



ARCHITECTS' COUNCIL OF EUROPE  
CONSEIL DES ARCHITECTES D'EUROPE

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## Practice of Architecture and Trade in Architectural Services

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Follow-up Report on Competition in Professional Services

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Position Paper

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Draft – 18<sup>th</sup> November 2005

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### Introduction

Following the recent publication, by the Commission, of the follow up Communication on Competition in Professional Services (COM(2005) 405 final), the ACE wrote to the Commissioner responsible, Neelie Kroes (NL), expressing its concern about the content of the report. The report was accompanied by a Staff Working Paper, which essentially repeats much of the same arguments as exist in the original Communication of February 2004.

In the letter, the ACE stated that it would write an elaborated commentary on the new document in due course. What follows is the announced elaborated commentary .

### Summary

The ACE is concerned that the follow-up Communication continues to rely on the flawed IHS Study on regulation of professional services, that its analysis of the public interest is over-simplistic, that it fails to recognise the valuable public service that architectural bodies (such as Chambers, Orders, Regulatory Bodies, Institutes and Associations) perform, that the concept of the client is misunderstood and that the analysis is not sufficiently based on respect for the public interest.

The ACE believes that the time has come to undertake a well-founded, properly resourced and thorough Sector Study of the architectural profession in order to ensure that the future policy developments will be evidence based and founded on the principle of acting in the public interest. The ACE, being a well-organised and fully representative organisation for the profession in the EU, is well placed to be the central actor in any such study.

The ACE supports the underlying objective of the work of the Commission to seek to ensure that regulation in professional services is proportionate, objectively justified and in the public interest. It recalls that architecture and hence the provision of architectural services, is a matter of fundamental public interest as it is a service that is central to the creation of a quality built environment in which the functions of society take place. Therefore a profound understanding and reasoned impact study of the effects of any legislative or regulatory result of the current work of the Commission is an essential step in the process towards the achievement of the objectives of the European Union in this subject area.

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## Position of the ACE

1. The Architects' Council of Europe (ACE) has taken note of the publication by the Commission of its follow-up Communication entitled "Professional Services – Scope for more reform" (COM(2005) 405 final) which constitutes its follow up to the report on Competition in Professional Services issued on 9<sup>th</sup> February 2004. The ACE also notes the publication of a Staff Working Document entitled "Progress by Member States in reviewing and eliminating restrictions to Competition in the area of Professional Services."
2. The ACE was concerned about the content of the first Communication on the topic of Competition in Professional Services and it has been proactively involved with the DG Competition in debating the issues arising from that Communication. It is not reassured by the contents of the follow up report and the Staff Working Document and this Position Paper sets out the reasons underlining that concern.
3. There are a number of matters of fundamental concern to the ACE in relation to the ongoing work of the DG Competition in the area of Professional Services. These include:
  - a. The continued reliance by the Commission Services on the study carried out by the Institute for Advanced Studies (IHS), Vienna in 2003 on the subject of Regulation of Professional Services. Many affected stakeholders, including the architectural profession, have repeatedly stated that the methodology on which the IHS Study is based is flawed. This means that the results of this study and the conclusions that it has drawn are unreliable foundations on which to build legislative or policy proposals at EU level.
  - b. The Commission and its services, among others, persists in misunderstanding or failing to grasp the fact that the specific features of Architectural Services mean that the usual rules of Competition law can not be applied to them. The International Construction Client Forum, in a follow-up to its meeting of November 2004, acknowledged this fact when it stated that: "The adage "competition is good, more competition is better" from other industries seems therefore to be oversimplified when it comes to the building and construction industry"<sup>1</sup>. In annex to this Position Paper is a brief explanation of the nature of Architectural Services intended to inform the reader of the specific characteristics of the profession.
  - c. The fact that the public service role (as distinct from any service to its members) of architects organisations (Chambers, Orders, Registration or Professional Representative bodies) is not acknowledged. These bodies play a key role in informing the public about the nature of service that can be expected from an architect and are principally motivated by the public interest in their actions in relation to the profession.
  - d. The ACE finds that the analysis of the market for architectural services is over-simplistic in its division of clients into small and large businesses (whether public or private) and individuals. The difficulties faced by an "ill-informed" client affect most clients regardless of size or legal structure and those clients that can be considered to be well informed have only become so through experience. Therefore the conclusion that only individual clients (and maybe small companies) need guidance or protection through regulation is flawed.
  - e. The emergence of the European Competition Network, being a forum for the National Competition Authorities of the EU Member States is a serious concern to the ACE as its actions appear to be motivated solely by the implementation of pure competition theory and not at all by the broader public interest. This imbalance needs to be questioned, addressed and reversed – all conjoint actions at European level should be carried out in the interest of the general public and for the betterment of the quality of life for all.
  - f. The inconsistency being displayed by the Commission in the fact that one of its Directorate Generals is attacking the architectural profession and its practices (DG Competition), while another has put the profession forward as a spearhead profession in

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<sup>1</sup> To download the source document go to: [www.scri.salford.ac.uk/activities/portals/revall/papers/rc%20george%20ang.doc](http://www.scri.salford.ac.uk/activities/portals/revall/papers/rc%20george%20ang.doc)

the negotiation of international mutual recognition agreements (DG Trade) because of its advanced approach to the opening up of markets for the profession at a global level and its extensive network of contacts and influence as the region of the world with the best organised and represented architectural profession is not tenable. In its work towards creating more credibility for the EU, it would be beneficial that such contradictions are eliminated.

4. Furthermore the ACE is particularly concerned to see that it has been, at this early stage in the process of bi-lateral consultations, quoted as a source of information on the percentage of work carried out by architects for business, public sector and households. As if this accurately reflects the situation in the EU, which it does not. This information was never officially communicated to the Commission, cannot be relied on as reflecting a true European situation and was mentioned as a single example from a single Member State during a meeting at the Commission Buildings. The concerns of the ACE arise from the fact that printing this information gives it the weight of an official estimate when the figures published are not based on any reliable research.
5. The Architectural Profession is involved with the conception and design of the Built Environment within which the citizens of Europe work rest and play. It has been repeatedly demonstrated that the quality of the Built Environment impacts on productivity, competitiveness and well-being. Furthermore many of the public health and safety factors that impact on society arise from the way in which the Built Environment is conceived. Therefore Architectural services can be considered to be of great importance to the public interest and to society at large as significant social coherence can be achieved through sustainable architecture and urban planning approaches. This concept of the public interest aspect of architecture features in several pieces of European Union legislation and has been specifically referred to in Recital 27 of the recently published horizontal Directive on the Recognition of Professional Qualifications (2005/36/EC). This recital states:  
*Architectural design, the quality of buildings, their harmonious incorporation into their surroundings, respect for natural and urban landscapes and for the public and private heritage are a matter of public interest.*  
Therefore, the ACE calls on the Commission to more consistently take this crucial aspect of architectural services into account in its work on competition in professional services.
6. As such it is crucially important that persons providing architectural services are fully qualified in all matters relating to the profession, are permitted to act independently of vested interests and are permitted to ensure that they are adequately resourced in order to carry out their work. When the significant asymmetry of information (whereby architects, through their education & training, know more about the services than their clients) between providers of architectural services and recipients of architectural services is added to this situation, it becomes critical to ensure that the way in which the provision of architectural services is regulated permits the protection of the public interest.
7. The ACE read with interest the section of the new Communication on better defining the public interest. It agrees with the Commission when it says that there is a need to refine and deepen the economic analysis of the professional services market and, in particular, to give more consideration to what is meant by public interest in different markets. This statement by the Commission strikes a chord with the architectural profession and it represents an admission by the Commission that its understanding of the topic is weak.
8. The ACE remains convinced that the time is right for a comprehensive sector study, under the responsibility of the Commission in close co-operation with the profession, that will provide a reliable database of knowledge on the exact nature of the market for architectural services and on the way which those services are provided across the EU. The undertaking and analysis of such a study are an essential prerequisite to the work now under way in DG Competition. Such a study should not use artificial indicators for the level of regulation of the profession but should look at the actual situation in each Member State, developing a sound knowledge of the sector on which all

affected parties can agree through their involvement from the earliest stages of the study including the preparation of the specifications and methodology for the study in accordance with the better law-making approach.

9. The architectural profession remains committed to the notion that a high quality, value for money service needs to be available for the benefit of all. Therefore, it believes that there may well be scope for the elimination of some existing regulation and for its replacement by better regulation. It therefore remains available to take its part in the work necessary to achieve this objective..
10. The ACE finds the analysis contained in the follow up Communication of the different sectors using professional services as being naïve and simplistic. It mentions small and big business, individual consumers and the public sector. The picture for architectural services is significantly more complex as the definition of who is the consumer of architectural services is not resolved. When talking about architectural services and the product arising from their provision, there are at least 3 categories of consumers that need to be considered:
  - a. The purchaser of the service, usually called the client. This person or body may or may not occupy the constructed work arising from the provision of architectural services and their expectations will differ depending on whether they are a public or private entity.
  - b. The user or occupier of the buildings resulting from the provision of architectural services. These are usually not the same person or body as the client mentioned in point (a) above.
  - c. The general public must be considered as consumers of architectural services as they occupy the spaces between buildings, use public buildings and generally spend significant proportions of their time in and around works of architecture. They also pay, through taxes, for all public works.
11. The ACE therefore believes that a deeper analysis of who constitutes the user or consumer of professional services (and specifically architectural services) needs to be undertaken and that the results of the analysis must inform any policy or legislative developments that the Commission may be considering to propose as part of its work in this area.
12. The ACE is concerned at the quantitative approach being taken by the Commission (or at least implied by the report) to the question of regulation. The report gives the impression that Member States are only making progress when they eliminate measures that the Commission judges, using only economic rationalism as its tool for measurement, affect competition in professional services. This approach has not been demonstrated to be effective and has the potential to seriously undermine the public interest if it is pursued in professions where the public interest and quality of life is directly affected by its provision of services.

## **Conclusion**

In conclusion, the ACE remains seriously uneasy about the potential benefits of the current work in DG Competition on the subject of competition in professional services. This is principally due to the obvious lack of reliable data, a clear lack of impact analysis on the public interest and on a poor understanding of who is the client (consumer) of architectural services.

The ACE therefore calls on the Commission to radically reconsider its approach to this topic and to engage in more meaningful dialogue with the affected professions funding, as necessary, sector studies to give a firm and well founded basis for further work in this field.

**ANNEXE:**

**To the Draft Position Paper of the Architects' Council of Europe on  
The Communication of the European Commission on Competition in Professional Services  
(COM(2005) 405 final)**

**A.0 The Nature of Architectural Services**

- A.1 Architectural services form an essential part of professional services in Europe, especially in the construction sector (currently worth about €910 billion annually to the economies of the EU-15) in the conception and realisation of the projects that lead to the materialisation of the built environment. It is in this environment that the citizens of Europe work, rest and play. It is therefore essential to ensure that the quality of the built environment provides the best possible stage on which we can all live productive and happy lives. As part of this, the ACE firmly believes that, to achieve these goals of quality and consumer protection, the optimal conditions for the provision of high quality, appropriately regulated architectural services must be ensured.
- A.2 The architect is usually the first person that a developer will contact once the decision to construct a building is taken and the first task of the architect is often to advise on the feasibility of the intended project. Following this the architect devises a solution to the problem posed by the requirements of the developer and by the proposed location of the project. That solution is the design proposal and it will always be unique to the project and location.
- A.3 The resulting design is conceived to meet the requirements of the client and to satisfy the wider cultural and environmental impacts of the project. Given the right conditions it will refer to history, the place, the local and regional culture and to the grand cultural references of the epoch and location. Then, having emerged from the mind of the architect, it is necessary to translate the design into reality. There are many steps and actors involved in this complex process and it is desirable to ensure that the clarity of the design solution is carried through to the final hand-over of the completed project. It is for this reason that the ACE believes that it is essential to ensure that the architect is intimately involved with all stages of a project.
- A.4 The outcome of such projects constitutes the built environment within which society functions. These projects carry the hopes and aspirations of society and create the principal physical heritage that will be passed down through the generations. This fact places a particular burden on the shoulders of those responsible for the conception and management of the built environment and it is therefore in the interests of society to ensure that these persons have gained a high level of education and training in their disciplines before they undertake these tasks. This fact has been recognised by the sectoral directives on the recognition of qualifications and these legislative acts function particularly well, from a legal viewpoint, in the context of the EU.
- A.5 A further matter of crucial importance is that the architect enjoys sufficient independence to permit him or her to devise the optimum solution to the problems posed by the project. This independence must, however, be tempered by the need to ensure that the requirements of the client are fulfilled. A socially responsible and ethically behaved architect will be able to find the best means to marry the individual requirements and ambitions of the client with the general interest of society at large. It is accepted that such independence comes at the price of individual responsibility and the profession believes that architects must be liable for the work they carry out. However this liability should not extend for an unreasonable amount of time and scope, nor should it be extended to cover the actions of others outside the control of the architect.
- A.6 In order to achieve these tasks, an architect in practice must be in a position to provide his or her client with a wide range of complex services and those services must be provided in a reliable and quality controlled manner. The Member States of the EU have regulated, to different extents, the manner in which the outcome of these services must perform in relation to technical, legal, aesthetic and liability requirements and the approaches adopted have varied from region to region. However, the provision of architectural services is principally a person to person transaction covered by a private law contract and so the impact of the proposed directive on this relationship must be properly considered.
- A.7 The specific nature of the architectural profession outlined above must be taken into account in any legislative proposals that will impact on the profession. It is with these factors in mind that the ACE has considered the proposal of the Commission for the SIM Directive.

End of paper