ARCHITECTS' COUNCIL OF EUROPE
CONSEIL DES ARCHITECTES D'EUROPE

Practice of the Profession and Trade in Architectural Services

Work Group Competitiveness

Guidance Paper : a Competition Policy for ACE Member Organisations

Final

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I PREFACE

1. This document should provide ACE Member Organisations with the rational for reasonable professional regulation. This applies even to those regulations, which all professional organisations consider vital for the pursuit of the professional activities. Unfortunately, not only the EU Commission but also some national competition authorities seek the revision[1)], if not abolition of quite many of these regulations. In the context of the European internal market, ACE therefore promotes a consistent policy to maintain the national professional regulations necessary for the independent pursuit of the architectural profession, for the benefit of clients and society in general. The special function of architects as liberal professionals is defined in recital 43 of the so-called Qualifications Directive[2a)].

2. This document represents a summary of the so-called "ACE internal Discussion Document on the Impact of Competition Policy on the Professional Practice of Architects – 2" of 2005, which in itself is a revised version of a document from the year 2002[2b)].

3. The statements of the original paper on "Registration"[3)] and "Intellectual property"[4)] are still valid so there is no need for action, particularly as the Professional Qualifications Directive, which regulates the mutual recognition of the professional titles and freedom of establishment, came into effect in spring 2005. Similarly, there exists sufficient and homogeneous regulation on the question of intellectual property throughout Europe, as well as the existing European package of internal market Directives dealing with them.

II INTRODUCTION

4. Architects usually act as liberal professionals. Numerous professions achieve their qualifications and competence not only on technical expertise and practice, but also on ethics and social concerns. This also includes employed architects. According to the Qualifications Directive liberal professions are those practised on the basis of relevant professional qualifications in a personal, responsible and professionally independent capacity by those providing intellectual and conceptional services in the interest of the client and the public[5)]. "Intellectual, creative, innovative and artistic services such as architecture and, indeed, all other creative design services, cannot be treated as being in the same "market" as toilet rolls, for example. As far as I am aware, providers of toilet rolls do not have a strong deontological code that they must abide by as architects have to, in the greater general public interest."[6)]

5. To fulfil the demands of consumer protection and of general interest, the profession of architect is regulated in the vast majority of Member States, which means that as required by national legal requirements the profession cannot be taken up or practised in these Member States without certain specified professional qualifications. This question, if and how these Member States regulate the profession, e.g. via a self regulatory structure of chamber organisations, falls indisputably in the competence of the Member States. However, the pursuance of the professions might be subject to various regulations not related to qualifications, such as fixed minimum prices, advertisement, group practice etc.…

6. In 2002, the EU Commission or rather the DG Competition took up the issue of regulations for liberal professions and has undertaken to evaluate their justification. To this purpose, the so-called IHS study[7)] was commissioned. The Commission intended to test a number of regulations for the liberal professions in the context of the Competition Law:

Fixed prices
Recommended prices
Advertising regulations
Entry regulations
Entry requirements and reserved rights
Regulations governing business structure in multi-disciplinary practices

7. Relying on this IHS study, the Commission evaluated in each member country the intensity of these regulations for each of the liberal professions. The Commission stated in a following report[8)] that some of the professional regulations could lead to restrictions which could eliminate or limit competition between service providers, which could possibly justify their abolition with regard to Article 81 EU Treaty. On the other hand, the report admitted that there could be essential reasons why some regulation of professional services may be necessary. The Commission would not enforce a strict application of Article 81 when dealing with questions of consumer protection, but rather favoured the **proportionality test** (causality test / general interest / substitution).[9)]

8. The Commission was aware of the problem of **"information asymmetry"** between the various participants in the market – a problem, which ACE had identified in its earliest paper to the Commission. Information asymmetry gains considerable importance whenever large and complex orders are placed by uninformed clients, which applies predominantly to building clients. In addition, there are other reasons why some regulation of professional services could be necessary: **"Externalities"**, which could influence third parties, and **"public goods"**, that are of value for society in general. As the report put it, "A poorly constructed building may jeopardise public safety." Furthermore, the report states that "… there is a danger that without regulation some professional service markets might undersupply or inadequately supply public goods".

9. The following three sets of professional rules presented in chapter III of this document have for many reasons been at the centre of most of the recent discussions in the Commission and also the European jurisdiction.[10)] This development has definitely not yet come to an end. Looking back it appears that the legal certainty with regard to professional regulations sought by the ACE at the DG Competition could not yet be achieved. There are many questions left open. Consequently, the following conclusions and targets might have to be adapted to further developments. Even though the Commission has installed a network with the national competition authorities to deal with infringements on the European competition law, the DG Competition itself shows a tendency to target more and more supposed infringements on the European Competition Law by the liberal professions. The lack of a sectoral study[11)] on architecture and the construction industry makes it difficult for the Commission to produce evidence in concrete cases, but doesn't prevent it starting legal proceedings on the European level in the first place. However, in comparison with other liberal professions architects seem to be less regulated. At least, this is the reasonable opinion of the architects who find the level of regulation in other liberal professions like lawyers of pharmacists much higher. Nevertheless, it is doubtful whether the Commission shares this opinion.

III ARCHITECTS AND THE GENERAL INTEREST

10. For good reason, many activities are regulated in a basically free market such as the European Union. Activities need to be regulated to avoid exposing both the individual client or customer and the public at large to unacceptable risk. The risk may be related to health and safety, as with safety regulations, but it may also be related to unacceptable financial risk, as with banking or other financial regulations. Indeed, unacceptable private risk, as when an important financial institution becomes bankrupt, can be unacceptable to society as a whole, both because such serious injustice is intolerable in general terms and because of the consequent burden that falls upon the public purse, the courts and other agencies.

11. Thus, Architects exercise a regulated activity because they give advice to clients that may have important financial, health or safety consequences both for the specific clients and for the public more widely. Architects' activities are regulated by primary law in most countries of the European Union, underpinned by regulations or codes that strictly control their activities. Such regulations, for example, can regulate the way in which Architects may deal with clients' funds or the way in which they may give advice.

12. Nevertheless, the Architects' role is also subject to a further and more complex set of considerations.[12)] There are many circumstances in which the Architect is required to place the client's interest before his or her own interests. It is essential for an Architect to advise clients of their own best interests rather than merely to promote a particular personal interest, for example in the use of a particular material or contractor. Moreover, the Architect must be in a position to advise the client of their best interests with the project as a whole in mind, for example in relation to lifetime costs, rather than to give short-term, short-sighted advice.

13. The status of the liberal professional is reinforced by the obligations that the Architect also holds to society as a whole. The Architect is not merely a "mouthpiece" for a particular client. The Architect has specific duties towards society as a whole which can involve taking account of broader needs than the immediate commercial gain of the client, warning of undesirable consequences from a course of action and, of course, always acting honestly and impartially, especially in those circumstances where it is contractually necessary to do so. In many circumstances in the construction industry it is necessary for matters to be decided, for example, in relation to fair payment or construction quality, not in a biased way but in a way that brings professional skill and knowledge to bear in order to reach a fair assessment of a particular situation which can readily be accepted by other parties and adopted in order that progress can be made with a particular task.

14. Hence, the Architect must have a lengthy and complex study and training period, must develop experience in practice, and must have an innate ability to deal with economic and practical issues as well as aesthetic considerations. All these talents may be summarised in the description of the "liberal professions" set out in Directive 2005/36/EC (at recital 43): "… those practised on the basis of relevant professional qualifications in a personal, responsible and professionally independent capacity by those providing intellectual and conceptual services in the interest of the client and the public."

For all these reasons the profession of the Architect must be considered to be not only a regulated activity but also a liberal profession.

15. Furthermore, extending the tasks of both the regulated activity and the liberal profession, the Architect has the role of **cultural and environmental defender**. The Architect has a unique training not only in the technicalities of construction and the practicalities of administration but has developed an aesthetic sensibility and an understanding of environmental considerations. Four to five years of disciplined study at university level do not, of course, create a uniform profession of geniuses. It does, however, inculcate knowledge of history of art and architecture as well an underlying grasp of history and cultural qualities. It also instructs in the wide range of environmental issues, both long term and short term, which need to be understood if the planning, development and construction processes are all to be effectively managed for the benefit of society as a whole, over the long term.

16. This special role of the Architect as a cultural and environmental guardian has been recognised for very many years in the law-giving procedures of the European Union, for example in the former so-called Architects Directive 384/85/EC, the preamble of which sets down the proposition that "… architecture, the quality of buildings the way they blend in with their surroundings, respect for the natural and urban environment and the collective and individual cultural heritage are matters of public concern." The new Qualifications Directive 2005/36/EC modifies this principle only slightly.[13)] The Council Resolution (2001/C 73/04) of 12 February 2001 on architectural quality in urban and rural environments affirms that “architecture is a fundamental feature of the history, culture and fabric of life of each of our countries; that it represents an essential means of artistic expression in the daily life of citizens and that it constitutes the heritage of tomorrow” and that “architectural quality is a constituent part of both the rural and urban environment”

17. At a meeting between ACE and DG competition in 2002, the responsible representatives from DG Competition pointed out that the only justification for professional **Codes of Conduct** was consumer protection. While ACE, of course, recognises that there are wider issues in Codes of Conduct than consumer protection, this statement highlights the importance of an overt rather than an implied emphasis in national Codes of Conduct on consumer protection. A particular example of this is the recognition at commission level and also by Competition Authorities and competition economic theory of the importance of the principle of information asymmetry.

18. A distinction is usually made between the uninformed consumer and the large buyer of professional services. An uninformed consumer is often defined as the client doing work to his or her home etc. However, even large and consistent buyers of professional services often do not have adequate information on charges and the scope of services to be provided. In the commercial sector many small and medium sized enterprises have similar difficulties in the definition of services and appropriate charges. Attempts by the Commission and by national competition authorities to restrict the issue of consumer symmetry to the domestic or small scale commercial client should be resisted.

19. A further example of how consumer protection affects architects’ policies is the question of qualifications. In discussions about consumer protection it is easy to overlook the fundamental role that all the ACE member organisations play in consumer protection by ensuring that architects have appropriate qualifications and the skills necessary to provide an adequate service to the public. At fundamental level a member of the public is in entitled to know that a person holding himself out to have a particular skill or expertise should have adequate qualifications, trainings and skills in this area.

20. There are five key elements in any consumer protection policy for professional services;

1. Qualifications
2. Information on services
3. Information on costs
4. Effective complaints handling
5. Redress

21. As noted above, adequate **qualifications** are the foundation of any effective consumer protection in the area of professional or indeed other services.

22. A consumer should have access to clear, jargon-free **information on the general services** provided by an architect, description of the various stages of the work, definition of the architect’s responsibilities and definition of the client’s responsibilities.

23. All **cost information** must be directly related to the amount of work and period of delivery and transparent to the consumer.

24. Consumers should have access to timely and **effective complaints handling procedures**. Complaints procedures should include general advice to consumers, informal mediation and alternative dispute resolution systems as well as the option of formal complaints about poor professional performance. Most of the professional organisations offer arbitration and / or mediation procedures.

25. **Redress** is the most difficult area for consumers and professionals. Whereas professional indemnity insurance provides protection to the consumer in the event of serious or significant loss, professional indemnity insurance is usually too complex and inappropriate for cases of poor professional performance, which usually have the greatest impact on the small scale consumer or consumers in general. Some ACE member organisations have provisions for fines or return of some or all of the fees paid, or the provision of services at no cost to the consumer in rectifying the particular fault. Even though in some EU Member States professional indemnity insurance isn't mandatory, the reality is that almost no architectural practice is without such insurance.

26. It is obvious that all participants in the construction process must share in the responsibilities and partake in an **indemnity system**. The architects' professional indemnity insurance cannot be more than one element in this system, which must be available to the consumers.

IV PROFESSIONAL RULES

IV – 1 Cost Information Systems - CIS

27. Target for CIS: The European professional organisations of architects are of the opinion that all CIS protecting general interest criteria are justified and should be excluded from the scope of enforcement of competition rules. Regardless of the fact that there are different types of CIS protecting the general interest using different methods, all of them are useful and not contrary to competition law. Furthermore, ACE shall continue working to find the best methodology, taking into account the Commission proposal based on historical data, but having always in mind the general interest and the consumer protection.

28. All types of CIS are to be considered as information systems containing valuable data on average services for clients and are recognized as very useful instruments for estimating intellectual performance and preventing situations where the quality of intellectual services is reduced by inappropriately depressing the correct level of resourcing for a project.

29. Assessing the possible advantages and disadvantages of using CIS, the advantages for the consumer and society in general of having access to those information systems, as described at national and regional level, outweigh the possible disadvantages.

30. Undoubtedly the DG Competition is currently focused on the issue of fee scales. The question is, how far will the Commission go: Its activities against fee scales with binding minimum and maximum fees are just a stepping stone (after the fee-case of the Belgian order) to eliminate all regulations analyzed in this document one after the other. However, up to now the European Parliament has taken another view on fee scales.[14) and 15)] It is vital to agree a consistent European Architects' policy against the Commission's handling of the fee issue and to demonstrate support of fee scales as one acceptable CIS.[16)]

31. Due to the fact that two Communications on Competition in professional services by the EU Commission[17)] contain anything else but a clear position, the legal uncertainty still continues in respect of regulations concerning cost information systems (hereafter CIS). These two papers neither specify the EU Commission position concerning the content of the different existing CIS in Europe nor their compliance with the EU competition law. As a result, the political and legal aspects are extremely unclear. The said papers lack precision because the EU Commission itself lacks adequate knowledge and experience of the existing national systems.

32. However, the **EU Commission** demands from the professional organisations and national authorities an analysis of all existing regulations on CIS. In this situation, with no economic analysis of the market and without answering the main legal and technical questions, professional organisations of architects can only point out the present risks as appropriate and the global protection of the general interest.

33. In its two Communications, the EU Commission has accepted the well known **principle of "information asymmetry"** in the **scope of consumer protection policies**. ACE considers this statement as regarding mainly the compatibility of CIS with competition law. This principle concerns

protection of the so-called uninformed consumers. Regardless of the characteristics of those consumers (public or private, small, medium or big ones) this statement of the EU Commission is important because consumers must have the possibility of having information on the content of the professional services offered, giving them at the same time minimum references to assess costs.[18)]

34. But it has to be said that CIS works as a useful instrument not only in consumer protection policies, but also as useful **data for professionals themselves**, for **administrative entities** at all levels, when launching **public procurement services**, or for **judicial authorities**, when dealing with litigation on professional fees. In fact, the CIS are necessary for **general information**. Finally the CIS are necessary to ensure that services are always to assure the general interest, including **information, transparency, quality, health and safety**, and to allow clients/consumers to make a reasoned choice in terms of benchmarking the level of quality/satisfaction offered for the price.

35. It is essential that such a system defines not only the professional fees to be charged, but also the content and the type of the service to be provided. The respective fee frames, rules, parameters, coefficients and related formula must be defined and correctly applied. Otherwise, CIS will be useless. In addition, the various professional tasks or missions must be defined with regard to categories and levels of difficulty, phases and levels of performance (complete or partial services). The information may be based on statistical surveys or polls among professionals. It is vital to safeguard that the data sources as well as the methodology are acceptable to third parties. Only those CIS containing this information will have an informative function and therefore be of general interest.

36. How to provide such information is an issue to be decided by the **national authorities** and **professional orders**, taking into account the national professional specificities and regulations. The calculation method is of lesser impact on the issue of competition policy. If, the specified frames and coefficients based on square meters or cubic meters enclosed space, levels of difficulty, reference cost estimates, lump sum prices have been determined with the utmost independence and objectivity, they do not affect competition policies and should therefore not be a concern of competition authorities.

37. In fact, at national level there are different ways to assure information systems. In some instances this information is given by a precise CIS, containing not only the professional fees for each service provided but also the content of the different parts of these services and the formula to calculate the costs. In other cases, there are only statements in the code of ethics or on the general conditions for architectural contracts. These statements imply taking account of the reasonableness of fees, stating at the same time that the cost must be estimated with regard to the contracted task/mission, specifying that the cost is directly related to the amount of the work and period of delivery. In other countries professional organisations are using statistical studies on fees being charged. Those statistical studies deliver information on hourly rates charged for services, specifying at the same time the various levels of qualifications and professional experience of professionals, also information about regional differences, types of works, types of contracts and financing. Graphic representations can deliver the physical value on one axis and the percentage of the reference fee charged by the individual service provider on the other axis.

38. There are recent developments concerning CIS: In Ireland the Royal Institute has come to an agreement with the Competition Authority on the question of the so-called “historical fee data”. The Royal Institute has evaluated and followed the recommendations of the Follow-up Report and has surveyed historical data.

IV – 2 Advertising

39. Targets for Advertising: European architects should support freedom of profession-related 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.[19)]

40. Some restrictions can be justified with regard to protection of consumers. Restrictions on advertising are also justified on other grounds such as deontology and ethics.[20)]

41. ACE member organisations need to be aware of the different policy options[21)], including those which are more restrictive than the target mentioned above. Justifying these more restrictive policies is the responsibility of the individual member organisations.[22)]

42. Professional freedom of advertising may be justified by:

- Consumer protection by the informative value (asymmetry of information) of advertisements and
- the guarantee of a real competition in the Internal Market, because it would facilitate access to the market for young professionals, new entrants and smaller offices.

43. Restrictions to freedom of professional advertising can be justified by the need to protect:

- the consumers to whom advertising is addressed from dishonest or misleading advertisements,
- the profession in general (preventing unfair advertising), particularly new entrants and smaller offices, because advertising will always provide greater advantages to the large organisations which already operate in the market and have access to more effective publicity resources,
- other principles and general legal values (deontology issues) which must also be protected.

IV – 3 Multi-disciplinary Practices

44. Targets for Multi-disciplinary Practices: Generally, any kind of professional (intellectual) company or partnership, for single- or multi-disciplinary groups is acceptable, as long as the following seven principles are respected:

1) The independence of the work of the architects must be guaranteed.
2) The company's services are limited solely to professional services.
3) The vast majority, if not all members of the professional firm must be liberal professionals.
4) The strong personal responsibility characteristic for the provision of services by liberal professionals creates the necessity for sufficient representation in the management of the professional firm.[23)]
5) All professional members of a registered multi-disciplinary professional firm must be listed in their respective professional register.
6) Professional firms must obtain insurance cover against risks from planning, consulting, supervision and coordination defects.
7) Details about the "organisation" of the votes or shares necessary to assume the legally protected title must be defined and regulated according to consumer protective interests.

45. The independence of the architectural work in multi-disciplinary practices is a vital precondition for the performance of architects. The European Court of Justice has confirmed the possibility of safeguarding the independence within professional firms of a specific professional group subject to specific professional codes (e. g. architects) in order to guarantee the control over the work and independence for specific professional tasks.[24)] All types of multi-disciplinary groups should be allowed, except in cases of possible conflicts of interest between the partners / shareholders. These conflicts will arise if the independence of the architects is not assured within the rules of the codes of conduct and the clients' needs.

46. In the last decade practices in **multi-disciplinary groups** of liberal professions have gained ground. Professional firms have become a useful instrument for this. The various legal systems have given different legal treatment to this issue, creating specific forms or using general forms from the civil or business law. Specific forms are special legislation for professional firms having regard to the characteristics of liberal professions (e. g. Germany and Spain), whereas forms from business law as joint-stock architectural firms, treat them the same way as any other joint-stock companies. The latter type of company usually is (additionally) listed with the regular commercial registers.

47. In the following, the term professional company or professional firm is applied solely to those firms which provide **"classical" professional services** such as design, planning and construction monitoring without additional commercial interest and activities. Firms providing commercial services, e. g. practices engaged in building and construction are definitely not professional firms and therefore not subject to the following.

48. The increasing demand to register as a professional firm is not matched by respective provisions: Most professional codes as well as architectural legislations contain no provisions for such firms. What are the reasons for the increasing interest in register as a professional firm? The most important objectives are to **limit liabilities** and to use the positive results of the synergy between offices. Furthermore it seems possible to enlarge the scope of marketable services in a professional firm by including other liberal professions to facilitate flexible and progressive market action.

49. The following text cannot deliver solutions to all these questions, because in most cases it is up to the legislator to deal with them. Nevertheless ACE should promote the (following) **necessary principles** which should reflect the basic thinking for the **transposition of rules** concerning the implementation of a firms' register with the professional organisations.

50. First principle: In the case of multi-disciplinary groups, the **independence of the work of architects** and control of the architectural missions of the group should not come into conflict with the fact that the firm is under control of professionals from different fields. So, to protect the independence of architectural activities, 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.

51. Second principle: The integration of liberal professionals from other branches in a professional firm must serve a **non-commercial goal**, **other than professional services**. There are a number of positive effects: On one hand, such a performance-oriented group will not tolerate self-complacency of its members. On the contrary, the members will check and encourage on each other. The character formation of the members of this group will be developed. On the other hand, the cross-professional cooperation enhances the firm's competitiveness in comparison to commercial service providers, because nowadays business, public and private clients alike expect full-service of different professionals from one source (see also general planning, single point of contact, one-stop shop …).

52. Third principle: The vast majority, if not all members of the professional firm must be liberal professionals. The firms' registers at the professional organisations must see to it that solely members of liberal professions form professional firms to carry on their professions and must make sure that these firms don't carry on other trade services. The **majority of members** of such professional firms should consist of **natural persons** to avoid dominating (anonymous) capital participation. Even if such financial participation is necessary for the development of the professional firm, it must never be allowed to supplant the liberal professional performance of services by commercial ones. To maintain creditability in the independence from commercial interests of such professional firms as well as their commitment to professional codes, only those providers of professional services may form a professional firm, who are subject to such professional codes.

53. Fourth principle: Independent work procedures and competences are vital to avoid conflicts between the members of a professional firm. This objective would require the right to **participation in the management** of the professional firm. Without **substantial** participation of architects in the management, a multi-disciplinary architectural firm will not take sufficiently into consideration the architects' interest in the task.

54. Fifth principle: Due to the fact that the personal responsibility for the services cannot be replaced by a company responsibility, **all responsible members of a multi-disciplinary professional firm must be listed in their respective professional registers**, so they remain subject to the surveillance of their individual professional activities, and are with regard to their clients still committed to the codes of conduct of their respective professions. Furthermore, in many cases the performance of professional duties is closely connected with the individual qualities of the architect and cannot be transferred to the professional firm.

55. Sixth principle: On one hand, there exists a desire to limit liabilities, which in most European countries are onerous. If liberal professionals form a professional firm, as a rule they can obtain **professional liability** insurance against risks from design, planning, consulting, supervision and coordination defects. This is a privilege which is not available to commercial firms, which can only obtain insurance against the consequences of their faulty actions, but not against the actions themselves.

56. Seventh principle: **definition of minimum requirements for the assumption of a legally protected professional title by a professional company.** The individual assumption of a professional title depends on the professional qualifications of the aspirant. With regard to consumer protection, a professional company could probably use the term “architect” or “architecture”, as long as an essential share or a majority of its owners or stakeholders are architects themselves. Details about the “organisation” of the votes or shares necessary to assume the legally protected title must be defined and regulated according to consumer protection interests.

V FOOT NOTES

1) Council Regulation (EC) No 1/2003 of 16 December 2002

2a) Directive 2005/36/EC:

“To the extent that they are regulated, this Directive includes also liberal professions, which are, according to this Directive, those practised on the basis of relevant professional qualifications in a personal, responsible and professionally independent capacity by those providing intellectual and conceptual services in the interest of the client and the public.”

Further definitions:
- European Court of Justice, 11 October 2001 - C-267/99 (Adam Case): “…the liberal professions (…) are activities which, inter alia, are of a marked intellectual character, require a high-level qualification and are usually subject to clear and strict professional regulation. In the exercise of such an activity, the personal element is of special importance and such exercise always involves a large measure of independence in the accomplishment of the professional activities”.
- OECD: "A liberal profession is characterised essentially by moral and financial independence, a high level of education and practical training, and a code of conduct."
- CEPLIS: To guarantee the public and the clients’ interest - companies require as much protection as individuals regarding the quality of services offered -”regulations, including sanctions, are necessary to maintain the inseparable moral and financial components of independence.”

2b) “An ACE Discussion Document on Competition Policy and Professional Practice of Architects”, 25 June 2002.

3) **ACE Conclusion on Registration (16 July 2002):** „ACE considers that registration and licensing, permitted by Directive 85/384/CEE, is an essential way of protecting the public interest. ACE understands that national laws and rules of professional organisations must be applied in an effective way, not imposing discriminatory conditions based on nationality or other unjustified conditions and that a term of three months for final decisions concerning registration should be respected. When architects must register in a second regional register of the same member state the procedures should be straightforward. Linked to this, ACE considers that adequate resources through fees should be allowed for every registration or licensing organisation. Finally, ACE considers it necessary to create and maintain registers for professional firms, of which the owners of course should additionally be registered in the individual register, without having financial disadvantages.”
ACE Policy Concerning Registration (16 July 2002): “ACE supports a policy of its member organisations to ensure the efficient application of the Architects Directive and promotes registration rules that do not impose discrimination. Registration procedures should be transparent and simple when architects must register in a second regional register. ACE considers it necessary to create and maintain registers for professional firms, of which the owners of course should additionally be registered in the individual register.”

4) **ACE Conclusion on Intellectual Property (16 July 2002):** „As the subject intellectual property is harmonised up to a high degree within the EU member states, there should be no distortion of the competition rules in the internal market.”
ACE Policy Concerning Intellectual Property (16 July 2002): “ACE considers that generally national laws assure an appropriate level of protection of authors’ rights and is aware of the status quo arrived at for the

European Union internal market. However, there are some additional implementation measures that need to be taken by the professional organisations and that should be useful and justified."

5) DIR 2005/36/EC on the recognition of professional qualifications, Recital 43

6) John Wright: "Quality versus Procurement and the Market", December 2005

7) Research Report "Economic impact of regulation in the field of liberal professions in different Member States – Regulation of Professional Services", Final Report – Part 1 by Iain Paterson, Marcel Fink, Anthony Ogus and others, Institute for Advances Studies (IHS), Vienna, January 2003.

8) Communication from the Commission – Report on Competition in Professional Services COM(2004) 83 final, Brussels, 9 February 2004.

9) e.g. European Court of Justice, 3 October 2000 – C-58/98 (Corsten Case)

10) The European Court of Justice is the only European institution giving some legal certainty on those matters. On 29 November 2001, it stated that non binding CIS do not affect competition and, consequently, should be not forbidden by competition law (ECJ, 29 November 2001; Case C-221/99; Conte/Rossi). Therefore, when CIS are non binding, there are no effects on competition or their effects are insignificant. Consequently these types of professional decisions should be not judged within the scope of article 81 EC Treaty. In other case law, on binding charges fixed for lawyers in Italy, the European Court of Justice has stated that: "the fact that a Member State requires a professional organization to produce a draft tariff for services does not automatically divest the tariff finally adopted of the character of the legislation". Therefore, in the case of binding CIS covered by law, even when elaborated by the professional organization, the ECJ considers that in some cases there is scope for some exclusion from article 81 ECT. Finally, in its decision Autotransporti Librandi the Court established that: article 81 EC Treaty does not preclude this legislation "… 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 …"
See: European Court of Justice – C 35/99 (Arduino Case), point 36, and European Court of Justice, 1 October 1998 – C 38/97 (Autotransporti Librandi Case)

11) Even though the ACE tries to produce reliable data from all over Europe and to give at least an oversight on the situation in the individual European countries, the amount of work seems to be insurmountable. However, a reliable database is absolutely vital to achieve more precise statements from the Commission. It is worthwhile mentioning that the ACE, for many years and on several occasions, requested that the Commission should take appropriate steps to ensure that EUROSTAT would collect relevant, reliable and meaningful data on professional services including, in particular architectural services or at least to establish an appropriate methodology. Unfortunately, this has not happened and EUROSTAT continues to publish useless data in that respect.

12) Architects have a special role to play within the European Union in both the economic and cultural context. As ACE puts it: "Society is increasingly demanding as to building quality, in terms of structural safety, fire protection of property and persons, as well as other aspects related to welfare, such as acoustic protection, thermal insulation, or accessibility by disabled persons. … The architectural domain has progressively extended to the living environment and its objects. From buildings, architecture invested itself in public spaces (streets, squares), civil engineering structures (bridges, tunnels, earth retaining, etc …) parks and gardens. Today, the cities are the subject of much attention, including that of the architect who has his "raison d'être "and legitimacy in "urban design". More recently, the wider landscape and its territorial scale have been recognised – thus embracing infrastructures (roads, motorways, canals, railways, etc …) – as architectural objects. Social and functional mixing is an answer to contemporary problems of urban renewal. At the same time, and this for a number of years, the field of intervention has considerably widened to include new fields and data : amongst others the high environmental quality, social housing policy, leading-edge technology such as motorcars, shipbuilding, aeronautics, but also more recently, data processing and genetics, … All those fields lead to as many specialisations, or even practices." Extract from ACE Architect's Profile Professional Practice Reference Document adopted GA November 2003

13) Directive 2005/36/EC Recital 27

14) The European Parliament in its 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". Apparently for the European Parliament non binding fees are not under the control of the competition authorities. Source: Resolution PE 303.070 B5-0247/2001

15) On 23 March 2006 the European Parliament has adopted a resolution on the legal professions and the general interest on the functioning of legal systems. The European Parliament therein "… considers that fee scales or other compulsory tariffs for lawyers and other legal professions … are justified by the pursuit of a legitimate public interest … (when) Member States actively supervise the involvement of private operators in the decision-making process. Source: Resolution P6_TA-PROV(2006)0108 B6-0203/2006

16) The Commission's proceedings against the **Ordre des Architectes de la Belgique** (in 2003 / 2004) demonstrated again the Commission's unwillingness to consider in detail the positive influence of professional regulations on a specific market: The Belgian Order was fined by the Commission for publishing on its website a reference to a fee scale "as a guidance". There was no obligation to use it, nor was indicated, that it was a minimum fee scale. Source: Décision de la Commission de 24 Juin 2004 concernant COMP/A.38549, notifié sous C(2004) 2180.

17) See also 7) and Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Professional Services – Scope for more Reform (Follow-up to the Report on Competition in Professional Services, COM(2004) 83 of 9 February 2004), COM(2005) 405 final, Brussels, 5 September 2005 / Commission Staff Working Document – Progress by Member States in reviewing and eliminating restrictions to Competition in the area of Professional Services SEC(2005) 1064, Brussels, 5 September 2005.

18) Experience with quality-surveys shows consistently that providing the architect with a fair and not-below cost fee results in good planning quality and it is this planning quality that the consumer expects. All CIS 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 a high level of services is fulfilled. Given that the architectural practice is considered to be an undertaking, other relevant rules and logical reasoning that apply to such must also apply to the architectural practice, notably in terms of obligation to manage the firm in a sound economic manner and to ensure adequate profit margins, that also allow to (re)invest in research and innovation. Source: Design and Documentation Quality Survey – A Survey Investigating Changes in Design and Documentation Quality with the Australian Construction Industry and its effect on Construction Process Efficiency. Tilley and McFallan, 2000.

19) 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.

20) European Court of Justice, 28 March 2003 – T 144/99 (IAA Case)

21) For example, architects are allowed to advertise and to present their services on an individual basis as well as collectively with other architects. Advertising would include information on projects, skills, services, rates and conditions on request (passive advertising). They would also communicate this information on their own initiative and without prior demand (active advertising). However, architects would not be allowed to offer their services to a specific (potential) client without being requested to do so, when they are aware of the fact that a client is in contact with another architect at that time for the same services.

22) 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" herein. Justifying these more restrictive positions is the responsibility of those who apply them. In any case, ACE's 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 of ethics in relation to professional practice. That is why ACE is convinced that an open system of control should be adequate, 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 about advertising are completely open or do not even exist.

23) Generally speaking, with regard to ownership and votes, different examples could be envisaged:
- Example no. 1: Architects have to own no less than 50% of the capital and have to maintain at least half of the votes in the main organs of the company (original proposal voted by the General Assembly in 2002).
- Example no. 2: Architects have to own a substantial percentage of the capital and likewise of the votes of the capital holders/shareholders (alternative proposal). If so, professional companies are compelled to publicly declare the fact that and how many of the shares are held by non-professionals. Architects have decisive power in the management of the company's department dealing with architectural tasks. One of the executive managers of such a company must always be a registered member of a chamber or professional association of architects.

24) European Court of Justice - C-309/99 (Wouters vs. NOVA Case)