

# 7 Conclusions

## The monopoly situation

7.1. We are required to report whether a complex monopoly situation<sup>1</sup> exists in relation to the supply of civil engineering services, defined in the reference as the services supplied by persons who have been admitted to the membership of the Institution of Civil Engineers (ICE) and who offer their services as consultants in that field. In so doing we are required to limit our consideration to agreements and practices relating to the advertising of these services.

7.2. We describe in Chapter 4 the two main sets of rules observed by these engineers which limit their freedom to advertise and which we have identified for consideration.

7.3. First, members of ICE are expected to observe the rules for professional conduct and the Pronouncement on Publicity of ICE itself, which impose limitations on the way in which members may advertise (paragraph 4.3 and Appendix 4.1). The most important of these for our purposes are the provision that advertisements should be plain statements of verifiable fact and the prohibition of general unsolicited circulation of brochures and informatory letters. ICE represented to us that the rules bear on only the activities of those of its members who practice as individuals since it considered it was unable to take action against those members who advertised the services of their partnership or company. For the present purpose, however, we have to consider whether the rules are observed by all members. The Pronouncement appears to relate to all members of ICE and ICE has told us it expects members to observe this Pronouncement. We have seen no evidence of advertisements by members which infringe the terms of the Pronouncement.

7.4. Secondly, a number of those offering the reference services are also members of the Association of Consulting Engineers (ACE) (paragraphs 4.8 and 4.9). Members of ACE are required to observe the rules of professional conduct of ACE. These state, among other requirements, that a member shall not advertise either himself or through any person or firm apart from brief directory entries and practice announcements. Further, it is a condition of membership of ACE that all those in the firm to which the member belongs adhere to these Rules of Professional Conduct. Support for the requirements on advertising was reaffirmed in 1987 at the annual general meeting of members and we are satisfied that it is generally observed.

7.5. It is clear that ACE rules prevent its members from using advertising or communicating with potential clients, except in specified and limited circumstances. ICE rules also impose some limitations albeit less severe on the freedom of ICE members to use certain forms of advertising and publicity. Observance of the rules of both these bodies must affect both the means by and the extent to which consulting civil engineers can compete with one another. Accordingly we conclude that a complex monopoly situation exists, by virtue of section 7(1)(c) and (2) of the Fair Trading Act 1973, in favour of the members of the group consisting of members of ICE who offer the public their services as consultants in the field of civil engineering.

---

<sup>1</sup> See note on the complex monopoly situation at Appendix 7.

## The public interest

7.6. We are asked to consider whether any steps are being taken by these civil engineers for the purpose of exploiting or maintaining the monopoly situation and whether any action or omission on their part is attributable to the existence of the monopoly situation. In the circumstances of this reference and the terms in which it was made these questions are largely technical. We do not find that any steps by way of uncompetitive practices or otherwise are being taken by consulting civil engineers for the purpose of exploiting or maintaining the monopoly situation we have found to exist (paragraph 7.5), nor do we find that any action or omission on the part of these engineers is attributable to the existence of the monopoly situation.

7.7. Finally we have to consider whether any facts found by the Commission in pursuance of their investigations operate, or may be expected to operate, against the public interest. In doing so, however, we are, as a practical matter, bound to take account of the general context in which the services are supplied.

### General considerations

7.8. We identified public interest issues for consideration in relation both to competition and efficiency within the consulting civil engineering profession and in relation to the interests of consumers. In considering these issues we have had in mind some general considerations.

7.9. First we have taken into account conclusions reached in earlier inquiries by the Commission, most notably the 1970 report on the general effect of certain restrictive practices, including restrictions on advertising, in the professions, and the series of reports in 1976 on advertising restrictions in a number of individual professions (see Chapter 3).

7.10. Secondly we noted the changes since 1970 in the general climate in which the professions operate and in the public's attitudes to and expectations of the professions. These factors, coupled with the outside competitive pressures on some professions, have together led to an increasing acceptance of the view that competition and professional status are not incompatible, provided professional standards are maintained.

7.11. Thirdly our consideration of the effects of the restrictions took account of the differences between the rules of the two bodies ACE and ICE. ACE at present prohibits advertising by individual members apart from brief directory entries, including *Yellow Pages* and in particular the *Consulting Engineers Year Book*, and announcements of practice changes. ICE permits advertising but with restrictions on both content, form and distribution. Given the greater freedom allowed by the ICE rules than those of ACE the impact on the public interest of each had to be considered separately.

7.12. Fourthly we noted that some consulting civil engineers with whom we are concerned are also members of other bodies of engineers, for example the Institution of Structural Engineers and the Chartered Institution of Building Services Engineers, besides other bodies of engineers less directly concerned with construction, such as the Institution of Mechanical Engineers. The services provided by members of the Institution of Structural Engineers (ISE), however, are the most closely related to civil engineering. We understand that a declining number of civil engineers, currently about 3,000, hold joint membership of ICE and ISE; of these less than 700 are thought to work as consultants and thus to be covered by the reference.

7.13. We noted the existence of a Guidance Note issued by the ISE on the interpretation of its rules of conduct in relation to advertising as a matter that might need to be considered. On examination, however, it appeared to us that although the wording of the guidance was slightly different from that of the ICE rules the practical effect was likely to be the same. In particular we noted that the ICE requirement that letters and brochures should be sent only to clients or potential clients with a genuine interest is paralleled by the ISE guidance that letters may be sent to persons or organizations 'who may have an interest' in receiving the information. In the absence of any evidence or suggestion that

observance of ISE guidance acted as an additional constraint on the behaviour of ICE members who were civil engineering consultants we did not examine the ISE guidance further.

7.14. Fifthly we bore in mind the general characteristics of the market. In general consulting civil engineers are offering a product tailored to the needs of the individual client. The general public seldom require the services of a consulting civil engineer. The typical client, even for the smaller commissions, is likely to have sufficient expertise to formulate his requirements and to assess the credentials of the engineers and the suitability of the services he is being offered. Generally, though not always, he has some knowledge of where to look for the services he needs. At the same time most commissions are for projects whose quality may only be tested over a considerable life span.

7.15. Finally, we have noted that this inquiry was marked by the virtual absence of any evidence in response to the advertisement of the inquiry, either from members of the public, from clients, or from within the profession, except from ACE and ICE themselves. This suggests that the effects of the present rules are not such as generally to create serious concern in either the providers or the users of consulting civil engineering services.

## Competition within the profession

7.16. The Commission set out, particularly in the 1970 report, their reasons for concluding that restrictions on advertising by the profession were in general likely, by restricting competition, to have adverse effects on innovation and efficiency generally. In the present inquiry the professional bodies argued that advertising was of little relevance since civil engineering consultants were chosen by an informed clientele on the basis of reputation. Support for the restrictions within the civil engineering profession seems to stem as much from the view that advertising would be ineffective as that it would be unprofessional. While these characteristics of the market for civil engineering consultants' services may affect the extent and form of any advertising that might take place, we consider that the restrictions must to some extent limit the flow of information, and thus affect the competitive situation.

7.17. The main competition issue we have identified is the effect of restrictions on the establishment of new practices and the expansion of existing practices. Further issues concerned the effects of the restrictions on the ability of consulting civil engineers to compete on price, on their use of other means of self-promotion, and on the competitive position of those who observe the rules, as opposed to those offering civil engineering consultancy services who are not subject to them.

### **The establishment and development of civil engineering consultancy practices**

7.18. Restrictions on their ability to publicise the services they can provide must be expected to hamper those who are attempting to establish themselves and some of the very limited evidence we received identified this as a concern. However, the view has also been put forward that freedom to advertise would harm the smaller practice which would not have the resources to compete on advertising with larger firms. Both ICE and ACE argued that individual practices were established by those who had already acquired experience and some contacts and that for them as for other practices, reputation, recommendation and contacts were more important than advertising in securing commissions. ACE pointed out that consulting engineers needed to have been in practice for three years before becoming eligible for membership, and that its rules could therefore not be held to impede the establishment of practices.

7.19. We recognise this last argument, although establishment of a successful practice is a continuing process which is likely to take a number of years. We do not, however, accept that the ability to advertise is irrelevant to the consulting civil engineer's opportunities to secure work. The OFT survey and the ACE survey of its membership both showed significant minorities who wanted the present rules

on advertising to be relaxed, at least to some degree. We would expect the ACE prohibition of advertising to hamper the engineer who wishes to make himself known to a wider clientele as an aid in building up his practice. Whether or not he is correct in thinking that advertising will be helpful, the restriction deprives him of the freedom to test its usefulness.

7.20. The ICE rules allow the provision of a wide range of factual information by general advertisement and unsolicited direct approaches to those who may reasonably be supposed to have a genuine potential interest. ICE explained to us (paragraph 4.7) that this last provision was liberally interpreted. If interpreted in the way described by ICE, it seems unlikely that the restrictions on the content or form of advertising would present significant practical difficulties for its members in publicising their services. We note, however, that there seems to be some misunderstanding among ICE members over the nature of the restrictions; these engineers who complained about present restrictions appeared to think that ICE disapproved of advertising as such and that its rules were more restrictive than ICE represented to us and this is a point to which we revert later.

#### **Effects on price competition**

7.21. Both ACE and ICE have withdrawn earlier prohibitions on price competition by their members and a considerable number of commissions are now awarded on the basis of fee competition. Both ICE and ACE claimed that ability to advertise fees was not an issue. Projects varied so widely that it would be impossible to quote meaningful charges in general advertising. Fee competition was already widespread and where it was not employed clients were able to check prices with competing engineers. Both bodies considered that advertising, by incurring costs, would tend to raise fees.

7.22. The scope for the advertising of fees in the consultancy field may be limited by the nature of the services offered (paragraph 2.9) but we note the move by Government departments and others to invite fee competition and that in other professions, eg solicitors, where the services offered are not standardized, relaxations in restrictions on advertising have led them to publicise their charges for some services. The argument that the costs of advertising will be passed on to the client in increased charges is one that has been put forward by a number of professions both in this country and overseas. The evidence is not clear-cut but some studies have shown fees and charges have fallen after freer advertising and hence more competition has been allowed (see Chapter 3).

#### **Other forms of publicity**

7.23. We were interested in whether restrictions on advertising might encourage consulting civil engineers to pursue other less open forms of attempting to secure business and whether this might not be more harmful to the profession's reputation than overt advertising. We noted in particular the use of announcements in the press by consulting civil engineers congratulating the client on the successful completion of a project and the appearance of editorial articles in the specialist press describing the successes of individual firms. Excessive use of entertainment might also be a form of covert promotion. ACE recognized that the line between congratulatory announcements and advertising might be blurred but was not aware of major problems. Neither body was aware of the use of excessive entertainment or thought that it was likely to arise given the relationship between clients and the profession. While there may be some potential for abuse in these areas, we consider it a minor concern.

#### **Competition with those not bound by the ICE and ACE rules**

7.24. Civil engineering contractors can offer construction packages which include the kind of services offered by consulting civil engineers (paragraph 2.9). In addition there is some tendency for firms of consulting civil engineers to become public companies or to be taken over by such companies. These contractors and companies are free to advertise and do so. ACE told us that freedom to advertise was not a major concern to its consulting civil engineering members in meeting such competition, although it had concerned some members outside the civil engineering field.

**The interests of consumers** 7.25. In considering the effect of restrictions on consumers we identified two major issues:

- (a) whether the restrictions limited the information available to potential clients in selecting a consulting civil engineer; and
- (b) whether the restrictions protected the public by maintaining professional standards.

**Information for consumers** 7.26. Advertising is one of the main ways in which information is given to the consumer in most markets. Both professional bodies argued, however, that the market for the reference services was such that potential clients already had adequate information. Most had sufficient expertise to identify the firms offering the type of service they required and would be mainly concerned with competence as demonstrated by the consultants' record. Practices were built on reputation and there were already adequate ways in which this reputation could be demonstrated to potential clients (see paragraphs 6.11 and 6.20).

7.27. The evidence of the OFT survey suggests that the larger users did not expect to benefit significantly from greater freedom for civil engineering consultants to advertise. However, a few respondents mentioned the problems they saw for smaller users in choosing a consultant and organizations representing smaller users suggested to the OFT that greater freedom to advertise would be desirable. ACE told the Commission that it received some five to ten enquiries a day from potential clients, usually with small-scale commissions, seeking a suitable consultant. Some of these would be for other types of engineer but the level of enquiry suggests a considerable need for information of a kind that can be supplied through advertising. And even among larger users it is not self-evident that reliance on information other than advertising necessarily leads to a more accurate perception of the merits of consultants than if advertising were allowed.

**Protection of the consumer** 7.28. The bodies also argued that their advertising rules protected the public from misleading advertising and that this was particularly important where the commission was 'one-off' and the client could not assess quality. This is not an argument against all forms of advertising and is difficult to reconcile with the claim that clients are generally sufficiently well-informed to select an appropriate consultant.

**The standing of the profession** 7.29. There is a belief in some parts of the engineering profession that advertising is in itself 'unprofessional' and likely to bring the profession into disrepute. The professional should observe duties to both the client and the public and some believe that advertising will increase pressures to subordinate these to immediate personal gain. This is not an argument we would reject out of hand. We see it, however, as an argument against certain types of advertising rather than a complete ban. ICE attaches importance to the maintenance of the ban on unsolicited general circulation which it considers is needed in order to maintain the civil engineering profession's dignity and standing. We do not share this view nor do we think its abandonment would lead consulting civil engineers to flood the public with unselective approaches, as in practice they would not be of much help in identifying and informing potential clients and could be counter-productive. The issue does not therefore appear to us of much practical significance.

## Conclusions

7.30. We have considered separately the effects of the differing restrictions flowing from the rules of ICE and ACE with these various issues in mind. We have also considered the general conclusions of the 1970 and 1976 reports (see paragraphs 3.3, 3.4 and 3.14) on the effects of advertising restrictions. We endorse the reasoning which underlies them and adopt them as the starting point for our assessment.

7.31. We considered first the effects of the ICE rules. The restriction on general unsolicited circulation does not appear in practice likely to have any significant effect on the flow of information to the potential client if interpreted in the way that ICE explained to us. Nor do the other provisions of ICE's Pronouncement prevent the dissemination of relevant factual material to the general public. In general, the rules are on lines accepted in other professions where they have not prevented effective advertising. The rules that advertisements should be plain statements of verifiable fact, avoiding self-laudatory language, and the advice on the type of information on qualifications and achievements that is appropriate to supply, are on lines accepted in other professions. Accordingly we conclude that observance by consulting civil engineering members of ICE of its rules on advertising and publicity does not operate against the public interest.

7.32. The present ACE rules, however, impose an effective ban on advertising except in very limited circumstances. They are observed by a significant proportion of the civil engineering consultants whose services fall within the scope of our inquiry, not only by those who themselves belong to ACE but by those who belong to the same firms as these members. We conclude that the observance of the restrictions imposed by these rules has specific effects adverse to the public interest, namely that it restricts competition within the civil engineering consultancy profession, thereby hindering the establishment and development of civil engineering consultancy practices, and hampers the potential client in making an informed choice of supplier. These effects are not outweighed by benefits for the protection of the client or the maintenance of professional standards. We therefore conclude that the observance of these restrictions by those offering the reference services operates against the public interest.

7.33. ACE has told us (paragraphs 4.16 to 4.18) that its Council has considered and will shortly put to the membership for approval revised rules on advertising which would allow members to advertise provided the material was factually correct, not defamatory and would not bring the profession into disrepute. The proposed rules would allow exploratory introductions to be sought with potential clients where these might be considered welcome but without troublesome persistence. We comment later on these proposals.

## Recommendations

7.34. We have found observance of the present ACE rules on advertising by consulting civil engineering members of ICE to be against the public interest (paragraph 7.32) and recommend accordingly that these rules be no longer observed.

7.35. ACE should consider, in the light of our recommendation and its present deliberations, the withdrawal of its present rules on advertising and the adoption of rules which avoid the adverse effects of the present restrictions. The main principles of the British Code of Advertising Practice are written into the rules of a number of professions, either specifically or in effect. We accept, however, that some kinds of advertising which would be permissible under the Code might, because of their form or content, be such as to undermine the standing of the profession. We consider that consulting civil engineers should be free to advertise in accordance with the principles of BCAP, but that this freedom could properly be qualified by a further provision that such advertising should contain nothing which could reasonably be regarded as likely to bring the profession into disrepute.

7.36. Our conclusions are deliberately framed in general terms. We do not think it appropriate for us to lay down detailed guidelines on interpretation but we would not expect to see a restrictive interpretation placed upon these principles. On the content of advertisements ACE's proposed rules (paragraphs 4.16 to 4.17) seek to avoid denigration of or claims of superiority over other members of the profession, misleading or extravagant advertisements and troublesome persistence in their approaches to potential clients.

7.37. Rules on the lines that ACE has told us are currently under consideration would appear to be broadly consistent with our conclusions.

7.38. We have not found observance of ICE rules to be against the public interest (see paragraph 7.31). It is our impression, however, that there may be some misunderstanding among its members about the extent of the restrictions thereby imposed. The OFT report concluded that a significant number of professional practices of consulting civil engineers were unaware of the extent to which they were already free to advertise. Such evidence as we received from individual engineers in this inquiry supported that impression. We suggest therefore that ICE should consider wider publicity for what is permissible advertising under the rules, particularly on the interpretation of the words 'genuine potential interest' (see ICE's account in paragraph 4.7). It should also make clear that the types of factual content listed in Rule 5 of its Pronouncement are examples and not exhaustive definitions and in particular that they do not prevent the giving of information on fees and charges if the engineer so wishes.

M S LIPWORTH (*Chairman*)

C C BAILLIEU

L BRITZ

M B BUNTING

P H DEAN

B C OWENS

S N BURBRIDGE (*Secretary*)

23 November 1988