C-35/99).
In the more recent Case C-35/99, *Arduino*, the ECJ has stated that the fact of giving powers to the professional organization is not forbidden in itself, when "? the members of the professional organization can be characterized as experts who are independent of the economic operators concerned and they are required, under the law, to set tariffs taking into account not only the interests of the undertakings or

associations of undertakings in the sector which has appointed them but also the public interest and the interests of undertakings in other sectors or users of the services in question ?" (Point 37).
In *Autotransporti Librandi* (ECJ decision of 1/10/98, C-38/97) the Court established that "Articles 3 (f) and (g), 5, 85 and 86 of the Treaty do not preclude legislation of a member state which provides for road haulage tariffs to be approved and brought into force by the state on the basis of proposals of a central committee the majority of whose members are representatives of the economic agents concerned [...], provided that the tariffs are fixed with due regard for the public-interest criteria defined by the law and the public authorities do not hand over their prerogatives to private economic agents in taking into account, before the approval of proposals, of the observations of other public and private bodies and even by fixing tariffs ex officio".
This implies that competition rules are not contravened by fee schedules when:
- They are authorised by law.
- All agents of the economic sector concerned are represented in the decision body.
- Public-interest criteria defined by the law are observed.
- Public authorities do not delegate their prerogatives to private economic operators, with total freedom to do the work (see also Point 37 of ECJ Case C-35/99)

The approach made by the Court in decision C-35/96 (*customs agents* case) and, specially, the opinion of Advocate General Cosmas, is also important in the sense of a less strict application of competition rules. The common *ratio* to these decisions seems to be the consideration of criteria, other than the preservation of the free competition system, such as those related to the public interest. Beyond the functioning of a system based on the legal authorization, this position reveals a more flexible application of the competition provisions which is grounded on the *rule of reason*, inspired in the American doctrine towards competition. According to this principle, certain conduct which may distort competition at a first sight, might fall outside the scope of competition rules if it can be proven that they fall within certain limits of rationality. To this end, the distortion of competition produced by the conduct and the interests concerned must be weighed. If the interests concerned are too transcendental and the incidence on competition is mild enough that it can be reasonably justified, then the conduct should not be prohibited.
The latest European Parliament resolution on fee scales and compulsory tariffs considers that Articles 81 and 82 of the Treaty does not apply if anti-competitive conduct is required of an undertaking by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part. Nevertheless, they may apply if it is found that the national legislation does not preclude undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition.
It also considers that only compulsory tariffs established by professional bodies or associations of all members of a given profession may be regarded as decisions of associations of undertakings submitted to the competition rules, and that member states are authorised to establish compulsory tariffs taking into account the general interest (and not only the interest of the profession), and to protect the high moral, ethical and quality standards that liberal professionals represent and their clients trust in.
Finally, it points out that necessary rules for each profession in order to ensure the impartiality, competence, integrity and responsibility of the members of that profession or to prevent conflicts of interests or misleading advertising, which do not represent barriers to the free movements of services, are not considered to be restrictions on competition within the meaning of Article 81 of the Treaty.

B. Information Problems in Purchasing Architectural Services

Fee scales provide information about the situation of the average supply function of the average service provider. This information gives the possibility to assess at least the average amount of value combined with an average price.
Fee scales also contain information on the average (typical) amount of services an the related necessary average workload for the average service provider needed to obtain the objectives of typical contracts. This is essential not only for customers, who are able to more precisely specify their demands according to this information, but also for service providers, who can base their calculations on this information.
This is not information about the real individual value of the service ? as by definition the objective value of an intellectual service cannot be measured ? but fee scales provide information on the average potential adequate value of a specific service to be provided.
The "ignorant" customer: The average customer purchasing intellectual services such as architectural planning has no specific skills and/or expertise to carry out the service himself. He needs the skills and the knowledge of the expert he is seeking. As he is not able to carry out the services on his own, he also lacks

the necessary expertise to evaluate the quantity and quality of the service offered to him. This is especially true if the customer has to compare different offers.
As intellectual services by definition cannot be objectively measured, the only piece of understandable information an average customer can deal with is the price. The real value of the offered service (its amount and quality) is hidden behind a "veil of (the customer?s own) ignorance" (F. *Hayek*).
The market as information system: The main function of a market is to give information to the customer about price ? value combinations for required goods and services. The customer is seeking a means of fulfilling his requirement. He can only determine his return, if he is able to assess the (individual) value of the service offered to him. This will always be a decision about the use (technically: the allocation) of the customer?s scarce resources.
This vital market function cannot work if the customer is not able to assess the value offered to him. Therefore the customer will try to replace the objective assessment of the value offered to him by his own subjective estimation of what the value offered to him could be. But as he is not able to assess the value objectively he will tend to estimate the value either by personal subjective criteria or by simply assessing the different prices.
The inelasticity of service (costs): The costs for intellectual services are mainly dependant on the input for persons engaged into a specific project. They need by their sheer nature human action and can rarely be automated. They regularly deal with individual problems and need individual solutions.
The impossibility of automation and standardisation causes service costs closely follow the amount of input and the resulting wage costs. As human productivity and wage costs can be held at least comparable within Europe, price differences between offers for intellectual services will under normal circumstances reflect different amounts of input resulting in different quality and therefore in different value. As a result, the price alone does not give significant information as to whether the offered value intellectual services provides value for money.
Fee scales and competition theory: Modern competition theory (see especially I. *Kirzner, Competition and Entrepreneurship*) believes that the market itself cannot fully perform the duty of providing information. *Kirzner* has therefore introduced the figure of the *entrepreneur* (who also could be defined as an "agent") into competition theory. An entrepreneur in the *Kirznerian* sense is not the provider of the service. It is a person/institution that provides both sides ? the customer as well as the supplier with information about their respective demand and supply situation, that is about the other partner?s respective demand and supply function.
It is the task of the *entrepreneur* to provide the necessary information to the parties involved into a potential business situation. This creates a win ? win situation, where as a tendency the customer pays less, and the service provider gets more leaving all parties better off than before.
Adopting this concept, one can describe a fee scale as acting in an *entrepreneurial* role in the *Kirznerian* sense, i.e. to provide information in order to reduce the "information gap". The amount of the benefit share that each side can realize, depends on the way and the representation of the interests involved in the creation of a fee scale.
Deduction: A fee scale that is
- set up under fair and equal participation of all interests involved
- is based on a solid past experience of the market situation
- sets up and lays down average price ? value combinations
- is regularly updated
- open to all interested parties
- and is able to create and attract significant market acceptance

will act in an entrepreneurial role in the *Kirznerian* sense. It is economically viable as it provides a benchmark against which an individual offer can be assessed even by a non expert customer.
In providing the necessary information for a purchasing decision, a fee scale is not an obstacle to but a means for the introduction and realisation of effective competition for the average customer.
C. Quality Problems
Studies on quality in the construction process: Often professional people are concerned about the over all quality of buildings. The concern covers not only recently complied constructions but also long term aspects. The Atkins study and the following research work on the ?competitiveness in the construction sector" reveal many reasons as to why in Europe the construction sector is ?weak". As everybody knows quality is linked to financial questions and therefore is an input-output problem. The Atkins report has no specific view on the problem of how planning quality, vital for the over all quality of a

building, is influenced by bargaining down costs/fees of the architects. The Australian construction sector on the other hand has looked in detail at this problem.

Designers fees and documentation quality: The Australian construction industry ordered a nationwide survey on design and documentation quality (by Tilly / Mc Fallan, called in the following text "design study", May 2000). The survey investigates the relation/link between design quality, documentation quality and overall quality. It attempts to give answers as to how the design and documentation process has changed over the past 15 years and has been affected in quality.

Results of the Australian study: A questionnaire was given to 3.000 design and planning firms and to 2.500 individuals and firms on the construction side. The quality and quantity of responses assure reliable results. One of the most important results was the perception of both contractors and designers that over the last years the overall design and documentation quality declined in the areas of ?completeness" and ?final checking". The outcome if that the lack of clarity of the documents is what caused conflicting and incorrect information.

According to the designers those criteria who had the most impact on quality aspects were:

- low fee structures and insufficient profits and
- insufficient overall design time.

Designers estimated that the fee has declined during the last 12 to 15 years approximately 24 %, causing an income loss. Innovation and in-house and external training of the staff are neglected therefore. Designers also concluded that completeness and reliability of the documentation are also affected even with the use of CAD and modern information technology.

The contractors indicated that low design fees contribute considerably to a poor design and documentation quality. This results in higher projects costs and longer project duration. Reducing design fees to save overall costs leads to an inefficient construction process and higher overall costs.

Architects must convince clients that the fee level influences largely the design and documentation quality. Unless unfair bargaining can?t be stopped the work of architects will not reach, in every case, the quality level expected by the client and the society.

Conclusion:

All types of fee systems freely chosen by competent authorities in each member state are to be considered as information systems containing valuable information on average services for consumers (users) and are recognised as very useful instruments to estimate intellectual performances and prevent situations where the quality of intellectual services is reduced by depressed incomes for architects.

The experience with quality-surveys show consistency that the provision of the architect with a fair and non-below cost fee result in good planning quality. This planning quality is what the consumer expects. Reference should be made to the "Atkins-report" the over-all quality in the construction sector. Fee information-systems help to establish whether the fee-offer of an architect is abnormally low or high or in a range where the expectation of the client for an high level quality mission is fulfilled.

Seeing the advantages and the disadvantages of using information-systems for charges / fees ACE supports the opinion that the advantages for the consumer of having access to fee information-systems, described above, out weigh the disadvantages.

To summarise:

-Indicative charges systems do not affect competition in the context of article 81 EC;

-All types of charges systems covered by law, fulfilling all requirements assuring protection for the general interest, should, in principle, be accepted;

-The fact that the law or the legal instrument delegates to the professional organization the drawing up of the professional charges, does not mean that the system loses its legal character;

-If the law covering the professional decisions concerning charges does not include in itself the mechanism to assure the protection of general interest, the professional organizations are obliged to assure this protection by themselves in drawing up the charges;

-The same conclusion should be in the case where there is no legal framework.

ACE policy concerning Charges and Tariffs:

ACE, therefore, considers that all information-systems covered by law, elaborated and decided by bodies representing all agents of the economic sector and protecting general interest criteria, must be justified and excluded from the scope of application of competition rules.

4. Advertising

Background: If professional advertising is to be authorised, it should be considered whether codes of conduct could limit this, by imposing more restrictive conditions than those already provided by general

laws. It must also be considered what type of advertising would be allowed: general advertising on qualifications and services offered by the architect, comparative advertising, advertising in specific fields etc. We accept that restrictions on professional freedom of advertising create distortion on competition in the professional market. But we consider that some restrictions should be justified having regard to protection of consumers to whom advertising is addressed. Restrictions on advertising are also justified on other general legal values, such as professional deontology and honour. All our main statements take into account the recent case law from the European Court of Justice "IAA"; T-144/99 (28-3-2001, not published).

Prohibitive option :

Principle : Any advertising by liberal professions is forbidden.

Modalities: as,

- Individual advertising is forbidden, but advertising that benefits to the profession as a whole is allowed.
- Any unsolicited offer of services is forbidden.
- A prior authorisation from the relevant Authority (National Order or Council) is necessary.

Permissive option :

Principle : Liberal professions are allowed to advertise.

Modalities: as,

- Architects may advertise to present their services on an individual basis as well as collectively with other architects.
- They are allowed to communicate their references, services, rate and conditions to anybody who is asking for it (passive advertising). They may also communicate those information on their own initiative and without any prior demand (active advertising).
- Architects are allowed to do general advertising. They may also offer personalized services to individual (potential) clients . However, they are not allowed to offer their services to a specific (potential) client without being requested to do it, when they are aware of the fact that this client is in contact with another architect at that time for the same services.

Commission position on restrictions to advertising : The Commission?s Decision of 07-04-1999 on *IMA Code of conduct* (Institute of Registered Agents to the European Office for Certificates ? JO L 106/14 of 23-04-1999) is the legal basis.

Within this context article 7 § 5 of Directive 84/450/CEE authorises the Member States to maintain or to introduce prohibitions on comparative advertising for services from liberal professions in accordance with the rules of the Treaty. Those prohibitions or restrictions may be imposed by a law or by an organisation that has been instructed by national legislation to regulate the practice of a liberal profession, since the professional code of ethics has not yet been harmonised at European level.

According to the Commission, articles 2 and 5 of the above mentioned directive, which forbid comparative advertising that may hinder an offer of services to other architects? clients, prevent more efficient architects to develop their services to the detriment of less efficient ones. Those provisions help crystallizing architects? own clients within each national market. Architects are indeed not in a position to compare their services with other services that are provided within and outside their national frontiers, and to offer them to potential (national or foreign) clients that were already doing business with another architect for a specific project.

In the above mentioned decision (IMA) the EU Commission concluded that those provisions are not necessary to ensure liability, independence and professional secrecy as well as to avoid false or fallacious assertions and conflicts of interest, hence to ensure that members of the IMA do respect the professional code of ethics.

For and against: It would be useful to consider, concerning advertising regulation, whether there should be a general advertising ban in the architectural sector. Moreover, if professional advertising would be authorised, considered if deontologic rules which imposed more restrictive conditions than those provided by the general regulation should be considered.

On the other hand, it must also be considered what type of advertising would be allowed: i.e. general and informative advertising about the qualifications and services offered by the professional of if comparative advertising, or advertising in specific areas will be also legitimised.

Finally, the issue of limiting specialised services offers according to the number of professionals in the specific practice/offer would be another point to consider.

Professional freedom of advertising may be justified by:

- The protection of the consumer because of the informative function of the advertising.

- The guarantee of a real competition in the Internal Market, because it would facilitate access to the market for new members such as young professionals and smaller offices, with certain reservations.
- Its function of technical and deontologic control.

Restrictions to professional freedom of advertising are justified by the need to protect:
- The consumers to whom advertising is addressed, in order to avoid dishonest or misleading advertising.
- The rest of the professional competitors (preventing disloyal advertising), particularly, new entrants and smaller offices, because advertising will always provide greater advantages to the big studios which are already inside the market, having access to more effective publicity resources.
- Other principles and general legal values (like professional deontologic or the honour) which must also be protected.

Conclusion

There may be different national situations each being more or less restrictive. ACE and its members have to be open to these systems, even if they are much more restrictive than reflected in the final statement on "ACE- policy", hereinafter. Justifying these more restrictive positions is the responsibility of those who apply them.

In any case, ACE view is that the general laws concerning advertising and those concrete rules concerning dishonest or misleading advertising, are to be considered as a legal framework sufficient to protect the main interests concerning ethics in relation to professional practice. That is why ACE is convinced that an open system of control should be enough, if it works in a correct and proper way.

Finally, ACE counts on the professional and responsible behaviour of all architects all over Europe, even in those countries where the professional rules concerning advertising are completely open or do not even exist.

ACE-policy concerning ?Advertising":

ACE supports professional freedom of advertising in content, instruments and all types of media, while protecting clients and professional interests by general laws and professional codes of conduct, avoiding dishonest, misleading, disloyal or unfair use of advertising. Examples: active advertising to a potential client shall be prevented when the architect knows that the client is already working with another architect. Or: comparative advertising when it is used against a particular architect, when it makes reference to his studio, to his name and namely his work.

5. Group Practice

Background: In the last decade practice in groups of liberal professions has gained ground. Professional firms have become a useful instrument for this. The different legal systems have given different legal treatments to this issue, creating specific patterns or using general patterns from civil or business legal orders. In all cases we frequently find legal restrictions in order to avoid unwarranted interference by professionals of other fields or by non professional capital owners. These restrictions are basically related to the right to vote and the right to take part in the decision making process. All are to be justified by general interest. Otherwise, professionals who wished to practice in group are at risk of suffering this unwarranted interference.

Levels of protection: Concerning the protection of the architectural profession, there must be two levels of protection, because only one level does not assure that there will not be societies that provide architectural services under other professional names. These two levels are:
- The protection of the title of the company: Possibility of naming the professional company "Architecture society" or "Architecture services society"
- The protection of the work developed by architects, in order to defend the citizens and consumers interests.

The protection of the title: In case of unidisciplinary or pluralisciplinary groups, we should consider the restrictions justified by the general interest, that should be included in any national rule concerning practice in group in the professional field, are those that can assure that those professionals directly related to the object of the firm, do control:
- No less than 50% of the capital
- And no less than 50 % of the votes in the main organs of the firm (for instance, the board of directors).

These two conditions should be considered as cumulative ones.

Protection of the work of architects: In case of unidisciplinary groups, the conditions above, if correctly applied, should be sufficient to assure the protection of the work of the members of the groups.

In case of pluraldisciplinary groups, the protection of the work of architects of the group should not enter in conflict with the fact that the firm is in control of professionals from different fields. So, to satisfy the target

of protecting architectural services, in case of specific decisions concerning missions in the field of Architecture and services to be provided in this field, Architects should have adequate means to influence the decisions of the company.

Legal situation: In its recent Case C-309/99, *NOVA* (not yet published), the European Court of Justice has focused the problem, establishing the general legal criteria on the matter. The Court found that there may be a degree of incompatibility between two professions (lawyers and accountants) and that the professional ethics of the professional organization concerned (the Dutch Bar) should ban multidisciplinary partnerships with the other professions concerned (accountants). These professional rules should safeguard professional's independence, professional's secrecy and avoid conflicts of interests.

ACE understands that the ECJ has concluded that even if all conditions for applying article 81 EC are fulfilled, nevertheless it is not reasonable to apply it (using the American system concerning the scope of application of competition rules known as the doctrine of the "rule of reason"): "however, not every agreement between undertakings or any decision of an association of undertakings which restricts their freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in article 85.1 (current 81.1) of the Treaty. For the purpose of application of that prohibition to a particular case, account must, first of all, be taken of the overall context in which decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organization, qualifications, professional ethics, supervision and liability, in order to ensure the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience?. It has then to be considered whether the consequential effects restrictive on competition are inherent in the pursuit of those objectives." (Point 97).

Conclusion:

ACE concludes from the above mentioned decision that all types of multidisciplinary groups should be accepted, except in cases where there are possible conflicts of interest between the partners/shareholders. These conflicts will arise if the work of the architects is not assured within the necessary independence, within the rules of the codes of conduct and within the respect of the clients needs.

ACE-policy concerning ?Group Practice":

In general, ACE accepts the use of any kind of professional (intellectual) company or partnership, for uni- or multidisciplinary groups, but considers that it is essential to protect the name of the company when using "architectural society", "architectural services" or similar, by imposing two cumulative conditions: architects have to own no less than 50% capital and have to maintain at least half of the votes in the main organs of the company. ACE should promote special provisions to avoid conflicts of interest in multidisciplinary groups and in the case where non-intellectual professions are involved in a practise by holding capital and votes whatever the share is.

6. Registration

Background: Registration is a topic mainly linked to free movement, freedom to provide services and mutual recognition of architects. We know that registration is not the main object of the architects Directive (85/384/CEE), but we also know that this legal instrument provides us with the provisions concerning registration matters, so that barriers to exchange of services and the obstacles to registration in a different country are minimized. Directive 85/384/CEE is the legal instrument to prevent obstacles to trade in services created by Member State laws or administrative rules. So, the European institutions, when approving provisions of Directive 85/384/CEE concerning registration, have admitted that member states can impose compulsory registration or licence for practice in all architectural services. But we are also aware of the second main pillar of the internal market: i.e. obstacles and barriers hindering competition in the internal market and having a private origin in decisions taken by professional organisations, directly or indirectly related to registration and licence issues. So, conditions, terms and limits, imposed by professional organisations should be specified when applying their competences on registration and licensing activities.

Whereas the title of architect is in some EU member states only subject to the diploma in architecture itself and in other states to an additional practical experience with or without practice examination, in most of the states the registration in a state or national organisation is the precondition to use the title ?architect". Registration itself is not the main concern of the architects Directive (85/384/EU) but the creation of such provisions that the exchange of services and the obstacles to register in a different country are minimised. In those countries, where registration is in addition to the diploma the precondition to hold the title, the

architects directive gives the possibility of a ?privileged" registration procedure, only open to those who are covered by the directive.

What is registration of architects?: Registration is a procedure where people educated in architecture meet the conditions, set by law or other regulations, to be listed as architect. Being registered as architect by a chamber or another organisation the architect is entitled to use the title ?architect". Building laws grant to those persons having the title ?architect" the permission to generate and sign those documents necessary for building permits. As the public and the individual client are able to have access to the architects list and to have proof of whether somebody is ?registered" or not, these lists are an element of consumer protection. The provision of such a list is in the public interest as otherwise there is no possibility for anybody to know whether the listed person has a minimum standard of professional education necessary for his/her missions.

The Orders missions are:

- the administration of a board, in order to control the architect?s ability to be/stay registered;
- to assume a disciplinary function and supervise the correct use of the code of ethics (moral standards, professional insurance?);
- to ensure that the architects? rights and obligations are respected, as well as to ensure the supervision of their title.

As a general rule, any professional architect who wants to be registered must prove:

- that he has got a diploma, certificate or any other title that gives him the authorization to practice;
- that his professional morality is beyond reproach.

Other obligations may be added to those legal obligations, such as a professional address, registration fees?

Which national regulations may give rise in this field to strong obstacles to free movement? According to Maria Jose Bicho of the European Commission, "any additional requirements laid down by a professional organisation to those already established by a law to be allowed to practice a profession are forbidden. Such is the case, for instance, when the registration is subject to a successful exam or when the number of trainees is limited, if those measures come to the same result as, for example, a numerus clausus. A professional organisation is also infringing competition law when it applies legal access conditions to a profession in a non objective and discriminatory manner".

Chapter V (articles 17 to 26) of Directive 85/384/CEE of 10-06-1985 makes provision for measures facilitating the effective implementation of the right of establishment and of the free provision of services. In the Vlassopoulou judgement (CJEC 7-05-1991), the European Court of Justice has established the obligation, for the relevant member