 Liberal professions and recommended prices: the Belgian architects case

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In the context of the Commission's endeavours to eliminate restrictive and unjustified rules in the liberal professions sector, it took a decision on 24 June 2004, condemning the recommended minimum fee scale operated by the Belgian Architects' Association. The Association has decided not to appeal this decision.

Background

The European Council meeting in Lisbon in March 2000 approved a programme of economic reform aimed at making the EU the most competitive and dynamic knowledge based economy in the world by 2010. In improving the competitiveness of the European economy an important part is to be played by professional services. Professional services are usually characterised by a high level of regulation, in the form of either state regulation or self-regulation by professional bodies. Some of this regulation is potentially restrictive, the five main categories being (i) price fixing, (ii) recommended prices, (iii) advertising regulations, (iv) entry requirements and reserved rights, and (v) regulations governing business structure and multi disciplinary practices.

The Decision on the scale of minimum fees drawn up by the Belgian Architects' Association is in line with the Commission's overall policy towards services in general and professional services in particular. This policy is reflected in the proposals for Directives on services (1) and on professional qualifications, (2) and the Commission communication on competition in professional services. (3) In this Communication, the Commission acknowledged that some regulation in the sector of professional services may be justified, for instance to reduce the asymmetry of information between customers and service providers. It, however, expressed its belief that in some cases more pro-competitive mechanisms than those which presently exist can and should be used.

Like fixed prices, recommended prices too have a significant negative impact on competition. They can facilitate coordination of prices between service providers. They can mislead consumers as to the price levels that might be reasonable and as to whether prices are negotiable. It is true, at least in theory, that they can provide consumers with useful information about the average costs of services, but there are alternative methods of providing price information of this kind. For example, the publication of historical or survey-based price information by independent parties (such as a consumer organisation) might provide a more trustworthy price guide for consumers which distorts competition to a lesser extent. In that regard it is worth noting that the Office of Fair Trading (OFT) in the United Kingdom in 2001 came to the conclusion that the Royal Institute of British Architects' (RIBA) indicative fee guidance could facilitate collusion. The OFT in 2003 accepted RIBA's new fee guidance based on historical information and the collation of price trends that did not provide a lead on the current year's prices.

In 2000, the turnover achieved in the provision of architectural and engineering services and related technical consultancy in Belgium amounted to €4.4 billion. This corresponds to 15% of the turnover achieved in the Belgian construction sector.

The Decision

The fee scale

A scale of minimum fees was adopted by the National Council of the Belgian Architects' Association in 1967, and was amended several times after; the most recent amendment, in June 2002, described it as a ‘guideline’ (indicatif/leidraad). The recommended minimum fee scale was meant to apply to all architectural services provided by independent practitioners in Belgium, regardless of whether the intervention of an architect was

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legally required or not. It laid down the architects’ fees as a percentage of the value of the works realised by the entrepreneur.

**Decision by an association of undertakings**

The Commission considers that the Association’s decision of 12 July 1967, laying down the original version of the fee scale, must be considered an independent act of a prescriptive character for which the Association, acting as an association of undertakings, is wholly responsible. The decision is neither a State measure nor simply an act preparatory to a State measure and the Association was not legally obliged to adopt this decision. Furthermore, the Commission comes to the conclusion that the Association intended to coordinate its members’ behaviour in the market through its decisions laying down and amending the scale. According to the case law of the Court, an act described as a recommendation may be contrary to Article 81, whatever its legal status, if it constitutes the faithful reflection of a resolve on the part of an association of undertakings to coordinate the conduct of its members’ on the market in accordance with the terms of the recommendation (\(^1\)).

**Restriction of competition**

In the Decision, the Commission sets out the evidence relating to the decision to establish the fee scale, the legal context, and the conduct of the Association that has satisfied the Commission that the decision to establish the scale is a decision of an association of undertakings which has the restriction of competition as its object. This is despite the fact that the Association has described the scale as a ‘guideline’, and despite the fact that not all architects have perceived or treated it as compulsory.

The evidence indicating that the scale sought to restrict competition includes the intentionally rule making tone of the title and of the recitals in the preamble, the fact that for 18 years the Association drew up and circulated a standard contract in which the only option for determining fees was a reference to the scale, and the fact that the Association went far beyond merely circulating information to its members, to clients and to the courts.

According to the preamble of the fee scale, rates lower than those set out in the scale will not enable the architect to perform all the duties incumbent upon him conscientiously and responsibly; if he failed to apply them, he would run the risk of neglecting his client’s interests; he would therefore undermine the honour and dignity of the profession of which the Association is guardian. The Commission notes in its decision that undermining the honour and dignity of the profession may give rise to disciplinary penalties.

With regard to the assistance given to clients and to the courts, the Commission points out that, if necessary in the event of a dispute, questions relating to the level of fees may be put to the governing bodies of the Association. While such a practice is not likely to encourage the conclusion of agreements restricting competition (\(^2\)), the same cannot be said when a scale of fees is published with a view to preventing such disputes. In other words, while a professional association may, in certain circumstances, legitimately pronounce ex post on the level of fees being claimed, it may not attempt to harmonise the level of fees ex ante.

With regard to the limits of the instructions that may be given to members by a professional organisation, any help provided towards management must not directly or indirectly affect the free play of competition within the profession. In particular, any instructions given in this respect should not have the effect of diverting undertakings from taking direct account of their costs when they individually determine their prices or fees. However, the Association did not circulate information to its members to enable them to determine their fees according to their costs (\(^3\)); it circulated a scale of minimum fees. In addition, the scale creates a somewhat artificial link between the cost of the building work and the architect’s fees. While it is true that the cost of the work is a determining factor in the insurance premium to be paid by the architect, there is no other direct link between the cost of the work and the architect’s costs, or any necessary link with the value added by his services.

Although the Commission concludes that the decision establishing the scale had the restriction of competition as its object, it goes on to set out evidence showing that the scale was applied at least to some extent.

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(\(^1\)) See Court of Justice in Case C-221/99 Conte [2001] ECR I-9359.
The Wouters case-law

According to the Wouters case-law (1) of the Court of Justice, a decision by an association of undertakings does not infringe Article 81(1) of the EC Treaty when, despite the effects restrictive of competition that are inherent in it, it is necessary for the proper practice of the profession, as organised in the Member State concerned. The Commission takes the view that the establishment of a recommended minimum fee scale by the Architects’ Association cannot be considered as necessary in order to ensure the proper practice of the architect’s profession. The scale does not prevent unscrupulous architects from offering poor quality services, and it may even protect them by guaranteeing them a minimum fee. Furthermore, the scale may discourage architects from working in a cost efficient manner, reducing prices, improving quality or innovating.

The end of the infringement and the fine

After receiving the statement of objections in November 2003, the Association withdrew the scale of fees and took the steps necessary to publicise the fact. The Commission therefore concludes in its decision that the infringement has come to an end.

Though the decision fixing or recommending minimum fees is a very serious infringement, the Commission qualifies the infringement as serious in light of the circumstances that the fee scale has probably not been applied universally by all architects and the geographical scope of the decision was limited to one Member State. Since the infringement lasted for over 35 years, it is an infringement of long duration.

The Commission decides to grant a substantial reduction of the amount of the fine, imposing a fine of €100 000. Indeed, it is plausible that there was reasonable doubt on the part of the Association as to whether its fee scale did indeed constitute an infringement at least until the Commission adopted in 1993 its CNSD Decision prohibiting the fixed fee scale of the Italian customs agents (2). Furthermore, the Commission's policy, set out in its Report of 9 February 2004, is to encourage the national regulatory authorities and professional bodies to revise and amend their restrictive rules, and give them the opportunity to do so. The amount of the fine also reflects a gradual approach (3) by the Commission in fining anti-competitive practices in the professions.

The situation in the Member States

At the initiative of the national competition authorities, recommended prices for architectural services have already been terminated in Finland, France, and the United Kingdom. The Slovak Chamber of Architects has recently withdrawn its recommended fee scale. According to a fact-finding exercise by DG Competition, recommended prices for architects seem to exist in Czech Republic, Hungary and Slovenia (recommended prices established by public authorities and professional associations for some kinds of services). The Commission will be discussing the situation shortly with the national competition authorities in the framework of the European Competition Network.

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(3) In its first decision concerning tariffs of professional bodies, in 1993, the Commission condemned the fixed tariffs of the association of Italian customs agents without imposing a fine. In 1996, the Commission took a decision concerning the recommended tariffs of the association of Dutch forwarding agents, imposing a symbolic fine of €1000.