



Reasons for justification of the German fee-scale system for architects and engineers (HOAI)

Article 15 of Directive 2006/123/EC on services in the internal market (“the Services Directive”) lists a series of requirements imposed on service providers, among which legal form, shareholding and tariffs. These requirements are not strictly prohibited, but have been identified by the European Court of Justice as possibly creating obstacles to the single market in services. The Commission’s peer review exercise undertaken in 2013 concluded that these requirements can only be maintained in so far as they are: **non-discriminatory, justified by overriding reasons relating to the public interest and proportionate.**

Non-discrimination

The applicability of the 2009 HOAI in Germany for all established providers of architectural services ensures that there is no discrimination. The HOAI applies to all providers of the services listed in the HOAI, who are registered and established in Germany, as well as to the clients of those service providers. All service providers who are not registered and established in Germany are free to offer services at lower or higher prices than those practised within Germany - which, in any case, are not uniform, but calculated within a band created by the establishment of minimum tariffs (to ensure that services are not offered at abnormally low rates i.e. below costs, which would undermine quality) and maximum tariffs (to establish an overall ceiling on construction costs).

Over-riding public interest

According to Recital 40 of the Services Directive the concept of “public interest” covers, inter alia, grounds such as consumer protection, the protection of the environment and the urban environment, including town and country planning, as well as the preservation of national, historical and artistic heritage. One of the main reasons for adopting a policy on fees is to safeguard quality. Maintenance of a high quality of service by members of a regulated profession has been accepted by both the European Commission ¹ and by the ECJ ² as being an objective of public interest.

Proportionality

The identification of maximum fees help to set a ceiling on construction costs (ultimately, to the benefit of the consumer and service recipient) while the establishment of minimum fees is designed to ensure that quality levels are not undermined.

The HOAI is functioning particularly well in this sense.. It helps to ensure transparency and prevent abuses when fees are settled, which is in the best interest of the consumer and service recipient. It allows clients and public authorities, both consumers of architectural services, to evaluate these services. The cost of services is directly related to the resources that are deployed and thus determined by the scope of those services. Therefore, a detailed list of tasks to be accomplished and a definition of the size and complexity of the building, will form the basis of any agreement between the

¹ Cf. Commission’s Reasoned Opinion against Italy of 21.12.2005, C(2005)5894, 4.3.1 and 4.3.2

² Cipolla case



client and the architect, and enable both to evaluate the quantum and cost of services purchased by the client.

While the service provider is generally well placed to be able to know the cost and complexity of the services provided, the recipient (often a 'once-in-a-lifetime' client) cannot reasonably be expected to have the same level of detailed knowledge of costs – therefore, an 'asymmetry of information' exists which a transparent fee-scale helps to redress (without which the consumer may find it difficult to judge the quality of the service purchased).

In an earlier report on the liberal professions, the European Commission stated that certain cost information models were acceptable that offered the client / consumer information about the possible cost of planning or building services:

“[...] For instance, active monitoring by consumer associations on pricing and **the collection and publication of surveys based historical price data by independent organisations**. Ways can also be developed to provide customers with costs of the professional service ex ante, at the moment of giving the mandate. Certainly scales which do not help the consumer to know in advance how much they will have to pay (either because of their complexity or because they are not public) are totally unjustifiable. [...]”.

The methodology of the HOAI corresponds exactly with the Commission's recommendation. The basis for the binding remuneration rules of HOAI 1977 was established by a thorough expert opinion, commissioned by the relevant ministry, which was submitted in 1974. In order to determine an average fee, the evaluators had numerous projects investigated and the average value that is necessary for the implementation of a construction project was set in the middle. With a freely negotiable range relating to this average value, the minimum and maximum rate for the respective planning services was enacted as binding.

The HOAI in its current version is also the result of long and complex research projects, in which contractors' and clients' expert provided the necessary expertise for this purpose in technical working groups. As part of the revision of the HOAI 2013, the performance profiles have been adapted to the current requirements of modern planning processes and thus created a consistent set of regulations. The minimum rates of the HOAI reflect the planning reality in Germany (i.e. required services within the planning system) as well as the corresponding workload.

It should be emphasised that HOAI does not regulate fees for certain (regulated) professions, but is a government price law for services that may be basically performed by anyone.

In any event, European Public Procurement legislation recognises the importance of awarding contracts on the basis of most economically advantageous tender (rather than lowest price), so competition on performance (including life-cycle costs) must also be taken into account (rather than competition solely on cost). It should be noted that the causal relationship between the offer price and service quality, as a legal principle, also forms the basis of European Public Procurement legislation which contains express provisions for the protection of service recipients against 'dumping'.



Recent experience

Analysis undertaken in the UK by the Royal Institute of British Architects reveals almost no difference in the level of professional fees charged before and after the abolition of fee-scales.

In Italy, the abolition of fee-scales brought about difficulties for public works departments (no basis on which to draw up budgets) as well as difficulties with litigation (the courts no longer have any basis on which to make awards when settling construction cases). The authorities are now having to work with the profession to elicit relevant cost information once more.

Meanwhile, the existence of the HOAI in Germany has not produced a situation in which fees are excessively high or low in comparison with other Member States - but rather are situated in between.

Impact on professional mobility

In our experience – and according to our own research³ – knowledge of local fee-scales and tariffs is not a major concern for professionals looking to work in another country. Architects we have surveyed have cited

- insufficient language skills,
 - insufficient knowledge of planning / building regulations,
 - practical / relocation issues,
 - lack of knowledge of the local market
- as being issues of greater concern than regulated fees.

Therefore, we conclude that the HOAI does not constitute an obstacle to cross-border establishment in Germany, nor has the abolition of compulsory fee-scales in other Member States led to a significant increase in cross-border establishments in the past.

³ Cf. ACE publication “The Architectural Profession in Europe 2014 – a Sector Study” 2014