COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 24 June 2004

COMMISSION DECISION

of 24 June 2004

relating to a proceeding under Article 81 of the EC Treaty

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THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, and in particular Articles 7(1) and 23 (2) thereof[1],

Having given the undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection, in accordance with Article 19(1) of Regulation No 17 and Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty[2],

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer,

Whereas:

1. INTRODUCTION

(1) This Decision concerns the scale of minimum fees adopted by the Belgian Architects' Association (*Ordre des architectes/Orde van Architecten*, hereafter referred to as "the Association") in 1967 and its updated versions of 1978 and 2002. For the update of June 2002, the scale was described as a "guideline". Amongst other things, the scale sets out a table in which the key to fixing architects' fees is a set percentage of the value of the building work, by category of work and by expenditure bracket.

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1 OJ L 1, 4.1.2003, p. 1. Regulation amended by Regulation (EC) No 411/2004 (OJ L 68 of 6.3.2004, p. 1).

2 OJ L 354 of 30.12.1998, p. 18. Article 34(2) of Regulation No 1/2003 states that procedural steps taken under Regulation No 17 are to continue to have effect for the purposes of applying Regulation No 1/2003.

2. THE FACTS

2.1. The Architects' Association

(2) The Association was founded by a Belgian Act dated 26 June 1963. It has legal personality[3]; its membership consists of everyone registered on one of its rolls or on a list of trainees[4],

(3) To work as an architect in Belgium in any capacity whatsoever, a person must be registered on one of the Association's rolls or on a list of trainees[5], The Association currently has over 11 000 members, approximately 91.5 % of whom are in independent practice, 5.9% are civil servants and the rest are salaried[6].

(4) At present, 96.6 % of these architects have the Belgian nationality and 3.1 % have the nationality of another European Union country[7]. If they wish to work in the profession in Belgium and set up either a permanent or temporary base for activities, citizens of other European countries are required to make a request to the Association in advance to have their name entered on the roll or on the list of trainees. Architects who are citizens of other European countries and who, exercising their freedom to provide services, wish to operate in Belgium as architects for certain projects, must register as "service providers" in line with Directive 85/384/EC of 10 June 1985 on the mutual recognition of diplomas, certificates and other evidence of formal qualifications in architecture, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services[8]. This directive is transposed into Belgian law by the Royal Orders of 6 July 1990 and 12 September 1990. They are also bound to comply with Belgian legislation, including the Code of Ethics, in respect of these specific projects[9].

(5) The governing bodies of the Association are its provincial councils, its appeal boards and the National Council[10]. Except where the Act states otherwise, the decisions of the Association's governing bodies are taken by the majority vote of the members present. The final decisions of the appeal boards and the National Council are notified by registered letter to the Minister for Small and Medium-sized Enterprises, the Professions and the Self-employed[11].

(6) In each province there is a council with jurisdiction over Association members based in that province[12]. Each council is made up of full members and substitute members, elected by those whose names are on the roll.

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3 Article 1 of the Act of 26 June 1963 establishing an Architects' Association, referred to as "the Act".

4 Article 3 of the Act.

5 Article 5 of the Act.

6 A salaried architect is an architect who is totally or partially bound by an employment contract to work for another person, natural or legal: Article 7 of the Royal Order of 18 April 1985 approving the Code of Ethics drawn up by the National Council of the Architects' Association (published in *Moniteur belge/Belgisch Staatsblad*, 8 May 1985).

7 Source: the Association's website http://www.ordredesarchitectes.be.

8 OJ L 223, 21.8.1985, p. 15. Directive amended lastly by the Act of Accession of 2003.

9 Article 8 of the Act; Association's reply to the request for information of 31 January 2003.

10 Article 6 of the Act.

11 Article 46 of the Act.

12 Article 7 of the Act.

(7) There are two appeal boards. One works in Dutch and sits in Ghent: it hears appeals against decisions made by the councils in the provinces of Antwerp, Western Flanders, Eastern Flanders and Limburg and by the Dutch-speaking council in the province of Brabant. The other appeal board works in French and sits in Liège: it hears appeals against decisions made by the councils in the provinces of Hainaut, Liège, Luxembourg and Namur and by the French-speaking council in the province of Brabant[13].

(8) The body that represents the Association is the National Council. This National Council is made up of:

(a) ten full members, and ten substitute members who sit if a full member is absent, elected by the provincial councils from amongst their members for a period of four years, one full member and one substitute member per council;

(b) two members appointed by the Crown for a period of four years from amongst the inspectors of architecture courses;

(c) four architect members appointed by the Crown for a period of four years, chosen as follows: one from the members of the teaching staff of the State schools of architecture; one from the members of the teaching staff of the official subsidised schools of architecture; and two from the members of the teaching staff of the independent subsidised schools of architecture;

(d) two members appointed by the Crown for a period of four years from amongst architectural and civil construction engineers, being university professors, one for official courses, the other for independent courses;

(e) two members appointed by the Crown for a period of four years from amongst architects who are civil servants or public service employees.

(9) The Council elects a chairman and a vice-chairman from amongst its members. The chairman and vice-chairman must be members of provincial councils and are therefore always members of the Association[14]. Under Article 2 of the Act establishing the Association, its role is "to establish the code of ethics governing the profession of architect and to ensure that it is followed. It shall seek to ensure the honour, discretion and dignity of the members of the Association in the exercise of or in connection with the exercise of the profession. It shall report any infringement of the laws and regulations protecting the title and profession of architect to the law-enforcement authorities."

(10) One of the functions of the National Council is to establish ethical rules governing the profession and to ensure that these rules are applied[15]. The Act empowers the Crown[16], at the National Council's request, to give binding force to the Code of Ethics by means of a Royal Order discussed in Cabinet.

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13 Article 27 of the Act.
14 Articles 11 and 36 of the Act.
15 Articles 37 and 38 of the Act.
16 Article 39 of the Act.

(11) The provincial councils may set fees at the joint request of the parties. They may give their opinion on the method for setting fees and on rates of fees at the request of a court of law, or on their own initiative in the event of a serious breach of professional duty, or in the event of a dispute between persons subject to the Association's jurisdiction[17].

2.2. The Code of Ethics and its legal framework

(12) The National Council drew up an initial Code of Ethics, which was approved by a Royal Order of 5 July 1967. The Code therefore had binding force.

(13) On 29 April 1983 the National Council adopted a new Code of Ethics. The Code was approved by a Royal Order of 18 April 1985, which thus gave it binding force. That Code will be referred to hereafter as "the 1985 Code".

(14) In its foreword, the report to the King explaining the Association's need to have the 1985 Code approved contains the following passage: "And in order to take account of the evolving nature of the profession, the Code of Ethics may subsequently be clarified by means of rules made compulsory by Royal Order discussed in Cabinet. This will be the case, in particular, for the provision setting a minimum fee scale."

(15) Articles 3 and 12 of the 1985 Code do not appear in the 1967 Code. They are particularly relevant to the present case.

(16) Article 3 of the 1985 Code stipulates: "Without prejudice to the application of legislation, this Code sets out the rules governing architects and the exercise of the architect's profession. It may be clarified by means of binding rules approved by Royal Order discussed in Cabinet, on a proposal from the National Council of Association, or by means of recommendations issued by the National Council of the Association."

(17) Article 12 of the 1985 Code states:

"Depending on the form in which he exercises his profession, an architect shall be remunerated by fees or a salary that enable him to earn his living and carry on his profession with honour and dignity.

"They must enable him to cover his expenses, and in particular his professional liability insurance.

"The National Council shall set the minimum fee scales by means of standards made binding in accordance with Article 3. Anyone infringing these provisions shall be liable to the disciplinary penalties provided for in Article 21 of the Act of 26 June 1963.

"The National Council shall also propose reference scales for salaries.

"Architects who have worked as independent experts in disputes shall draw up their fees statement with moderation, taking all aspects of the matter into account,

[17] Article 18 of the Act.

especially the difficulty and scope of their services, the interests at stake and, to a certain extent, the financial situation of the parties."

2.3. Ethical Standard No 2

(18) On 12 July 1967 the National Council in session adopted a document providing, in particular, for a "scale of architects' fees". It called the document "Ethical Standard No 2", "because it intended to have it made binding in a Royal Order enacted after discussion in Cabinet". However, the then Minister for Small and Medium-sized Enterprises, the Professions and the Self-employed "did not think it advisable to make the text binding, and no such Royal Order was ever enacted. The document [nevertheless] retained its initial title of "Ethical Standard No 2", and that is the name it is usually known by."[18]

(19) On 23 June 1978 the National Council amended Article 27 of the standard, which sets the bands to which different percentages apply, and Article 28, which governs the sliding scale of fees used where an architect is responsible for buildings of the same type within a housing development.

(20) In June 2002 the Council indexed the basic figures for calculating percentages and converted them into euros (with rounding where necessary)[19]. At the same time, it was stated that "Given that both the Belgian Competition Council and the European Court of Justice seem to be taking a particular interest in the compatibility with the competition rules of fee scales drawn up by regulated professions, *in the present context this fee scale should be understood as a guideline*".

(21) The fee scale published on the Association's website from June/July 2002[20] set out five categories of building work, beginning with "purely utilitarian structures designed very simply" and ending with "restoration of historic buildings, monuments or interiors". In each category there were six bands relating to the cost of the work - i.e. the total expenditure, real or presumed – to which a set percentage was applied. The fee level in the first category was 6.00% for band 1 (work costing from €0 to €160 000), and 4.00% for band 6 (work costing over €16 600 000). The fee level in the fifth category was 15.00% for band 1 and 9.00% for band 6. (Annex: scale, 2002 version)

(22) On 7 November 2003, the steering committee of the National Council decided to delete all reference to the fee scale with immediate effect.

(23) On 21 November 2003 the National Council took the following decision: "In view of the notification of the European Commission's objections, the National Council hereby withdraws Ethical Standard No 2 and rescinds the second paragraph of Article 30 of the Code of Ethics"[21].

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18 Association's reply to the request for information of 31 January 2003.

19 Association's reply to the request for information of 31 January 2003.

20 There are "corrected versions" in French (5 August 2002) and Dutch (13 September 2002).

21 The first paragraph of Article 30 of this Code states that an architect may take part in a competition in which he competes with other architects on the basis of project quality, if the rules of the competition are compatible with the honour and dignity of the profession. The second paragraph states: "On the

2.4. The relevant services

(24) Article 1 of Ethical Standard No 2 stipulates: “This fee scale for architects determines the minimum remuneration due to an architect for services that he has provided in an independent capacity as defined in Articles 7 and 10 of the Code of Ethics”.[22]

(25) The present case therefore relates to services provided in Belgium by architects subject to the supervision of the governing bodies of the Association where they are acting in an independent capacity.

2.5. National proceedings

(26) A number of complaints were lodged with the Competition Division of the Belgian Ministry of Economic Affairs by architects alleging that the Association had infringed the Belgian Protection of Competition Act. These complaints led to two sets of proceedings in Belgium, under Belgian law only. One case involved an application for interim measures; the other concerned the substance. The complaints followed disciplinary penalties imposed on the architects concerned, particularly for having drawn up statements of expenses and fees that were "disproportionate" (violation of Article 12 of the Code of Ethics).

(27) In October 1995, the Chairman of the Belgian Competition Council took a decision on the application for interim measures against the Association. He prohibited the Association from applying Ethical Standard No 2, implicitly or explicitly, pending a decision on the substance. The Association appealed against the decision, and on 14 November 1996 the decision was annulled by the Brussels Court of Appeal, which considered that the chairman of an administrative authority such as the Competition Council had no jurisdiction to intervene in proceedings lawfully undertaken by one of the governing bodies of the Association. On 27 November 1997 the Court of Cassation upheld the judgment of the Court of Appeal.

(28) In the proceedings on the substance, the Ministry of Economic Affairs, in its capacity as a competition authority, approved a report to the Competition Council on 27 June 1997 proposing that the Council should find against the scale imposed by the Association, and in particular against Ethical Standard No 2. The Ministry was of the opinion that the Association did not have the right to impose a scale on its members, as architects should be free to determine the conditions that defined their competitive position.

(29) The report was sent to the Competition Council on 4 July 1997. The Association was informed of the report’s existence and of its content on 16 May 2002.

(30) On 4 July 2002, the Competition Council adopted a decision in which it took the view that the rights of the defence had not been respected, owing to the unreasonably long time taken by the proceedings, and that for this reason it was no longer possible to take a decision on the substance.

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other hand, the architect must abstain from participating in any public or private invitation to tender aimed at encouraging architects to compete on the price of their services”.

[22] The reference is to Articles 7 and 10 of the 1967 Code of Ethics, defining independent and salaried architects.

2.6. The proceedings before the Commission

(31) The investigation of the case began with the initiation of own-initiative proceedings on 24 October 2002.

(32) A number of requests for information were sent under Article 11 of Regulation No 17. A first request was sent to the Association on 31 January 2003, to which the Association replied on 27 February 2003. A second request was sent to the Association on 15 April 2003, and the Association replied on 29 April 2003. A third request was sent to the Association on 8 May 2003, and the Association replied on 28 May 2003. Further requests for information were sent on 10 July 2003, to the ten provincial councils of the Association, and their replies were received between 19 August and 10 September 2003.

(33) A statement of objections addressed to the Association was approved on 31 October 2003 and sent on 3 November 2003. The Association had a period of ten weeks in which to submit written comments on these objections. It did so within the deadline, and a hearing was held on 9 February 2004.

3. LEGAL ASSESSMENT

3.1. Article 81(1) of the EC Treaty

(34) Article 81(1) of the EC Treaty states that decisions of associations of undertakings are prohibited as incompatible with the common market if they may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular if they directly or indirectly fix purchase or selling prices or any other trading conditions.

(35) The Commission considers that the decision setting the minimum fee scale, known as "Ethical Standard No 2, is a decision by an association of undertakings which may affect trade between Member States and which has as its object the prevention, restriction or distortion of competition within the common market, for the reasons set out below.

3.1.1. Definition of "undertaking" and "association of undertakings"

(36) The concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed[23]. Any activity consisting of offering goods or services on a given market is an economic activity[24].

(37) Architects provide their services on a long-term basis and for consideration. They therefore carry on an economic activity and are thus undertakings within the meaning

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[23] See in particular judgments in Case C-41/99 *Höfner and Elser* v *Macrotron* [1991] ECR I-1979, paragraph 21; Case C-244/94 *Féderation Française des Sociétés d'Assurance* [1995] ECR I-4013, paragraph 14; and Case C-55/96 *Job Centre II* [1997] ECR I-7119, paragraph 21.

[24] See in particular judgments in Case 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 7, and Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 36.

of Article 81(1) of the Treaty[25]. The complexity and technical nature of the services they provide and the fact that the practice of their profession is regulated cannot alter that conclusion[26].

(38) A professional organisation such as the Architects' Association may be considered to be an association of undertakings within the meaning of Article 81(1) of the Treaty when it adopts a regulation such as Ethical Standard No 2, for the following reasons.

(39) According to the Court's case law, the Treaty rules on competition do not apply to activity which by its nature, its aim and the rules to which it is subject does not belong to the sphere of economic activity[27] or is connected with the exercise of public powers[28]. This is the case where an association fulfils a social function based on the principle of solidarity[29], or exercises powers which are typically those of a public authority[30]. When it adopts a regulation such as Ethical Standard No 2, the Association is not fulfilling such functions.

(40) Therefore, the fact that under the Act of 26 June 1963 establishing an Architects' Association the Association has the task of drawing up a code of ethics and ensuring that it is complied with[31] cannot take this professional organisation outside the scope of Article 81 of the Treaty[32].

(41) The public-law status of a national body such as the Association does not preclude the application of Article 81 of the Treaty. According to the Court, the legal framework within which agreements are made and decisions are taken and the classification given to that framework by the various national legal systems are irrelevant as far as the applicability of the Community rules on competition is concerned. [33]

(42) In addition, an organisation such as the Association cannot escape from the application of Article 81 because a number of the members of its National Council are appointed by the Government[34]. Ten of the twenty members of the Association's

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25 See in particular judgments in Case C-309/99 *Wouters* [2002] ECR I-1577, paragraph 47, which concerned the Bar of the Netherlands, and Case C-35/96 *Commission* v *Italy*, cited above, paragraph 36.

26 See in particular judgments in *Wouters*, cited above, paragraph 49, and joined Cases C-180/98 to C-184/98 *Pavlov* [2000] ECR I-6451, paragraph 77.

27 See judgment in Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, paragraphs 18 and 19, which concerned the management of a special social security scheme.

28 See judgments in Case C-364/92 *SAT Fluggesellschaft* [1994] ECR I-43, paragraph 30, which concerned the control and supervision of air space, and Case C-343/95 *Diego Calì & Figli* [1997] ECR I-1547, paragraphs 22 and 23, which concerned anti-pollution surveillance of the marine environment.

29 See judgment in *Poucet and Pistre*, cited above, paragraph 18.

30 See judgment in *SAT Fluggesellschaft*, cited above, paragraph 30.

31 Articles 2 and 38 of the Act.

32 See judgments in *Wouters*, cited above, paragraph 59, which concerned lawyers, and *Pavlov*, cited above, paragraph 86, which concerned doctors.

33 Court of First Instance in Case T-513/93 *CNSD* [2000] ECR II-1807, paragraph 39; Court of Justice in Case 123/83 *BNIC* v *Clair* [1985] ECR 391, paragraph 17.

34 Court of Justice in *BNIC* v *Clair*, cited above, paragraph 19, Case C-38/97 *Librandi* [1998] ECR I-5955, paragraph 34; and Case C-185/91 *Gebrüder Reiff* [1993] ECR I-5801, paragraph 16. Commission Decision 76/684/EEC in Case IV/28.980 *Pabst & Richarz/BNIA*, OJ L 231, 21.8.1976, p. 24.

National Council, i.e. half, including the chairman, are direct representatives of the profession. The other members are appointed by the Crown. It is highly likely that the Crown appointees are also registered as architects with the Association, bearing in mind the groups from which these members are selected – architecture course inspectors, lecturers from schools of architecture, engineers working as university professors and public service architects.

(43) When it adopts a regulation such as Ethical Standard No 2, the Association is not performing a special duty to protect the general interest in accordance with criteria laid down by law[35]. There is nothing in the legislation to prevent the Association from acting in the exclusive interest of the profession. As a result, the members of the National Council cannot be characterised as independent experts[36].

(44) It is clear from the case law of the Court that a professional association must be considered to be an association of undertakings within the meaning of Article 81 when it adopts rules constituting the expression of the intention of the delegates of members of a profession that they should act in a particular manner in carrying on their economic activity[37]. The minimum fee scale, which was agreed on and decided by the National Council representing the Association at its meeting of 12 July 1967, constitutes the expression of the intention of the delegates of members of a profession that when the members of the profession determine their fees they should act in a particular manner in carrying on their economic activity. It follows that the Association must be considered an association of undertakings within the meaning of Article 81(1) of the Treaty.

3.1.2. Decision by an association of undertakings

(45) The Commission considers that the decision by which the minimum fee scale known as Ethical Standard No 2 was drawn up has to be considered to be a decision by an association of undertakings within the meaning of Article 81(1) of the Treaty.

3.1.2.1. The decision is not a State measure or simply an act preparatory to a State measure

(46) The Association maintains that Ethical Standard No 2 cannot be considered to be a decision within the meaning of Article 81. The Council merely put forward a proposal for a Royal Order, so that the case is similar to the *Arduino* case. In its judgment in that case, the Court decided that Article 81 was not applicable[38].

(47) It appears from the ruling given in the *Arduino* case that the measures taken by a State to delegate its authority in regulatory matters to private operators may be contestable on the basis of Article 3(1)(g), the second paragraph of Article 10 and Article 81 of the EC Treaty if the Government waives its power to take decisions of last resort or to review implementation of the measures. In the *Arduino* case, the professional association's part in the fixing of scales was limited to producing a draft

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35 See judgments in *CNSD*, cited above, paragraph 43, which concerned an association of professional customs agents, and *Wouters*, cited above, paragraph 62, which concerned lawyers.

36 See judgment in *CNSD*, cited above, paragraphs 54 and 55.

37 Judgment in *Wouters*, cited above, paragraph 64.

38 See the Association's reply to the statement of objections, points 225-226. Judgment in Case C-35/99 *Arduino* [2002] ECR I-1529].

that the responsible Minister was free to modify. Without the Minister's approval, the draft tariff did not come into force and the earlier tariff remained applicable. Without approval, therefore, the draft could not affect the market. The Court concluded that there had not been any contestable delegation of authority to the operators.

(48) The Commission considers that the situation here is different to that in the *Arduino* case. Unlike the scale set in the *Arduino* case, Ethical Standard No 2 is more than a mere preparatory act.

(49) Despite the absence of a Royal Order approving Ethical Standard No 2, the Association published the standard, circulated it, and updated it in 1978 and 2002. It is therefore clear that the standard was not simply a preparatory act, but an act intended to govern the behaviour of the members of the Association.

3.1.2.2. The Association was not obliged to adopt Ethical Standard No 2

(50) The Association was not obliged to adopt Ethical Standard No 2. At the time it did so there was no legislation giving it the task of formulating the rules and practices determining the method by which architects' fees were to be calculated as fixed percentages of the expenditure on the building work.

(51) The Act of 26 June 1963 establishing an Architects' Association gave the Association the task of protecting the honour, discretion and dignity of its members. Articles 41 to 44 of the Code of Ethics approved by the Royal Order of 5 July 1967, relating to the remuneration of architects, stated: "Fees are to be determined taking account of the difficulties of the task conferred on the architect, the scale of the work and the architect's reputation. In the interests of the client and in order to safeguard the dignity of the profession, the architect is at the very least bound to set his fees at a level that allows him fully and honourably to perform all the duties inherent in his task. The amount is to be determined taking account of the rules and practices generally accepted by the authorities of the Association. Nor may the architect claim excessive fees that do not take account of these criteria and of the reputation he has acquired." These provisions left the Association with a considerable margin of discretion and in no way required the adoption of such a mathematical and detailed scale of minimum fees with no exemption mechanism. The same reasoning applies to the decision of 23 June 1978 to modify the scale, as it was adopted using the same regulatory framework.

(52) The updating of the scale in June 2002 took place after the new 1985 Code of Ethics had come into force, having been approved by Royal Order. Article 12 of the Code states: "The National Council shall set the minimum fee scales by means of standards made binding in accordance with Article 3".

(53) This provision did not require the Association's National Council to adopt a scale of fees. The contrary interpretation is implausible, especially because if the provision did set out to impose an obligation, compliance with that obligation would depend not just on the only party referred to in Article 12, i.e. the Association's National Council, but also on the Belgian Government, which, according to Article 3, has to approve binding rules in Cabinet.

(54) In the alternative, even if it is supposed that Article 12 of the 1985 Code does impose an obligation, the Association and the Government have still to cooperate for compulsory regulations to be adopted. The Government cannot, on its own initiative, amend the contents of a proposal by the Association[39]. From this viewpoint, the adoption by the Association of the fee scale in question would be better seen as the exercise by the Association of the option to issue recommendations, which is provided for in Article 3. This option to issue recommendations is a right and not an obligation.

3.1.2.3. Ethical Standard No 2 as a declaratory codification

(55) The Association further contends that Ethical Standard No 2 cannot be considered a decision within the meaning of Article 81, as it is merely a codification of the rules and practices that were in existence when it was adopted.

(56) The Association seems here to be arguing that Ethical Standard No 2 was not a decision of a prescriptive character, but merely a description of existing usage.

(57) The Association has provided no evidence to show that the standard was simply a codification of existing rules and practices. It has not submitted any surveys or research to provide an outline of rules and practices that were in existence when the standard was adopted, nor has it submitted any evidence that any such survey was carried out at the time. It would seem from the preamble to the standard that the Association wanted to enshrine, not the usage followed on the market, but its own, prescriptive practice with regard to the fixing of fees at the request of parties or lawcourts. Although the preamble does state that the standard sets out the existing rules and practices, in reality it contains statements that have an intentionally rule-making tone. The preamble says, for example, that "the Code of Ethics stipulates that all architects are obliged to set their fees at a level determined at the very least by the relevant rules and practices accepted by the authorities of the Association" and that "it is the responsibility of the authorities of the Association to state the rules and practices determining the method for calculating architects' fees". It also says that "rates lower than those set out below 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 thereby be undermining the honour and dignity of the profession of which the Association is guardian."[40] It seems clear, therefore that the scale did not set out merely to codify existing rules and practices; it also sought to encourage architects to refer to it when setting their fees in the future.

(58) It is in any event unlikely that a straightforward codification of existing practices would produce so detailed a scale. As was explained in paragraph 51 of this Decision, the 1963 Act and the 1967 Royal Order left a significant margin of discretion to the Association, and did not in any way require the adoption of a mathematical scale of minimum fees set out in such detail and with no provision for exemption.

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39 See the Association's reply to the request for information of 31 January 2003.

40 Fourth, fifth and eighth recitals in the preamble to Ethical Standard No 2.

(59) The Commission therefore takes the view that Ethical Standard No 2 is a decision of a prescriptive character, and not a descriptive codification.

3.1.2.4. Ethical Standard No 2 as a recommendation

(60) Finally, the Association contends that Ethical Standard No 2 is not binding and is therefore not contrary to Article 81 of the Treaty[41].

(61) In so far as the Association is here arguing that the standard has never been made binding by Royal Order, that it has to be considered a recommendation, and hence cannot constitute a decision within the meaning of Article 81, the Commission sets out its comments in paragraphs 62 to 73. In so far as the Association is here arguing that the standard is not a decision whose object or effect is the restriction of competition, the Commission sets out its comments in paragraphs 75 to 96.

(62) In June 2002 the scale published on the Association's website was described as "*indicatif*" in French and as "*leidraad*" in Dutch. The Association prefaced the scale with the following notice: "Given that both the Belgian Competition Council and the European Court of Justice seem to be taking a particular interest in the compatibility with the competition rules of fee scales drawn up by regulated professions, *in the present context this fee scale should be understood as a guideline"*. (italics in original).

(63) However, the description of the scale as a "guideline" does not mean that the decision laying it down falls outside the prohibition in Article 81(1) of the Treaty, for the following reasons.

(64) 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[42].

(65) At the hearing of 9 February 2004, the Association stated that it did not intend to coordinate its members' behaviour in the market through its decisions laying down and amending the scale.

(66) From the circumstances described below, however, the Commission deduces that in adopting and updating Ethical Standard No 2 the Association did intend to coordinate its members' behaviour.

(67) First, although Ethical Standard No 2 is not binding within the meaning of the Code of Ethics, the Association has not so far changed its title, which could give rise to misunderstandings, or its preamble.

(68) According to the Association, the document was entitled "Ethical Standard No 2" in 1967 "because it intended to have it made binding in a Royal Order enacted after discussion in Cabinet". Again according to the Association, the then Minister for

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41 See the Association's reply to the statement of objections, points 235 and following.

42 Court of Justice in Case 45/85 *Verband der Sachversicherer* [1987] ECR 405, paragraph 32; see also Joined Cases 209 to 215 and 218/78 *Van Landewyck* [1980] ECR 3125, paragraph 86.

Small and Medium-sized Enterprises, the Professions and the Self-employed "did not think it advisable to make the text binding, and no such Royal Order was ever enacted. The document [nevertheless] retained its initial title of 'Ethical Standard No 2', and that is the name it is usually known by"[43].

(69) Both the standard's title and its preamble contain statements that have an intentionally rule-making or prescriptive tone. The preamble states that "the Code of Ethics stipulates that all architects are obliged to set their fees at a level determined at the very least by the relevant rules and practices accepted by the authorities of the Association" and that "it is the responsibility of the authorities of the Association to state the rules and practices determining the method for calculating architects' fees". The preamble also says that "rates lower than those set out below 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 thereby undermine the honour and dignity of the profession of which the Association is guardian."[44]

(70) Second, an architect may incur disciplinary penalties if he infringes Article 12 of the 1985 Code of Ethics. This provision stipulates: "Depending on the form in which he exercises his profession, an architect shall be remunerated by fees or a salary that enable him to earn his living and carry on his profession with honour and dignity. They must enable him to cover his expenses, and in particular his professional liability insurance. The National Council shall set the minimum fee scales by means of standards made binding in accordance with Article 3. Anyone infringing these provisions shall be liable to the disciplinary penalties provided for in Article 21 of the Act of 26 June 1963."

(71) In this context, the last recital in the preamble to Ethical Standard No 2 is particularly pertinent. It states that "rates lower than those set out below 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 thereby undermine the honour and dignity of the profession of which the Association is guardian". The Commission would here refer to the decision taken on 27 February 1991 by the Appeal Board of the Association working in French[45]. The Appeal Board took the view that Ethical Standard No 2 could serve as a yardstick for the day-to-day practice of the profession, as required by the dignity of the profession. It held that the architect concerned had not acted in line with the yardstick and had consequently broken the rules imposed by the dignity of the profession.

(72) Third, the National Council drew up and published a standard architect-client contract, which it approved at its meeting of 27 September 1968. Article 10 of the standard contract stipulates: "The parties expressly agree that the fees are to be fixed and paid in accordance with Ethical Standard No 2, a copy of which is attached. The fee rate will be fixed according to the scale for the category…" Eighteen years later,

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43 Association's reply to the request for information of 31 January 2003.

44 Fourth, fifth and eighth recitals in the preamble to Ethical Standard No 2.

45 See page 545 of the file.

at its meeting of 30 May 1986, the National Council decided to stop distributing that standard contract[46].

(73) In meetings on 26 September 1989 and 13 November 1989 respectively, the provincial councils of Brabant and Hainaut also approved a similar standard architect-client contract. Article 9.1 of this standard contract stipulates: "The fees are to be fixed in accordance with Ethical Standards No 2. They will therefore be equal to: -… % of the total actual cost of the work, not including VAT, i.e. the expenditure generally arising out of the construction, excluding taxes, work carried out by the client being estimated at the value at which it would be carried out by contractors.* - the flat-rate sum of … F not including any of the following possible additions* (* delete as appropriate)". Article 9.3 states that any modification to the project otherwise than by the architect gives rise to additional fees in accordance with Ethical Standard No 2. Article 9.4 stipulates that, if the work is done by separate tradespeople, the fees are to be increased by 1.5 % of the total cost of the work, owing to the extra duties to be performed by the architect. Article 9.5 states that the drawing up of a schedule of quantities with the client's agreement will give rise to a 10% increase in fees. Lastly, Article 10 stipulates in particular that the fees due to the architect are payable in cash, in instalments, in accordance with Ethical Standard No 2.

3.1.2.5. Conclusion

(74) The Association's decision of 12 July 1967, known as Ethical Standard No 2, must be considered an independent act of a prescriptive character for which the Association, acting as an association of undertakings, is wholly responsible. It can therefore be assessed in the light of Article 81 of the Treaty.

3.1.3. Restriction of competition

3.1.3.1. Decision which has as its object the restriction of competition

(75) The Commission considers that the decision fixing the fees scale, known as Ethical Standard No 2, has as its object the restriction of competition within the common market, within the meaning Article 81 of the Treaty.

(76) The Association contends that the decision does not fall into the category of behaviour that in itself restricts competition.

(77) The Commission acknowledges that recommended prices do not automatically and always infringe Article 81. It takes the view, however, that in the case at issue the decision fixing the scale had the object of restricting competition.

(78) As a preliminary, it is settled case law that the fixing of a price, even one which merely constitutes a target or recommendation, affects competition because it enables all participants to predict with a reasonable degree of certainty what the pricing

[46] Association's reply to the request for information of 15 April 2003.

policy pursued by their competitors will be, especially if the provisions on target prices are backed up by the possibility of inspections and penalties[47].

(79) The Court of Justice has also held that, even though fixed prices might not have been observed in practice, the decisions fixing them had the object of restricting competition[48].

(80) The question whether a decision has the object of restricting competition depends on a number of factors. Its object may be deduced from the terms of the decision, its objective aims, the legal and economic context and the conduct of the parties[49].

(81) The Commission considers that the following aspects of the terms of the decision fixing the scale, the legal and economic context and the conduct of the Association indicate that the decision had the object of restricting competition.

(82) As stated in Article 1 of Ethical Standard No 2, the scale drawn up by the Association determines the minimum payment due to an architect for services performed in independent practice. The Commission has already drawn attention here to the intentionally rule-making tone of the title of the standard and of the recitals in the preamble. According to the preamble, 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 that undermining the honour and dignity of the profession may give rise to disciplinary penalties. From these observations, it is clear that the Association wanted to see the scale used widely.

(83) Shortly after the scale was drawn up, the Association drafted a standard contract in which the only option for determining fees was a reference to the scale; this too attests to its intention to restrict competition on prices between its members by drawing up a minimum fee scale. It circulated this standard contract for eighteen years.

(84) The first paragraph of Article 30 of the 1985 Code of Ethics stipulates that an architect may take part in a competition in which he competes with other architects on the basis of project quality, if the rules of the competition are compatible with the honour and dignity of the profession. The second paragraph reads as follows: “On the other hand, the architect must abstain from participating in any public or private invitation to tender aimed at encouraging architects to compete on the price of their services.” On 4 May 2000, the Association’s Dutch-speaking Appeal Board delivered two decisions finding that this second paragraph was null and void under Article 2 of the Belgian Act of 5 August 1991, consolidated by the Royal Order of 1 July 1999,

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47 Court of Justice in Case 8/72 *Vereeniging van Cementhandelaren* [1972] ECR 977, paragraph 21.

48 Case 246/86 *Belasco* [1989] ECR 2117.

49 Court of Justice in Joined Cases 96-102, 104, 105, 108 and 110/82 *IAZ International Belgium* [1983] ECR 3369, paragraphs 22-25. See also Court of Justice in Joined Cases 29 and 30/83 *Compagnie Royale Asturienne des Mines and Rheinzink* [1984] ECR 1679, paragraph 26, and the Commission Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97, paragraphs 21 and 22.

concerning the protection of economic competition. In these two decisions, the Appeal Board explicitly acknowledged that the provision appreciably restricted competition between architects[50].

(85) The Association denies any link between the scale and the second paragraph of Article 30 of the Code of Ethics; but the fact that it did not inform all its members of the finding by the Dutch-speaking Appeal Board is a further indication that is was pursuing a policy of avoiding all forms of price competition.

(86) This is also shown by the fact that the Association went far beyond circulating information to its members, to clients and to the courts.

(87) With regard to the assistance given to clients and to the courts, it should be noted 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[51], 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.

(88) The circulation of recommended tariffs by a professional organisation is liable to prompt the relevant undertakings to align their tariffs, irrespective of their cost prices. Such a method dissuades undertakings whose costs are lower from lowering their prices and thus creates an artificial advantage for undertakings which have the least control over their production costs. Such a risk is not, however, inherent in the circulation of information that would help the undertakings to calculate their own cost price structures so as to enable them to establish their selling prices independently[52]. In the case at issue, it is not disputed that the Association did not circulate information to its members to enable them to determine their fees according to their costs; it circulated a scale of minimum fees. In addition, the scale creates a somewhat artificial link between the cost of 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.

(89) 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; instructions that do have that effect are evidence of a restrictive objective.

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50 See pp. 89 and 93 of the file.

51 See Court of Justice in Case C-221/99 *Conte* [2001] ECR I-9359.

52 Commission Decision 96/438/EC in Case IV/34.983 – Fenex, OJ L 181, 20.7.1996, p. 28, paragraphs 60-65.

(90) In conclusion, the Commission takes the view that the minimum fee scale drawn up and circulated by the Association between 12 July 1967 and 21 November 2003 has as its object the restriction of competition within the meaning of Article 81(1) of the Treaty.

3.1.3.2. Decision having as its effect the restriction of competition

(91) The Association considers that the Commission must demonstrate that the decision restricts competition effectively and appreciably and that the Commission must define the relevant market.

(92) According to the settled case law of Court, for the purpose of applying Article 81(1) there is no need to take account of the concrete effects of an agreement or decision once it appears that it has as its object the prevention, restriction or distortion of competition[53].

(93) In a decision applying Article 81 there is an obligation on the Commission to define the market where it is impossible, without such a definition, to determine whether a decision by an association of undertakings is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market. Consequently, if the Commission can prove that the Association committed an infringement whose object was to restrict competition within the common market and which was by its nature liable to affect trade between Member States, it is not required to define the market[54].

(94) Even though, for the purpose of applying Article 81(1), there is no need to take account of the concrete effects of an agreement or decision once it appears that it has as its object the prevention, restriction or distortion of competition, the investigation has shown that the scale was in fact applied, at least to a certain extent. This has not been denied by the Association.

(95) As shown by the decisions in disciplinary cases[55], and as may be deduced from the fact that it has been applied for many years, the scale constitutes a basis for negotiation between the architect and his client over the architect's remuneration. The scale thus constitutes a yardstick that suggests that the architect is not necessarily expected to base his fees on his own operating costs or possibly also on his reputation. The fact that the Association deemed it necessary to adapt the scale in June 2002, because unauthorised versions of the scale were springing up on the Internet, is another indication that the scale still plays a role[56].

(96) When the Commission asked the Association's provincial councils to produce copies of the 20 most recent contracts in which fees were lower than those determined by

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53 Court of Justice in Joined Cases 56 and 58/64 *Consten and Grundig* [1966] ECR 429; see also Court of Justice in Case C-235/92 P *Montecatini* [1999] ECR I-4539, paragraph 122, with further references.

54 Court of First Instance in Case T-62/98 *Volkswagen* [2000] ECR II-2707, paragraphs 230 and 231.

55 See, for example, the abovementioned decision by the French-speaking Appeal Board.

56 See page 24 of the file. The following notice was published on the Internet: "Noting that unauthorised and sometimes imaginary versions of the fee scale published by the Association in 1978 under the name of Ethical Standard No 2 have been springing up on the Internet, and that the fee scale needs to be adapted due to price changes and the arrival of the euro, the National Council meeting of 31 May 2002 has decided to provide architects with an updated version of the scale".

the scale, the provincial councils in Namur and Hainaut – the only councils who replied that they were in possession of copies of contracts – each sent 20 contracts. Although the Commission had asked them to produce contracts in which fees were lower than those determined by the scale, most of the contracts in fact stipulated fees equivalent to those determined by the scale. Each of the 20 copies received from the Namur council referred explicitly to Ethical Standard No 2 and to the scale, and there is no indication of how they are supposed to have departed from the scale. All the contracts were signed by the same developer. Two of the contracts received from the Hainaut council provided for flat-rate fees, four provided for fees set at a certain percentage of the total value of the building work, 13 referred to the scale or to Ethical Standard No 2 (sometimes with the wording "which the client acknowledges having read" or "a copy of which is attached"). One copy of a contract was incomplete. In all, over three quarters (32 out of 40) of the recent contracts examined refer explicitly to the scale. While it is true that this was only a limited sample, there is nothing to indicate that the situation might be different in the other regions.

3.1.4. The exception in the Wouters *judgment*

(97) In the *Wouters* case, the Court of Justice held that not every decision by an association of undertakings which restricted the freedom of action of the parties or of one of them necessarily fell within the prohibition laid down in Article 81(1). The Court said: "For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the 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 organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience (see, to that effect, Case C-3/95 *Reisebüro Broede* [1996] ECR I-6511, paragraph 38). It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives."[57] The Court concluded that Article 81(1) had not been infringed, as the disputed regulation, despite the effects restrictive of competition that were inherent in it, was necessary for the proper practice of the profession, as organised in the Member State concerned.

(98) It is not clear whether the Association considers that a recommended scale is necessary for the proper practice of the profession. In its reply to the request for information of 21 January 2003, the Association said that "the National Council does not consider that a scale common to all architects is necessary. It does consider that a recommended fee scale is useful, for two reasons" (see paragraph 99)[58]. Elsewhere, however, the Association seems to assert that Ethical Standard No 2 is necessary in order to ensure that the architect charges a fee that enables him to meet his professional obligations in the practice of his profession[59].

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57 Judgment in *Wouters*, cited above, paragraph 97.

58 See pp. 194 and 204 of the file.

59 Association's reply to the statement of objections, points 229-230.

(99) In any event, the Commission takes the view that the establishment of a (recommended) minimum fee scale cannot be considered as necessary in order to ensure the proper practice of the architect's profession. The Association asserts that the scale may be useful in that it can act as a guideline for replies to questions from parties to the contract or from a court of law. The Commission considers that information on prices can be provided in other ways. For example, the publication of information collected by independent parties (such as consumer organisations) concerning prices generally applied, or information based on a survey, can constitute a more reliable yardstick for consumers and lead to fewer distortions of competition. The Association further claims that the scale is useful because extremely low fees may be an indication of practices that are manifestly illegal. The Commission would point out that the Association is not automatically informed of the fees demanded by architects, that extremely low fees are not in themselves sufficient proof of illegal practices, and that other elements have to be taken into account, which means that the Association can continue to perform its supervisory function without a fee scale. In addition, 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. For this reason, therefore, the decision establishing the scale cannot be excluded from the scope of the prohibition in Article 81(1).

3.1.5. Effect on trade between Member States

(100) With regard to the effect on trade within the Community, a decision or agreement extending over the whole of the territory of a Member State by its very nature has the effect of reinforcing the compartmentalisation of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about[60].

(101) The Association's decision establishing a fee scale applies throughout Belgium and to any architect carrying on an economic activity as an independent practitioner in the country, including nationals of other Member States who are registered with the Association. The projects which under Belgian law require the participation or assistance of an architect are by definition the largest, at least from a financial point of view, so that the interest of foreign architects cannot in any way be considered negligible.

(102) At Community level, the Council has enacted legislation laying down explicit rules governing the practice of the profession of architect across purely national borders[61], thus helping to establish a regulatory framework that facilitates the practice of the profession and to put an end to the compartmentalisation of national markets.

(103) In these circumstances, the actual or potential effects on trade between Member States are appreciable.

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60 Judgment in *Vereeniging van Cementhandelaren*, cited above, paragraph 29; judgment in Case 42/84 *Remia* [1985] ECR 2545, paragraph 22; and judgment in *Wouters*, cited above, paragraph 95.

61 Directive 85/384/EEC, cited above.

3.2. Article 81(3) of the Treaty

(104) Article 81(3) of the Treaty states that the provisions of Article 81(1) may be declared inapplicable in the case of any decision or category of decisions by associations of undertakings which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives, or afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

(105) In its reply to the statement of objections, the Association put forward a number of arguments in support of the applicability of Article 81(3)[62].

(106) The Association argues that the scale helps to improve the production of architectural services, in that it offers the architects a guideline that reflects the scale of their liability, which is in proportion to the value of the works concerned.

(107) The Commission would point out that the absence of a scale does not prevent architects, when they draw up their fees, from taking account of their insurance premium, which is calculated according to the value of the work. The premium forms part of their costs. The Association has not demonstrated any link between the scale and an improvement in architectural services.

(108) According to the Association, consumers receive a fair share of the benefit resulting from the supposed improvement in production. The Association argues that the scale provides users with a basis for comparison, and thus tends to protect them against excessive fees.

(109) The Commission would point out that the scale may discourage architects from working in a cost-efficient manner and reducing their prices. The Commission considers that a scale that imposes or recommends minimum fees is unlikely to protect consumers against excessive fees. The fees indicated are minimum fees, and architects remain free to demand higher fees.

(110) As has already been said, the Commission considers that information on prices can be provided in other ways. For example, the publication of information collected by independent parties (such as consumer organisations) concerning prices generally applied, or information based on a survey, can constitute a more reliable yardstick for consumers and lead to fewer distortions of competition.

3.3. Article 7(1) of Regulation No 1/2003

(111) Article 7(1) of Regulation No 1/2003 states that where the Commission finds that there is an infringement of Article 81 of the Treaty, it may by decision require the association of undertakings concerned to bring such infringement to an end. The infringement began with the decision taken on 12 July 1967. It ended on 21 November 2003, when the National Council withdrew Ethical Standard No 2 and took the necessary steps to announce the fact.

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62 Association's reply to the statement of objections, points 261 to 264.

3.4. Article 23(2) of Regulation No 1/2003 (Article 15(2) of Regulation No 17)

(112) Article 23(2) of Regulation No 1/2003 states that the Commission may impose fines on undertakings and associations of undertakings where, either intentionally or negligently they infringe Article 81 or Article 82 of the Treaty. Article 15(2) of Regulation No 17, which was applicable when the infringement was committed, stated that the fine could not exceed 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement. Article 23(2) of Regulation No 1/2003 applies the same limitation.

(113) The Commission will calculate the fine to be imposed in the present case starting with a basic amount determined according to the gravity and duration of the infringement. This basic amount will be increased to take account of aggravating circumstances or reduced to take account of mitigating circumstances.

(114) In its reply to the statement of objections, the Association argues that it is legally impossible for the Commission to impose a fine for the following three reasons: the principle *ne bis in idem* must apply, in the light of the decision already taken by the Belgian Competition Council in July 2002; the infringement is time-barred; and the infringement was committed neither negligently nor intentionally. The Commission is of the opinion that these arguments are invalid, for the reasons explained below.

3.4.1. No application of the principle ne bis in idem

(115) In paragraphs 26 to 30 of this Decision it was explained that a number of complaints had been lodged by architects with the Competition Division of the Belgian Ministry of Economic Affairs, alleging that the Association had infringed the Belgian Protection of Competition Act. The Belgian Competition Council took a decision in those proceedings on 4 July 2002. In the decision, the Council concluded that the rights of the defence had not been respected, owing to the unreasonably long time taken by the proceedings, and that for this reason it was no longer possible to take a decision on the substance.

(116) The Association considers that to proceed against acts done before that decision would violate the principle *ne bis in idem*[63].

(117) The application of the principle *ne bis in idem* requires that three conditions be met:

– there must be a final criminal judgment, i.e. a judgment which has the authority of *res judicata;*

– the judgment must constitute an acquittal or a conviction;

– the fresh criminal proceedings or conviction must be in respect of the same offence.

(118) In the case at issue, even if it were to be supposed that the decision of the Belgian Competition Council could be deemed to be a final criminal judgment, it cannot be described as an acquittal or conviction. The decision did not consider the substance.

[63] Association's reply to the statement of objections, points 244 to 248.

A decision that does not rule on the substance of the case, and therefore does not make a finding that there has or has not been an infringement, cannot be regarded as an acquittal[64]. This criterion was applied by the Court of Justice in the *PVC* case. The Court there held that the application of the principle *ne bis in idem* presupposed that a ruling had been given on the question whether an offence had in fact been committed or that the legality of the assessment thereof had been reviewed[65].

(119) As there was no ruling on the substance in the national proceedings, the Commission is of the opinion that the principle *ne bis in idem* does not apply in the case at issue.

3.4.2. Not time-barred

(120) The Association argues that the infringement of Article 81 represented by the establishment of a fee scale in 1967 is time-barred, and can no longer be sanctioned[66].

(121) The Commission would point out that the Association amended and adapted the fee scale in 1978 and in 2002, and published it or made it available without interruption. The infringement is therefore a continuing infringement, for which the five-year limitation period begins to run on the day on which the infringement ceases[67]. The infringement of Article 81(1) committed by the Association took place between 12 July 1967 and 21 November 2003, and is therefore not time-barred[68].

3.4.3. Infringement committed intentionally or negligently

(122) The Association contends that the alleged infringement was committed neither intentionally nor negligently[69].

(123) However, the Commission would point out that according to settled case law, infringements of competition law which are liable to be sanctioned are those which are committed deliberately or negligently and it is sufficient for this that the party committing the act in question must have known that its conduct would result in a restriction of competition[70].

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64 The Commission would point out that in its decision the Competition Council indicated that the complainants were free to lodge a fresh complaint if the facts had not lost their relevance since 1997. It is clear, therefore, that the Association could not regard the decision as an acquittal.

65 Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij (LVM)* [2002] ECR I-8375, paragraphs 60-62.

66 Association's reply to the statement of objections, point 271.

67 Article 25 of Regulation No 1/2003.

68 See Commission Decision 95/551/EC in Case IV/34179 - Stichting Certificatie Kraanverhuurbedrijf, OJ L 312, 23.12.1995, p. 79.

69 Association's reply to the statement of objections, point 274.

70 Court of First Instance in Joined Cases T-213/95 and T-18/96 *Stichting Certificatie Kraanverhuurbedrijf* [1997] II-1739, paragraph 236, and in Case T-43/92 *Dunlop Slazenger* [1994] ECR II-441, paragraph 142.

(124) The Association must have known that its activities were caught by the European competition rules. The Treaty does not contain any provision excluding the professions from the scope of Articles 81 and 82[71].

(125) Furthermore, the community-law concept of "undertaking" has always been a functional one. The concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed[72]. Any activity consisting in offering goods or services on a given market is an economic activity[73]. Moreover, the Association must have known that the establishment of the minimum fee scale would result in a restriction of price competition[74].

3.4.4. Gravity of the infringement

(126) In assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographical market.

(127) Looking first at the nature of the decision fixing or recommending minimum fees to be applied by all the members of the Association in independent practice, the infringement has to be considered a very serious one. Price agreements are amongst the most serious infringements of Article 81.

(128) Turning to its actual impact on the market, there is no need to quantify in detail the extent to which prices differed from those which might have been applied in the absence of the anti–competitive arrangements in question. This cannot always be measured in a reliable manner, since a number of external factors may have affected the movement of prices for the service simultaneously, thereby making it extremely difficult to draw conclusions as to the relative importance of all possible causal effects. For the reasons mentioned in paragraphs 91 to 96, the Commission considers that the fee scale was in fact applied, at least to some extent. This necessarily created a risk that prices were at levels higher than they would have been under normal conditions of competition.

(129) However, the Association has provided evidence that the fee scale has probably not been applied universally by all architects, and that other methods of determining fees on the basis of individual negotiation have also been used.

(130) The geographical scope of the decision was limited to one Member State, Belgium.

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71 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 its 1993 *CNSD* Decision prohibiting the fixed fee scale of the Italian customs agents. The Commission will take this into account when determining the amount of the fine.

72 See in particular judgments in *Höfner and Elser* v *Macrotron*, cited above, paragraph 21; *Fédération Française des Sociétés d'Assurance*, cited above, paragraph 14; and *Job Centre II*, cited above, paragraph 21.

73 See in particular judgments in Case 118/85 *Commission* v *Italy*, cited above, paragraph 7, and Case C-35/96 *Commission* v *Italy*, cited above, paragraph 36.

74 See Commission Decision 95/188/EC of 30 January 1995 in Case IV/33.686 - COAPI, OJ L 122, 2.6.1995, p. 37.

(131) In the light of these factors, the infringement is to be classified as serious. Therefore the starting amount determined for gravity of the infringement is € 1 000 000.

3.4.5. Duration of the infringement

(132) There was a continuing infringement between 12 July 1967 and 21 November 2003. For the purpose of calculating fines the Commission takes account of complete months. The duration of the infringement is thus 35 years and 3 months. It is therefore an infringement of long duration.

(133) For infringements lasting more than five years, the amount determined for gravity may be increased by up to 10% per year. In the present case the Commission therefore considers it appropriate to increase the starting amount determined for gravity by 350%.

3.4.6. Basic amount

(134) Taking into account gravity and duration, the basic amount is set at € 4 500 000.

3.4.7. Aggravating circumstances

(135) No aggravating circumstances can be identified.

3.4.8. Attenuating circumstances

(136) 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[75]. A decision prohibiting the circulation of recommended tariffs by a federation of Dutch forwarding agents followed in 1996 with the *Fenex* Decision[76]. In the context of this case and on account of this attenuating circumstance the Commission considers it appropriate to remove the increase imposed for duration until 1993.

3.4.9. Other circumstances

(137) In this case the Commission considers it appropriate to take into consideration the specific context of the case. In the course of 2003 the Commission undertook a reflection on the level of competition in Professional Services. This reflection led the Commission to issue a Report on Competition in Professional Services on 9 February 2004[77]. The Commission's policy, set out in this Report, 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. Exercising its discretion regarding the setting of fines, the Commission also deems appropriate to take into account the fact that it did not impose a fine for the fixed fee scale of Italian customs agents in its 1993 *CNSD* decision and it imposed a symbolic fine of €1 000 for the circulation of recommended tariffs in its 1996 *Fenex* Decision. Therefore, in light of those

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75 Commission Decision 93/438/EEC in Case IV/33.407 – CNSD, OJ L 203, 13.8.1993, p. 27.

76 *Fenex* Decision, cited above.

77 COM(2004) 83 final.

circumstances the Commission considers it appropriate to refrain from imposing a high fine and imposes a moderate fine.

3.4.10. Amount of the fine

(138) The amount of the fine is € 100 000.

HAS ADOPTED THIS DECISION:

Article 1

From 12 July 1967 to 21 November 2003 the Belgian Architects' Association infringed Article 81(1) of the Treaty by adopting, in a decision of 12 July 1967 amended in 1978 and 2002, and making available a minimum fee scale known as Ethical Standard No 2.

Article 2

A fine of € 100 000 is hereby imposed on the Belgian Architects' Association for the infringement referred to in Article 1.

Article 3

The fine imposed in Article 2 shall be paid in euros, within three months of the date of notification of this Decision, into the following account:

001-3953713-69
in the name of the Commission of the European Communities with
FORTIS Banque/FORTIS Bank
rue Montagne du Parc/Warandeberg 3
B-1000 Brussels
(IBAN Code: BE71 0013 9537 1369; SWIFT Code GEBABEBB)

Failing payment within that time, interest shall be automatically payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points, i.e. a total of 5,50 %.

Article 4

This Decision is addressed to:

L'Ordre des Architectes belge/De Belgische Orde van Architecten
Représenté par le Conseil national de l'Ordre des Architectes/Vertegenwoordigd door de Nationale Raad van de Orde van Architecten,
Rue de Livourne 160 boîte 2/Livornostraat 160 bus 2
B-1000 Brussels

Article 5

This Decision shall be enforceable in accordance with the first paragraph of Article 256 of the EC Treaty.

Done at Brussels, 24 June 2004

For the Commission
Mario Monti
Member of the Commission

ANNEX

Ordre des Architectes

BAREME D'HONORAIRES

Mise à jour de juin 2002

Avertissement :

Etant donné que tant le Conseil de la Concurrence que la Cour Européenne de Justice semblent montrer un intérêt particulier pour les barèmes établis par les professions libérales réglementées, en ce qui concerne leur compatibilité avec les règles de la concurrence, *il y a lieu, dans le contexte actuel, de considérer le présent barème comme indicatif.*

Montant de la dépense totale, réelle ou présumée, calculé par tranches successives	*1ère tranche* de 0 à 160.000 €	*2e tranche* de 160.000 à 550.000 €	*3e tranche* de 550.000 à 1.400.000 €	*4e tranche* de 1.400.000 à 5.550.000 €	*5e tranche* de 5.550.000 à 16.600.000€	*6e tranche* au-delà
1ère Catégorie (1)						
Avant-projet	1,20	1,10	1,00	0,90	0,90	0,80
Projet pour exécution	1,80	1,65	1,50	1,35	1,35	1,20
Cahier des charges	0,60	0,55	0,50	0,45	0,40	0,40
Détails d'exécution	0,60	0,55	0,50	0,45	0,40	0,40
Contrôle - Réception	1,20	1,10	1,00	0,90	0,80	0,80
Vérification mémoires	0,60	0,55	0,50	0,45	0,40	0,40
Taux	**6,00%**	**5,50%**	**5,00%**	**4,50%**	**4,25%**	**4,00%**
2e Catégorie (2)						
Avant-projet	1,40	1,30	1,20	1,10	1,10	1,00
Projet pour exécution	2,10	1,95	1,80	1,65	1,65	1,50
Cahier des charges	0,70	0,65	0,60	0,55	0,50	0,50
Détails d'exécution	0,70	0,65	0,60	0,55	0,50	0,50
Contrôle - Réception	1,40	1,30	1,20	1,10	1,00	1,00
Vérification mémoires	0,70	0,65	0,60	0,55	0,50	0,50
Taux	**7,00%**	**6,50%**	**6,00%**	**5,50%**	**5,25%**	**5,00%**
3e Catégorie (3)						
Avant-projet	1,60	1,50	1,40	1,30	1,30	1,20
Projet pour exécution	2,40	2,25	2,10	1,95	1,95	1,80
Cahier des charges	0,80	0,75	0,70	0,65	0,60	0,60
Détails d'exécution	0,80	0,75	0,70	0,65	0,60	0,60
Contrôle - Réception	1,60	1,50	1,40	1,30	1,20	1,20
Vérification mémoires	0,80	0,75	0,70	0,65	0,60	0,60
Taux	**8,00%**	**7,50%**	**7,00%**	**6,50%**	**6,25%**	**6,00%**
4e Catégorie (4)						
a), b) et c)						
Avant-projet	2,40	2,20	2,00	1,80	1,60	1,60
Projet pour exécution	3,60	3,30	3,00	2,70	2,70	2,40
Cahier des charges	1,20	1,10	1,00	0,90	0,90	0,80
Détails d'exécution	1,20	1,10	1,00	0,90	0,90	0,80
Contrôle - Réception	2,40	2,20	2,00	1,80	1,60	1,60
Vérification mémoires	1,20	1,10	1,00	0,90	0,80	0,80
Taux	**12,00%**	**11,00%**	**10,00%**	**9,00%**	**8,50%**	**8,00%**
d) et e)						
Avant-projet	1,20	1,10	1,00	0,90	0,80	0,80
Projet pour exécution	3,60	3,30	3,00	2,70	2,55	2,40
Cahier des charges	1,20	1,10	1,00	0,90	0,85	0,80
Détails d'exécution	2,40	2,20	2,00	1,80	1,80	1,60
Contrôle - Réception	2,40	2,20	2,00	1,80	1,70	1,60
Vérification mémoires	1,20	1,10	1,00	0,90	0,80	0,80
Taux	**12,00%**	**11,00%**	**10,00%**	**9,00%**	**8,50%**	**8,00%**
5e Catégorie (5)						
Avant-projet	1,50	1,35	1,20	1,05	0,90	
Projet pour exécution	4,50	4,05	3,60	3,15	2,70	
Cahier des charges	1,50	1,35	1,20	1,05	0,90	
Détails d'exécution	3,00	2,70	2,40	2,10	1,80	
Contrôle - Réception	3,00	2,70	2,40	2,10	1,80	
Vérification mémoires	1,50	1,35	1,20	1,05	0,90	
Taux	**15,00%**	**13,50%**	**12,00%**	**10,50%**	**9,00%**	

DESCRIPTION DES CATEGORIES

(1) **La 1ère catégorie** comprend les ouvrages de caractère purement utilitaire et traités avec une très grande simplicité. Son également classés dans cette catégorie, les bâtiments dont les programmes se réfèrent à des dispositions types et dans lesquels les constructions comportent l'utilisation systématique d'éléments identiques. Peuvent notamment être classés dans cette catégorie :

- les constructions industrielles, commerciales ou agricoles, enfermant de grands espaces vides
- les hangars, entrepôts, halls, silos, écuries
- les cimetières sans caractère monumental.

(2) **La 2e catégorie** comprend les ouvrages de conception simple dont les aménagements sont traités sans recherches spéciales. Peuvent notamment être classés dans cette catégorie :

- les maisons d'habitation ou de commerce sans exigences particulières
- les bâtiments d'administration de caractère simple
- les écoles froebeliennes et primaires, salles de gymnastique
- les prisons
- les hôtels de petite ou moyenne importance
- les casernes
- les gares ferroviaires ou routières de peu d'importance
- les garages
- les terrains de sports
- les cimetières de caractère monumental.

(3) **La 3e catégorie** comprend les ouvrages nécessitant une étude approfondie en raison de la complexité de leur programme ou encore de leur caractère monumental. Peuvent notamment être classés dans cette catégorie :

- les maisons familiales, villas, résidences à exigences particulières
- les immeubles à appartements ou à étages multiples
- les magasins de distribution
- les bâtiments d'administration, ministères, hôtels de ville
- les banques
- les bâtiments judiciaires
- les édifices du culte
- les bâtiments militaires
- les postes de pompiers et de police, stations de radio, bureaux de poste
- les établissements d'enseignement moyen et supérieur
- les musées, bibliothèques
- les théâtres, salles de concerts, cinémas, salles de spectacles, casinos, salles de réunions, clubs, centres culturels, etc..
- les laboratoires, hôpitaux, cliniques, orphelinats, homes pour vieillards
- les établissements thermaux ou de bains
- les foyers sociaux, réfectoires, colonies de vacances
- les hôtels de grande importance et restaurants
- les gares ferroviaires, routières, aérogares
- les abattoirs
- les bâtiments industriels avec aménagements compliqués
- les crématoires
- les pavillons d'exposition.

(4) **La 4e catégorie** comprend:

a) les ouvrages dans lesquels le caractère et la recherche artistique sont prédominants. Peuvent notamment être classés dans cette catégorie :
   - les travaux de décoration ou d'aménagement de locaux, de stands d'exposition, etc.
   - les jardins publics, promenades, fontaines
   - les monuments commémoratifs et funéraires ;

b) les ouvrages qui malgré leur coût peu élevé exigent des connaissances spéciales étrangères à la techniques des bâtiments;

c) les ouvrages commandés par un programme nouveau, d'une réelle difficulté;

d) tous travaux généralement quelconques de transformation engageant la responsabilité de l'architecte dans une mesure plus importante que la valeur marchande des ouvrages exécutés;

e) les travaux d'entretien.

(5) **La 5e catégorie** comprend les ouvrages de restauration de bâtiments, monuments ou intérieurs historiques.

Au cas où, nonobstant l'application des critères propres à chacune des cinq catégories, un doute subsisterait quant à la catégorie dans laquelle doit être classé un ouvrage, la détermination de cette catégorie doit se faire en fonction de l'importance relative du parachèvement par rapport au coût de l'ensemble. Pour l'application de ce critère, il ne sera pas tenu compte du coût des aménagements des abords ainsi que des fondations spéciales. Le coût du gros oeuvre comprend celui des maçonneries, des travaux d'étanchéité, des bétons, des charpentes et couvertures ainsi que de tous travaux s'y rapportant. En fonction de ce critère, la détermination de la catégorie des ouvrages se fait ainsi :

- *la 1ère catégorie comporte les bâtiments dont le coût de parachèvement ne dépasse pas 35 % du coût de l'ensemble;*
- *la 2e catégorie comporte les bâtiments dont le coût de parachèvement se situe entre 35 % et 55 % du coût de l'ensemble;*
- *la 3e catégorie comporte les bâtiments dont le coût de parachèvement se situe entre 55 % et 75 % du coût de l'ensemble;*
- *la 4e catégorie comporte les bâtiments dont le coût de parachèvement dépasse les 75 % du coût de l'ensemble.*