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**Competition Interventions in the Architectural Profession: Experience of the
Competition Commission of South Africa**

Karabo Motaung and Mamontshi Keleme¹

ABSTRACT

Competition authorities and sector regulators share a common objective to improve economic performance. This objective can be achieved by preventing market power and economic inefficiencies associated with market power. Despite having a shared objective, tension may arise between competition policy and regulation where regulation limits the scope of competition laws and where regulation makes it increasingly difficult to enforce competition law. In South Africa, such conflict has been largely prevalent in professional services markets. The South African Competition Commission (“Commission”) has been very instrumental in using competition policy to change how professional services are regulated. The Commission’s interventions in professional services began as early as 2004. The Commission has to date intervened in the Attorney’s profession, Natural Scientists profession, Estate Agents, Medical profession and broadly in the Built Environment Profession. In the Architectural sector specifically, the Commission has been influential in the development of reforms that are aimed at limiting barriers to entry in the market, promoting competition and transforming markets to ensure greater participation of historically disadvantaged individuals and small and medium-sized firms. This paper demonstrates how the Commission has been able to mitigate against some of the most severe effects of the restrictions on competition that were emanating from Architectural professional rules using both its enforcement and advocacy tools.

¹ K Motaung and M Keleme are both Senior Analyst at the Competition Commission of South Africa.

1. INTRODUCTION

Competition authorities and sector regulators share a common objective to improve economic performance. This objective can be achieved by preventing market power and economic inefficiencies associated with market power.² Competition authorities pursue this objective by ensuring easy entry and exit from the market. The authorities seek to incentivise firms to compete on price, product, and service quality and to not be impeded by regulation. Competition authorities are concerned with ensuring that dominant firms are prevented from acting unfairly in a way that reduces competition.³ Sector regulators, on the other hand, pursue this objective by regulating market failures. Market failure can be defined as an inability to deliver goods and services to consumers in an efficient manner.⁴ Competition policy and regulation are often regarded as the two most important and inter-related areas of regulatory policy. The policies are designed to address market failures within the market system. If used efficiently and complementary to each other, competition policy and regulation can both play a key role in improving the quality of regulation in a particular country, thus creating healthy and competitive markets.⁵

Despite having a shared objective, tension may arise between competition policy and regulation where regulation limits the scope of competition laws and where regulation makes it increasingly difficult to enforce competition law. In South Africa, the tension between competition policy and regulations governing professional services has occupied the spotlight in recent years. Professional services in South Africa have traditionally been highly regulated both by the government and through self-regulation. Many professional services have set up councils or associations, which apply these self-regulations. The statutes that regulate the professional services are embedded in terms that empower the councils or associations to (i) determine professional fees that registered professionals are entitled to charge for their work and (ii) identify the scope of work for every category of registered persons within the profession. It is widely recognised, however, that such regulation is not without cost to consumers. Such regulations impact competition through their effects on the structure of the relevant professional market and the market conduct of professional practitioners.

² HILKE, J. C. (2006). Improving Relationships Between Competition Policy and Sector Regulation. Fourth Meeting of the Latin American Competition Forum. San Salvador. 11 – 12 July 2006.

³ DUNNE, N. (2015). Competition Law and Economic Regulation: Making and Managing Markets. Cambridge University Press.

⁴ CRAMPTON, P. (2002). Striking the Right Balance Between Competition and Regulation: The Key Learning from our Mistakes. APEC-OECD Co-operative Initiative on Regulatory Reform: Third Workshop. Jeju Island, Kores. 16 – 17 October 2002.

⁵ DUNNE, N. (2015). Competition Law and Economic Regulation: Making and Managing Markets. Cambridge University Press.

The Competition Commission of South Africa (Commission) has been very instrumental in using competition policy to change how professional services are regulated. The Commission's interventions in professional services began as early as 2004 when it launched an investigation into the conduct of the Institute of Estate Agents of South Africa (IEASA).⁶ The Commission established that IEASA recommended a commission on sales of houses, semi-detached units, residential sectional titles and share block units at 7.5% of the sale price. The recommended commission was published in the IEASA tariff book which was accessible to all members of IEASA. The Commission found that the publication of tariffs was anti-competitive and restricted agents to negotiate their own fees. This matter was resolved by way of a consent order wherein IEASA agreed to cease publishing the recommended tariffs and allows member to determine their own tariffs. In the same period, the Commission received an exemption application from the Law Society of South Africa (LSSA) on behalf of four⁷ statutory provincial law societies.⁸ The exemption application was brought in respect of the following main categories of the Attorneys' professional rules: rules on professional fees; reserved work; organisational forms and multi-disciplinary practices; and advertising, marketing, and touting. The Commission found the rules had the effect of substantially lessening or preventing competition. In May 2012, the LSSA entered into an agreement with the Commission and undertook to consider the competition issues raised and to engage with the Commission when drafting new rules for the legal profession.

The Commission intervened in the healthcare profession when the Health Professions Council of South Africa (HPCSA) filed an application for the exemption of some of its ethical rules in 2008.⁹ The rules for which an exemption is sought are categorised as follows: rules dealing with advertising; rules dealing with corporate structures and rules dealing with behavioural issues. Here, the Commission found that the rules did not qualify to be granted an exemption. The Commission however found that some of the rules were justified but recommended the HPCSA to consider other less restrictive ways of achieving its objectives. In 2018, the Commission was requested to provide commentary on the Natural Scientist Professions Bill (NPS Bill). In particular, the Commission provided comments on (i) the identification of scope of practice and competencies; and (ii) professional conduct and rules. In its response, the Commission emphasised the importance of recognising the principles of competition in the process of determining the scope of practice and competencies. The Commission highlighted the importance of ensuring that such processes incorporate elements of fairness,

⁶ Competition Commission, Case Number:2004May998.

⁷ The Law Society of the Northern Province, The Law Society of the Cape of Good Hope, The Law Society of the Free State and the Law Society of Kwa-Zulu Natal.

⁸ Competition Commission, Case Numbers: 2004Jul1127 and 2005Nov1927.

⁹ Competition Commission, Case Number: 2008Jan3456.

transparency, equity, access and openness. The Commission also encouraged wide consultation with all professionals, regardless of their affiliation to sector associations.

The Commission has also intervened in the Built Environment profession. More specifically, the Commission have intervened in the Property Valuers profession, the Landscape profession, the Project and Construction Management profession, the Engineering profession and the Architectural profession. In the Architectural profession specifically, the Commission has been influential in the development of reforms that are aimed at limiting barriers to entry in the market, promoting competition and transforming markets to ensure greater participation of historically disadvantaged individuals and small and medium-sized firms. This paper demonstrates how the Commission has been able to use competition advocacy to mitigate against some of the most severe effects of restrictions on competition that were emanating from Architectural professional rules.

This paper is organised as follows: Section 2 provides an overview of the regulatory framework in the Architectural profession. Section 3 sets out the competition issues in the Architectural profession that have emanated from regulations. Section 4 demonstrates how the Commission has been able to influence reforms in the Architectural profession through competition advocacy. Section 5 concludes.

2. THE REGULATORY FRAMEWORK IN THE ARCHITECTURAL PROFESSION

The Council for the Built Environment Act, 43 of 2000 (CBE Act) establishes the Council for the Built Environment (CBE) as the overarching body within the built environment. CBE is responsible for coordinating the activities of the six professional councils including the South Africa Council for the Architectural Professions (SACAP).¹⁰ The Architectural Profession Act, 44 of 2000 (Architectural Act) specifically establishes SACAP as the body responsible for providing the registration of architectural professionals and regulating the architectural profession. SACAP is an autonomous structure whose mandate is complementary to that of the CBE.

The Architectural Act introduced registration of Professional Architects; Professional Senior Architectural Technologists; Professional Architectural Technologists; and Professional

¹⁰ The other councils include: the South African Council for the Quantity Surveying Profession ("SACQSP"), the South African Council for Property Valuers Profession ("SACPVP"); the South African Council for the Landscape Architectural Profession ("SACLAP") and the South African Council for the Project and Construction Management Professions ("SACPCMP"); the Engineering Council of South Africa ("ECSA") and the South Africa Council for the Architectural Professions ("SACAP").

Architectural Draughtspersons. The Architectural Act also introduced the identification of work for each category of registered persons.

The identification of work for each category of registered persons is aligned to the training programmes of Architectural Learning Institutions which are accredited by SACAP. Therefore, persons are registered in the architectural profession based on experience or qualifications obtained from these institutions.¹¹

Section 20 of the CBE Act impels CBE to determine the Identification of Work (IDoW) policy for the different categories of registered persons and identify the scope of work for every category. The IDoW policy is developed to regulate the work that the professionals are allowed to undertake based on their skills and competencies. In respect of the Architectural profession, the policy sets out the qualifications and skills requirements for the performance of architectural work and details the kinds of construction work that can be undertaken under each category. In terms of Section 26 (2) of the Architectural Act, SACAP is required to consult with and submit recommendations to the CBE on the scope of work that has been identified for every category of registered persons in the Architectural profession. However, in exercising its powers and carrying out certain functions, the CBE has a legislative obligation to liaise and consult with the Commission to ensure that the implementation of industry standards and legislations, including the IDoW, do not impose anticompetitive practices or restrict competition in the market.

Neither the CBE nor SACAP have a specific mandate to regulate competition in the built environment or Architectural profession. The Competition Act, 89 of 1998 (Competition Act) establishes the Commission as the body responsible for regulating competition in South Africa. Section 3(1) of the Competition Act expressly states that the Competition Act applies to all economic activity within South Africa.

Schedule 1 of the Competition Act requires the professional association to apply for an exemption provided they satisfy certain criteria. The Competition Act empowers the Commission to exempt (all or part of) the rules of a professional association if such rules contain a restriction that has the effect of substantially preventing or lessening competition in a market. The Competition Act defines professional rules as “rules regulating a professional association that are binding on its members.” The Competition Act explicitly lists the Acts which contain such rules and to which the Competition Act applies. The Architectural Act¹² is

¹¹ SOUTH AFRICA. South African Council of Architectural Profession. Board Notice 27 of 2021. The Identification of Work for the Architectural Profession. Government Gazette No. 44505: 2021.

¹² The Competition Act lists the pre-2000 Architects Act however the applicability remains.

one such Act that has been included in the list. There is thus no dispute about the applicability of the Competition Act to the activities of Architectural professionals and more broadly the built environment professionals.

2.1. EXEMPTION APPLICATIONS

In 2011 the Commission received exemption applications from the CBE on behalf of the professional councils in the built environment including the SACAP. The exemption applications were divided into two parts. The first category of the exemption application related to the IDoW which identifies and categorises the types of work that can be undertaken by registered Architectural professionals based on their educational level, relevant experience, skills level, and record in continuing professional development.¹³

In assessing the exception application, the Commission found that the IDoW created different categories of registration and allocated work to those categories. In terms of the IDoW, Architectural professionals could not undertake work outside their area of registration, even though they were competent to do such work. The IDoW reserved high complex work for Professional Architects and Professional Senior Architectural Technologists while Professional Architectural Technologists and Professional Architectural Draughtspersons, who are registered in the lower categories, are only allowed to undertake work of low sensitivity and complexity and consequently of low value. The Commission was concerned that the exclusion of Professional Architectural Technologists, and Professional Architectural Draughtspersons was not based on their level of competency or skills, but rather because they were not registered in the categories of Professional Architects or Professional Senior Architectural Technologists.

The Commission found that the IDoW was anti-competitive and that its implementation would be in contravention of the Competition Act. Amongst others, the Commission found that the restrictions imposed by the IDoW had some element of market allocation. The Commission found that, in creating different categories of registrations, the IDoW would divide the market by allocating service providers. Market allocation is regarded as one of the most severe contraventions in competition law and is a per se a violation in terms of section 4(1)(b)(ii) of the Competition Act. The Commission was concerned that allocating markets, would not only be harmful to professionals but would also harm consumers. The Commission was of the view

¹³ Competition Commission, Case Numbers: 2011Oct0287, 2011Oct0288, 2012May0254; 2012May0255, 2012May0256 and 2014Apr0123.

that such allocation would limit the number of service providers in the market, resulting in high demand and less supply and consequently limiting the choice of consumers and raising prices for Architectural services.

The Commission rejected the exemption application on the basis the implementation of the IDOW policy would (i) eliminate competition between registered and unregistered architectural persons; (ii) eliminate competition between registered Architectural professionals and other professionals registered under CBE; (iii) eliminate competition between registered Architectural professionals and professionals outside the built environment; and (iv) elimination of competition between different Architectural categories.

While the Commission recognised the importance of regulating professional services to address market imperfections, the Commission has always held the position that the outcomes desired could be achieved through less exclusionary regulatory methods.

The second category of the exemption application related to the publication of professional guidelines fees.¹⁴ The application was based on the premise that professional guidelines fees were necessary to maintain professional standards. In its investigation, the Commission found that the existence of professional guidelines fees would cause professional fees to converge towards the recommended fees thereby reducing price competition between professionals and consequently resulting in higher prices to the detriment of consumers. The Commission also found that professional guidelines fees could enable competitors to guess the fee that would be charged by its competitors when tendering and therefore were more likely to use this indication to excessively discount in order to win tenders.

While the Commission acknowledged that an imbalance in knowledge and experience exists between professionals on the one hand and their clients on the other and that issues of excessive discounting were a concern, the Commission was of the view that alternative mechanisms, other than professional guidelines fees, could help address the aforementioned imbalance and predation. The Commission rejected the exemption application.

¹⁴ Competition Commission, Case Numbers: 2014Jan0026, 2014Feb0033, 2014Feb0035, 2014Mar0095, 2014Jun0280 and 2014Jul0371.

3. COMPETITION ISSUES IN THE ARCHITECTURAL PROFESSION EMANATING FROM REGULATION

SACAP disagreed with the Commission's decision to reject the exemption applications and sought to appeal the decision to the Competition Tribunal. SACAP argued that publishing the IDoW was in line with the powers conferred onto it by Parliament on the scheme of the Architectural Act and the CBE Act. SACAP further argued that they had met all the statutory requirements, including consulting the Commission and thus they were obligated to publish the IDoW. SACAP proceeded to publish the IDOW in 2019, in complete disregard of the Commission's decision.

Following the publication of the IDoW in 2019, the Commission was inundated with complaints against SACAP from its own members, and in particular, Professional Architectural Draughtspersons.¹⁵ The complainants alleged that the IDoW was exclusionary in that it prevented Professional Architectural Draughtspersons from undertaking complex projects which they were previously able to undertake. The Complainants alleged that the IDoW reserved complex projects exclusively for Professional Architects and Professional Senior Architectural Technologists in contravention under section 8(c) of the Competition Act.

The complaints highlighted the precise issues the Commission had anticipated would arise from the implementation of the IDoW when it assessed the exemption applications. While the Commission recognised the mechanisms introduced to enable Professional Architectural Technologists and Professional Architectural Draughtspersons to continue to undertake work that was not identified for their category or to move up to higher categories, the Commission was of the view that the application fees related to these mechanisms were excessive and placed an additional cost burden on the professionals in these categories. The Commission was of the view that these additional costs would render Professional Architectural Technologists and Professional Architectural Draughtspersons uncompetitive relative to professionals in higher categories and would induce clients not to deal with professionals in lower categories. The Commission found that the conduct was exclusionary and in contravention of section 8(d)(i) and or 8(c) of the Competition Act.

¹⁵ Competition Commission, Case Numbers: 2019Feb0043, 2019Mar0009, 2019Mar0012, 2019Mar0014, 2019Apr0016 and 2019Apr0022.

4. COMPETITION ADVOCACY FOR REGULATORY REFORM

In exercising its powers to reject the exemption applications of SACAP, the Commission was clear about the applicability of the Competition Act to the Architectural profession. The CBE Act appears to obligate the CBE to act in compliance with the Competition Act or at the very least, to consider competition laws in exercising its powers and functions. The complaints against SACAP presented an opportunity for SACAP to once again engage the Commission with a view of finding an amicable solution that would address the competition and transformation concerns that the Commission had identified when assessing the exemption application. For SACAP these engagements became important to enable to (1) implement the IDOW in a manner that is inclusive and that promotes adequate competition in the market and (2) determine guideline professional fees in a manner that does not contravene the Competition Act.

4.1. ADVOCATING FOR REDUCED APPLICATION FEES TO PROMOTE ENTRY AND COMPETITION

To address the competition issues raised by the Commission, SACAP introduced mechanisms that would enable professionals to (i) continue doing work outside of their category of registration and (ii) move up to higher categories. These mechanisms include:

- (i) Recognition of Prior Learning: This mechanism recognises prior learning and provides an opportunity for registered professionals who do not have a formal qualification but have an informal qualification to perform architectural work.
- (ii) The Special Consent: This mechanism grants permission to registered professionals who have made an application to do a type of project that is not identified for their category of registration.
- (iii) The Special Limited Dispensation: This mechanism enables registered persons in lower categories to continue to perform work outside of their category of registration for one year from the date of the publication of the IDOW policy.
- (iv) The Transitional Provision: This mechanism enables registered professionals to continue to practice work outside of their category of registration until the effective date of the publication of the Identification of work policy.

These mechanisms are subjected to an application process for which application fees are payable. One of the Commission's concerns, was that the application fees were too high and

posed a significant financial barrier particularly for Small and Medium sized enterprises who are already subjected to annual and other ad hoc fees associated with practicing as a registered architect. The Commission engaged SACAP to revise the fees in order to afford as many professionals as possible the opportunity to utilise the proposed mechanisms and improve competition in the market. Following numerous engagements, SACAP was able to significantly reduce the application fees. Table 1 below shows the application fees as they were in 2020 prior to the Commission’s intervention and the revised fees following the Commission’s intervention.

Table 1: SACAP SCHEDULE OF FEES

| RECOGNITION OF PRIOR LEARNING (RPL) ASSESSMENT | 2020 | 2021 |
|--|-------------|---|
| Professional Senior Architectural Technologist (PSAT) to Professional Architect (PrArch) | R14 000.00 | R7 000 |
| Professional Architectural Technologist (PAT) to Professional Senior Architectural Technologist (PSAT) | R12 000.00 | R4 000 |
| Professional Architectural Draughtsperson (PAD) to Professional Architectural Technologist (PAT) | R9 000.00 | R2 500 |
| Special Consent and Limited Special Dispensation | | |
| Application / Assessment | R9 000.00 | R7 000 PSAT R4 000 PAT R2 500 PAD |

Source: SACAP¹⁶

4.2. ADVOCATING FOR A TRANSPARENT AND EFFECTIVE DETERMINATION OF PROFESSIONAL GUIDELINE FEES

Guideline professional fees remain a contentious issue for the Commission. Notwithstanding, the Commission acknowledges that it may be advantageous for consumers and the government to have access to accurate information about the prices of different architectural services in order to address the risks related to over and under-charging. One of the Commission’s concerns regarding professional guideline fees is the method used to determine the fees which involve discussions between registered professionals in contravention of the Competition Act. SACAP has undertaken reforms aimed at addressing the competition concerns raised by the Commission regarding the determination of professional guideline

¹⁶ Available online: <https://www.sacapsa.com/services/recognition-of-prior-learning>.

fees. These reforms include: (i) the use of a third-party service provider not affiliated with SACAP to determine the guideline fee and (ii) the use of actual fees charged by registered professionals plus the costs of providing architectural services to determine the fee.

These revisions are aimed at ensuring that the process of determining professional guideline fees is transparent, efficient, and effective and that the guidelines do not restrict competition in the market. The Commission remains concerned that the professional guideline fees may result in a convergence of fees by registered professionals toward the guideline (recommended) fee which could be much higher than what could be determined through a competitive process. To manage this concern, the Commission will monitor the impact of the professional guideline fees. Such monitoring could entail an assessment of fees charged by professionals for different types of architectural projects. SACAP will submit survey data annually to the Commission for 3 years.

4.3. ADVOCATING FOR EVEN GREATER REFORMS

While these efforts have been welcomed by the Commission, the complaints revealed that there were more issues in the market which call for policy reforms. One such issue relates to the exclusion of unregistered persons. The IDOW policy only allows registered professionals to undertake architectural work identified for their category of registration. This provision excludes unregistered persons from participating in the market in competition with the registered professionals. Engagements with various stakeholders within this sector have revealed that there are many barriers – both systematic and financial, pertaining to the registration itself, that makes it difficult for people to register including annual fees and other ad hoc costs.

Another concern relates to issues of varying qualifications of students that emerge from the various types of institutions of higher learning in South Africa. The IDOW policy recognises prior learning as an important tool that would enable registered professionals who do not have formal qualifications but have informal qualifications to perform architectural work. The policy however still largely bases educational competence on specific qualifications and National Qualifications Framework levels that are obtainable only from some Institutions of Higher Learning. Professionals with varying qualifications not recognised by SACAP but who may have the same educational competence are excluded from participating in the market further limiting potential competition.

The applications for undertaking work outside of a particular category of registration are assessed by a Panel of Assessors within the prescripts of the Architectural Act. Panel membership is open to all members of the public, including Architectural professionals. Interested persons are invited to apply and a normal process of shortlisting is followed. The Commission however, found that the majority of the panellists on SACAP's Panel are Council members. This raises significant concerns for the Commission as the recommendation to approve or reject the applications is made by the Panel of Assessors while the final decision is taken by the Council. The concerns of the Commission are that due to the composition of the panel, the objectivity of this process becomes questionable since Council members are practicing professionals themselves and may have incentives to restrict competition in their registration categories in order to protect their own commercial interest.

To address these issues, The Commission has proposed additional reforms which include: (i) the inclusion of unregistered persons in the sector through advocacy initiatives aimed at policy and legislative amendments (ii) the incorporation of other qualifications which may not be included in the list of qualifications that are currently recognised by SACAP but which provide professionals the same educational competence and (iii) the diversification of the Panel of Assessors to include more academics, retired professionals, and independent persons who are not affiliated to any Council, for purposes of maintaining the independence of the Panel of Assessors.

Addressing some of these issues requires some changes to legislation. As part of its advocacy initiatives, the Commission is also engaging the National Department of Public Works and Infrastructure to advocate for legislation that is procompetitive and inclusive. Other advocacy initiatives that have been undertaken include raising awareness about the harmful effects of the reservation work and publication of professional guideline fees to competition in the market if implemented without regard to competition policy. These initiatives have been aimed at encouraging other professional councils and associations to consider pro-competitive reforms that will enable entry and participation in the market when regulating their respective industries.

4.4. CO-OPERATING FOR EFFECTIVE REGULATION IN THE ARCHITECTURAL PROFESSION

The growing number of competition issues in the Architectural profession have called for greater co-operation between the Commission and SACAP in order to strengthen competition regulation in the sector. Section 21(1)(h) read with section 82(2) of the Competition Act

enables the Commission to negotiate and conclude an agreement with any regulatory authority, which, in terms of any public regulation, has jurisdiction in respect of conduct regulated in terms of the Competition Act. In order to improve regulation of the Architectural profession, the Commission and SACAP have concluded a Memorandum of Understanding (MOU).¹⁷ The MOU is aimed at enabling the Commission and SACAP to collaborate on efforts to promote competition in the Architectural profession and to collectively work towards addressing the outstanding competition issues.

In particular, the MOU will enable the Commission and SACAP to consult with each other annually on any proposed changes to the IDOW to ensure that its provisions are pro-competitive and that nothing in the policy contravenes any section or objectives of the Competition Act. The MOU establishes cooperation between the Commission and SACAP that seeks to ensure that the design and application of the IDOW:

- i) does not exclude unregistered persons or non-members of SACAP from participating in the market;
- ii) facilitates access to architectural work to all registered and unregistered persons; and
- iii) promotes the transformation of the architectural profession.

The MOU will also enable the Commission and SACAP to consult with each other on the process for the setting of professional guideline fees. This will ensure that such process does not contravene any section or objectives of the Competition Act and that any competition issues that do arise, are mitigated. The MOU will enable the Commission and SACAP to monitor the impact of the professional guideline fees on the market and to respond accordingly to any adverse effects.

5. CONCLUSION

Professional services are characterised by information asymmetry. As a result of these asymmetries, consumers are not always able to assess the quality of services that have been provided to them. Sector regulation seeks to address these market failures in professional services markets. The regulations can, however, restrict competition more than is appropriate or necessary, raising entry barriers and limiting price competition. Such potential conflict elevates the importance of cooperation and coordination between sector regulators and competition authorities.

¹⁷ Available online: <http://www.compcom.co.za>

It is clear that competition policy and regulation are important areas of regulatory policy. If used effectively and complementarily, these policies can limit barriers to entry, promote competition and transform markets to ensure greater participation of historically disadvantaged individuals and small and medium-sized firms.

The experience in South Africa has shown that competition advocacy has had a great influence on regulatory reforms in the Architectural profession. The Commission and SACAP acknowledge that there are a number of competition issues arising in the Architectural profession, most of which are related to the IDoW and the publication of professional guideline fees. The MOU reached between the Commission and SACAP will be instrumental in helping the two regulators collectively work towards addressing the competition issues in the Architectural profession.