

16th January, 2004

The Competition Authority
Parnell House
14, Parnell Square
Dublin 1

Attention: Reuben Irvine

A Chairde,

**Re: Study of Competition Professional Services in Ireland
Consultation Document 2 Architects**

Thank you for sending me a copy of the above for comment and I would like to compliment the Authority on the insight which you are achieving into the competition environment of the provision of architectural services.

I set out below the following issues for your consideration in relation to your final report and recommendations later this year. I have been actively seeking to rectify the non-competitive position in the provision of architectural services since the mid-80's. This submission addresses the relatively complex issues of the lack of competition and excessive dominance in the market place of one organisation leading to an unbalanced marketplace and a non-competitive environment.

I have focused in this submission, as you requested, on the key issue of registration for the architectural, building surveyor and quantity surveyor professions, generally, under three headings:

1. background to the present position
2. existing situation
3. solutions proposed

Background

In 1984, the E.U. introduced a directive on the architectural profession. The principal organisation representing architects in Ireland which was listed in the directive progressively used this in their marketing campaign on behalf of their members. Members of other organisations representing architects sought to introduce the re-introduction of some balance into the competitive market in the provision of architectural services in a number of ways. This included the court case –

Sally v The Minister for the Environment dated 14.05.88 known as the Lardner judgement.

See Appendix 1

This identified the terms of the architect's directive and concluded that the Minister was not required in law to deal with the competition issue in the manner sought. However, in 1989 the Minister did set out to clarify the competition issue and established a board to identify those individuals who met the criteria set out in the E.U. directive and this led, following assessment, to c.171 individuals, who had applied, being approved for the "Minister's List".

The matter was also clarified in the Ministerial answer to a question in the Dáil on 6th April 1963 and this confirmed that a 'number of persons were overlooked when the directive was being negotiated'.
See Appendix 2

The principal organisation representing architects, however, continued to use the E.U. directive as a marketing aid in their publicity on behalf of their members and in conjunction with the high quality of the services which their members offer has resulted in their near complete domination of the marketplace for the provision of architectural services in Ireland. One would find it extremely difficult to find any substantial government or private commercial project for which architectural services are provided by a non-member of the RIAI.

In relation to design competitions the Government has regularly written to local authorities and semi-state organisations directing them that competitions should not be restricted to E.U. directive eligible architects. Again, it is difficult to find any competition to which attention has been paid to this Government directive.

One department of Government; Education & Science, has sought on the face of it to address the question of competition and some non-RIAI architects are listed on their approved panel of consultants. However, in the absence of any other reference standard other than the E.U. directive and RIAI membership, their own duty of care to their clients, school managers, teachers and pupils they have used RIAI or I.E.I membership as the reference standard.

See Appendix 3, Paragraph 9

It is appropriate to note also the high standard of this document and the reference in your report to possible collusion on fees. All Government departments and major users of architectural services have expert in-house personnel charged with negotiating optimum terms for architectural services for their organisations. Collusion is not a factor in the fee bidding process and the organisations are fully aware of the actual cost of the delivery of the services and the level below which an adequate service cannot be provided. (Government Publication 11.87 The Negotiation Document for Architects etc)

It is also appropriate at this point to identify the difference between the arbitration-like service provided by architects, building surveyors and quantity surveyors between the clients and their contractors. In small works a variation of in excess of 100% is not uncommon between the highest and lowest tenderer. In commercial competition theory this might indicate collusion, however, in the building industry one might read no more than that the most expensive tenderer does not wish to take the work except at a considerable premium and that the lowest tender is either incompetent at pricing the job correctly or, alternatively, is pricing below cost with a view to achieving a profit margin through extras on the project. From a client's point of view there are few things worse than having a contractor discover shortly after he has taken possession of the site and started the works to discover that he has underpriced the works. The service provided by architects, building surveyors is very different in nature to that provided generally by the other professions in your study, such as, doctors, dentists, solicitors and barristers. In these cases the services provided are either relatively easily defined from the outset, or each party has their own representation.

In the mid-90's, the forum for the construction industry was established and the organisations representing architects other than the RIAI were not initially included in the remit. However, they applied in the continuing context of seeking to rectify the competitive environment for provision of architectural services and a sub-group was set up including the organisations under the aegis of the forum.

At the outset, there was little confidence in the non-RIAI membership of the sub-group in the ability of the RIAI to administer a registration process objectively or impartially. However, after a complex negotiation process over a number of years the White Framework Document was agreed between the members of the group (representing architect members of professional organisations) and submitted to the Government. The unique aspects of the form registration proposed included –

1. Knowledge of the pros and cons of registration structures which exist in other E.C. countries the USA and Australia .
2. Current human rights and competition legislation
3. A comprehensive grandfather clause
4. A complaints procedure
5. An exam structure allowing non-academic entry route into the profession

The existing situation

In relation to the present position on consumer complaints, all of the organisations have complaints procedures in place. However, due to the dominant position which the RIAI holds in the marketplace and as it declares itself to be the representative body for professionally qualified architects in Ireland in its marketing literature, it is the only body which receives complaints. Only a small proportion of the complaints which it receives relate to its own members and in the order of 80% of the complaints relate to non-RIAI providers of architectural services which they are not in a position to do anything about. In this case, it is their use of the definite article in relation to their organisation which implies to the consumer that they are the only organisation representing professionally qualified architects in Ireland which is not the case.

In relation to regulatory assessment (RIA), this formal process is relatively new, the only reference to an RIA disclosed on enquiry to the Larachtas library was one submitted by J. & L. Goodbody on behalf of the hospitality industry in relation to the proposed anti-smoking legislation. Similarly, RIA's in the E.U. are relatively new and are envisaged as being introduced progressively in 2004.

See Appendix 4

However, just because an RIA may not have been formally carried out in this case does not mean that all of the RIA criteria have not been fully and exhaustively investigated by the Government in their drafting of the proposed building control bill which will provide for registration of architects, building surveyors and quantity surveyors. Given the length of time in preparation of this draft legislation, the high calibre of individuals in the Department of the Environment involved in the drafting, the and the historic Regulatory Quality Checklist, all of the key RIA reference points have been taken account of.

The Department has identified the trade-offs in achieving the competitive objectives. They have complied with the common set of basic questions and minimum analytical standards of RIAs identified by the E.U. They have taken account of the flexibility required to deal with the combination of issues, including standards, certification of compliance with building regulations, health and safety and the competition environment. They have systematically analysed the likely impacts of the intervention through regulation by the Government and concluded correctly that the appropriate mechanisms to deal with these issues are as described in the draft legislation.

The alternative of an independent authority dealing with registration will not work as, apart from the cost, it would have little more effect on the competitive environment than the letters and directives from the Government in relation to the running of competitions. It would maintain and enforce the present system and do nothing to address the near total market dominance of the RIAI that exists at present (by market dominance I mean the percentage of building construction turnover in which architectural services are provided).

The Department of Environment sought and received a broad range of views in an open and transparent manner and took into account all submissions made and different scenarios were compared before the final drafts of the legislation.

The present regulatory environment for the consumer is increasingly complex, for instance, the recent health and safety legislation places a range of liabilities on the consumer for which expert assistance is needed. **See Appendix 5**

The solutions proposed

The proposed legislation complies fully with the E.U. and Government aspirations to simplify and improve the regulatory environment.

In terms of the formal RIA checklists for preliminary and extended form of assessment in relation to the building control legislation as drafted –

1. The issues and objectives have been clearly identified, the potentially unsustainable trends investigated.
2. The main policy options have been fully explored taking into account proportionality and subsidiarity.
3. The impact of the legislation has been carefully considered.
4. Consultation has taken place with all the parties who have expressed an interest and also with relevant personnel with appropriate expertise.
5. The nature of the economic, environmental and social impacts on the relevant sectors have been considered.
6. The degree of impact on the interested parties, consumers and providers of the services have been assessed and considered.
7. The options of no regulation, self-regulation and co-regulation have been fully considered and analysed in depth.

In relation of fees, the percentage fee system generally operates in favour of clients linking the architect or consultant to the project without a time framework. Often a time based rate for provision of services is not in the consumer interests.

The immediate benefit in registration of architects, building surveyors and quantity surveyors will be to introduce up to a 30% increase of architects in a genuinely competitive environment. As the registration relates only to title it does not place any restriction or rights to practice or offer any services including design, project management, certifications of compliance. This increase will make the marketplace more competitive. In addition the examination will provide a non-academic route to registration which is novel in the registration processes in the E.U.

The U.K. Royal Institute of British Architects methodology for calculating and remuneration is flexible and identifies a range of options including other methods, such as, betterment or incentive fees, equity shares, or unit price fee which provide for flexibility and competition in relation to services provided. In relation to architectural services, the incentive to inflate the contract cost to increase the percentage fee does not exist as the potential liabilities flowing from this type of approach far outweighs any possible minor benefit gained. Some form of fee advice is appropriate for consumers who do not have experience in the use of architectural services and I understand there is recent case law in the U.K. which finds that provision of historical information does not conflict with U.K. competition laws. **Appendix 6**

The regulatory framework in the proposed building control legislation is well designed and workable. It achieves the principal objective of the legislation of building control standards and incidentally corrects the existing competitive imbalance in the marketplace. The appropriate use of other policy instruments were considered and it was recognised that regulation in some form is necessary to achieve the aims of public policy in relation to building control. The Safety, Health & Welfare at Work, Construction Regulations 2001 identifies that all construction workers must receive a capital FAS safe pass, safety aware training and be in possession of registration cards. All workers undertaking specified safety critical duties must have received training approved by FAS under the construction skills certification scheme. The need for some form of certification goes through the entire construction industry with responsibility for safety delegated to members of the team involved in the delivery of the building project from client through project supervisor design stage, designers and project supervisor for the construction stage. **See Appendix 7**

The proposed legislation passes the tests for the concept of good regulation identified by Mandelkern Group 6, that is –

1. **Necessity** - that is the authorities must make the case for introduction for regulation and the possibility of alternative approaches.
2. **Proportionality** – the regulation must find a balance between the advantage it provides and the constraints it proposes.
3. **Subsidiarity** – decisions must be taken as close as possible to the consumers.
4. **Transparency** – participation by and consultation with all interested parties prior to drafting.
5. **Accountability** – all parties affected by the regulation should be able to identify the body introducing the regulation and be able to consult with them if difficulties arise so that amendments can be introduced.
6. **Simplicity** – the regulation should be as detailed as necessary and as simple as possible (Reference: the final report of the Mandelkern Group on better regulation, European Commission November 2001). The form of registration proposed contributes to the general interest without the public authorities or Government needing to intervene in the activity (covered by a mechanism of co-regulation) unless the registration body fails to meet the standards set out in the legislation.

In relation to the Consultation Document 2, please note the following comments

Page 3, Paragraph 2

The architectural profession has no restriction on entry and no regulatory structure related to minimum safety standards. This has operated to the benefit of some clients. The competition authority has not identified the case for restriction of use of title or architect and this does not mean that there is not a case for such restriction on the use. The registration proposed will open up entry to the profession through the provision of a non-academic route for qualification, it will increase the number of formally recognised architects by up to 30% on implementation and progressively through the non-academic examination. It is unlikely that this will have negative effects on clients as it will increase the choice of architects. The fee structures will be relaxed and more competitive and advertising provided for. A regulatory impact analysis has already been carried out, albeit in a less formal manner and the registration system is best administered by the dominant organisation in the marketplace with provision for active lay and consumer involvement in the process and with adequate safety mechanisms in place to permit direct Government involvement should the administration body fail to meet the standards of objectivity and impartiality set out in the legislation.

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The public interest is not always best served when practices respond to market demands. Regulation must focus on objective safety and ethical standards given the arbitrator like role which the profession provides between client and contractor and in this it is different from the other forms of profession, such as, doctors, dentists, solicitors etc., where either a specific service is provided or each side has separate representation.

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The Registration structure proposed complies with all of the criteria set out in Section 4 of the Competition Act , 2002

In my experience of over 30 years of both providing architectural services and employing architects as consultants, collusive agreements either tangible or intangible do not exist between architects . Competition economics theory based perception of architectural services as simply a 'good' is incorrect and an over simplification of the process. Some of the service is intangible and takes into account ethical standards , environmental sustainability and the arbitrator like role provided between client and contractor

In summary the proposed registration system for architects, building and quantity surveyors will substantially improve the competitive environment for provision of services to the construction industry . It will provide a mechanism for appropriate non confrontational involvement of the Government, at no cost to the exchequer or the profession, in the administration of the processes should the situation require.

I trust that the above is of assistance to you in arriving at your conclusions and confirm that I am available at your convenience to discuss the matter further if you wish

Yours sincerely

A handwritten signature in cursive script that reads "Michael A. Cassidy". The signature is written in black ink and is positioned in the lower middle section of the page.