GAZDASÁGI
VERSENYHIVATAL

RECOMMENDATION OF THE GAZDASÁGI VERSENYHIVATAL CONCERNING THE REVIEW OF THE REGULATION OF NOTARIAL SERVICES

27 May 2005

Executive summary

The Gazdasági Versenyhivatal (GVH – the Hungarian Competition Authority) has examined the self-regulation of professional chambers in a number of competition supervision proceedings and, in the framework of its competition advocacy activities, made recommendations during the drafting of legal relations pertaining to professional regulations. This paper is intended to summarise the experiences of that work, in line with the recommendations set out in the report to Parliament on the year 2004 activities of the GVH.

Professional services play an important role in improving competitiveness and in promoting economic growth, as they produce public goods that are of value for society in general, and their activities have a direct impact on economic actors. Thus the states makes these professions subject to extensive regulation to assure the public interest in the adequate quality of services and to protect the interest of consumers, also striving to eliminate any market failures (e.g. fiduciary nature, information asymmetry) resulting from the competition on the markets of such service.

However, the regulations required by the objective nature of such services often interfere in the operation of the market by restricting the use of certain competitive instruments. Therefore excessive or unjustified competitive restrictions may increase the costs of entry, reduce competition between service providers, hindering the extension of more effective and better quality services.

The state sets direct or indirect entry restrictions through the status rules adopted upon the establishment of professional self-regulatory bodies, to address existing or presumed market failures in the service market concerned. In addition, the legal regulations establishing such organisations provide specific authorisation to adopt internal rules with the effect of restricting competition. Finally, the organisations, based on their discretionary decisions, may adopt self-regulations that may restrict competition to varying degrees without any separate legislative authorisation.

Thus, when assessing the costs and benefits of regulation, it is necessary to determine whether the intervention is suitable for the effective remedy of market failures, whether justified and reasonable solutions that are the least restrictive have been adopted, and whether they pass the test of proportionality. If these criteria are not satisfied, and the regulation is also unable to guarantee the expected quality of services, its necessity cannot be justified on public interest grounds.

Acknowledging the necessity of professional regulation, the various rules must contain the fewest possible restrictive elements; furthermore, to facilitate sound legislative decisions, the existing rules will have to be evaluated in detail, the various restrictions reviewed and reconciled with the principles of competition law.

To that end, the GVH recommends that a comprehensive regulatory reform is commenced from the competition policy perspective, with the participation of regulatory authorities, to determine whether the existing rules serve a public interest, whether they are necessary to attain the regulatory objectives, and whether less restrictive arrangements could be identified to achieve those objectives. For the deregulation process to be successful, the coordinated, government-level cooperation of all regulatory authorities responsible for the compliance supervision of the aforementioned professional services, in particular of the line ministries, is

necessary. Furthermore, to identify arrangements promoting competition and efficiency, the various regulators must devise sound impact assessments, with a uniform approach, to support the drafting of future legislation. The GVH wishes to take an active role in assessing the potential competitive effects of the various elements of regulation, thus assisting regulators in their decisions making.

In the framework of the Lisbon economic reform programme of the EU up to 2010, the Commission established that professional services have an important role to play to improve the competitiveness of the European economy, and their progress is part of the Lisbon strategy of development and employment, which has the primary objective of making the EU the most competitive and dynamic knowledge based economy by 2010.

Thus the reform of state professional regulations is encouraged by the European Commission, which identified, in the framework of a major stocktaking exercise, the state and self-regulations pertaining to liberal professions in the EU Member States. The findings of the exercise were summarised in its Communication of 9 February 2004 on competition in professional services, which assesses the competitive aspects of the legitimacy and practice of regulation by professional chambers, defining a range of possible anticompetitive provisions and the assessment thereof. In the course of 2004, the Commission extended this stocktaking to the review of the legislative, self-regulation and ethical practices of the professional bodies of new Member States, providing a comprehensive summary of the type and scope of regulations used by the professional bodies of the 10 new Member States.

In Hungary, the most stringently regulated branch of liberal professions is the activity of notaries. Therefore, in line with the legislative recommendations and objectives set out in connection with the competition policy assessment of professional regulations, the GVH recommends that the regulations pertaining to the notarial profession are reviewed and any questionable provisions are re-regulated.

In the current regulatory system, notaries have a public law status; they exercise their public authority pursuant to state authorisation, in competences defined in legal regulations; their activities and responsibilities can be regarded as state or regulatory activities, and the public deeds they issue have special legal effect as defined in law, and the regulations applicable to them set out strict rules to guarantee impartiality, independence and authenticity.

In the opinion of the GVH, however, notaries perform their activities as economically independent undertakings, at their own risk, and they perform certain activities as competing, effectively market, services, thus those activities also have business elements; therefore some of the strict legislative provisions guaranteeing the performance of regulatory functions can also be seen as anticompetitive.

Consequently, the regulator must inspect, by type of activity (separating exclusively regulatory activities from competitive functions), the regulatory objectives, the restrictive regulations applied, and justify their necessity and proportionality.

It may be appropriate to review, for their necessity and proportionality, the exclusive activities reserved for notaries, as well as the territorial competence rules and the restriction of the numbers of notaries. Furthermore, the GVH recommends that a more differentiated system of fees and prices is devised; in particular, in case of regulatory activities, the determination of fixed procedural fees that approximate social expenditures to actual costs, while in case of

competitive, essentially market-type activities, where choice among notaries is not restricted, the introduction of maximum fees that cover fixed expenditures as well as profits.

In view of the current system of Hungarian regulations pertaining to notaries, which maintains a wide range of restrictions, we consider that competition can be effectively promoted primarily by reducing restrictions arising from the details of regulations to the minimum level; in the course of this, the public interest to be protected consists in the peculiar legal safeguards relating to notarial proceedings; these will continue to safeguard the well-defined and clearly identified public interest.

1. Introduction

The rules governing the markets of professional services, which are ever growing in importance, and the pro-efficiency regulatory arrangements applied by the state play a major role in promoting competitiveness and convergence of Hungary.

The Gazdasági Versenyhivatal (GVH – the Hungarian Competition Authority) has examined the self-regulation of professional chambers in a number of competition supervision proceedings and, in the framework of its competition advocacy activities, made recommendations during the drafting of legal relations pertaining to professional regulations. This paper is intended to summarise the experiences of that work, in line with the recommendations set out in the report to Parliament on the year 2004 activities of the GVH.

The paper will take account of the competition aspects of the review of professional regulations, the possible reasons for regulation, their potentially anticompetitive effects, as well as various regulatory problems. Also, this study has the purpose of presenting the legal practice of the European Union in light of the stock-taking exercise of the Commission. Finally, in order to eliminate any restrictive elements of professional regulations, the GVH will propose the launch of a comprehensive regulatory reform, in cooperation with the regulatory authorities and, in respect of the most regulated notarial profession, make recommendations for reviewing the existing legal environment and the identification of the potential scope for deregulation.

2. Competition policy assessment of professional regulations

Certain professional services, in particular the so-called **liberal professions** (legal, medical, engineering, accounting professions), play an important role in economic competitiveness, producing public goods that are of value for society in general and having a direct impact on consumers.

The states makes these liberal professions **subject to extensive regulation** by setting direct status rules or delegating regulatory powers, through the self-regulation of professional bodies.

As the aforementioned professional services produce **public goods** that are of special value for society, the social expectations and public interest justify that the state assure their high quality and protect consumers against malpractice through appropriate regulations. Such public goods include, *inter alia*, independent legal advice in the administration of justice, legal security for all in connection with notarial services, or affordable medical services.

The fundamental function of professional regulation is to provide the **most effective protection to public interest** in public goods, including guaranteeing high-quality, affordable services at sufficient professional standards and assuring consumer confidence. However, professional regulations can effectively provide that protection only if the related public interest can be clearly identified.

In addition to safeguarding public interest, the professional regulations have the purpose of managing or eliminated so-called **market failures**, i.e., problems arising form the competition on the market of professional services.

The markets of the various professional services, as product markets, are unique competitive markets in a number of respects, which have in common the character of "**credence goods**" and a high level of asymmetry of information. Though consumers may chose among competing service providers, that decision is based on insufficient information about the adequacy of the service, because the service itself has features which render it impossible to assess in advance whether it would be capable of meeting the needs of the consumer, and even after the use of the service the consumer may not be able to correctly judge whether the best possible service was provided. Thus consumers do not have the additional knowledge necessary to decide which service is most appropriate for them, or which service provider should be chosen, thus the decision is generally based on the price of services rather than their quality.

Furthermore, **externalities** may be present in these service markets, thus inadequate services may have far-reaching adverse effects (for instance, poor quality medical services may make health insurance more expensive; an inaccurate audit may mislead creditors; a poorly constructed building may jeopardise public safety).

These market failures may lead to oversupply, the provision of poor quality services, or the undermining of consumer confidence, thus the effectiveness of competition is more limited in markets characterised by a credence relationship, therefore the objective nature of services requires that the state **intervene** in the operation of the market through regulations to reduce the social costs of a market failure.

Consequently, the facilitation of certain **competitive restrictions** (such as limited advertising restrictions or the possibility of the publication of recommended prices to provide better access to information for consumers) does not affect the decision making of consumers significantly, i.e., it does not lead to such an efficiency loss as in other markets, which justifies the limitation of the use of certain competitive instruments – taking into account the characteristics of the service market concerned.

However, this does not mean that competition between service providers would not be conducive to more efficient services or to promoting the interest of service providers in cost efficient, cheaper, higher quality services. Restrictive interventions may increase the costs of entering or staying in the market, they may reduce the number of potential competitors or restrict the freedom of competition, hindering innovation and the evolution of new forms of services.

Thus certain element of regulation may represent direct **structural** entry barriers (such as requirements concerning qualifications, education, professional experience, minimum period of practice, mandatory membership in professional bodies, citizenship, language skills), while all regulatory elements imposing restrictions on multi-disciplinary practices or on the business structure can be regarded as indirect entry restrictions (such as mandatory business structures, or restrictions on the ownership or management of such organisations).

Restrictions on conduct, which also tend to restrict competition, may include ethical rules of organisations, the limitation of advertising or marketing, pricing rules, or professional requirements relating to the pursuit of the activity concerned.

Thus, when **weighting benefits against costs**, we must assess whether the intervention is **capable** of effectively resolving market failures, whether a **justified and reasonable** solution

involving the least possible restrictions was selected, and whether this passes the test of **proportionality**. If these criteria are not satisfied, and the regulation cannot guarantee the expected quality of service either, its necessity cannot be justified on the basis of the public interest.

Finally, when assessing the necessity of professional regulations, apart from taking into account the above fundamental consideration, we must establish the severity of market failure justifying such regulations, the level of interest in consumer safety, and the costs and inefficiencies caused by the existence or absence of regulation. Having assessed those factors, we may chose between **state status regulation** or **authorisation for self-regulation**.

Self-regulation has the advantage over state regulation that it contains concrete, understandable, profession-specific rules of conduct for members, with more extensive rules going beyond legal standards and reflecting social expectations, allowing for the cheaper and more efficient monitoring of the market activity of members. Such rules are more flexible, and allow for faster adaptation than legislation, as practitioners are quicker to realise market needs and to adapt to them. Efficiently functioning self-regulation provides reliable information to consumers, promoting informed consumer decisions and resulting in better conditions for competition and greater transparency.

On the other hand, self-regulation as such entails the **possibility of competitive restrictions**, where the existence of the self-regulating body or the status rules applicable to it hinders market entry, or elements with the purpose or effect of restricting competition are incorporated into self-regulation, or the mode of the application of rules in specific cases (case-by-case decisions) restricts or distorts competition, or the operation of the self-regulating body creates opportunities to arrange restrictive agreements.

From a competition policy aspect, instead of the moral-ethical obligations of members towards competitors and consumers, we should focus on self-regulations where the regulatory activity concerns the market conduct or behaviour of members or affects the market structure. Self-regulatory bodies typically set out in ethical rules their expectations from members, the standards of conduct, and the sanctions applicable to infringers, and they establish procedures and decision making fora to operate those systems.

The state sets **direct or indirect entry restrictions** through the **status rules** adopted upon the establishment of professional self-regulatory bodies, to address existing or presumed market failures in the service market concerned. Thus these rules determine:

- the conditions of gaining membership (required school qualification, work experience, citizenship, permanent residence);
- whether the chamber has any discretionary powers in deciding about the admission of a member;
- whether only natural persons or also certain economic associations can be members;
- whether the use of certain titles or descriptions by outsiders is limited;
- whether there are any particular provisions for the form, ownership and management of economic associations engaging in the professional activity;
- whether there are any provisions reserving certain services to members of the entity;
- whether there are limitations on activities that can be performed in conjunction with the core activity;
- whether there are requirements concerning the location of the performance of the activity, the minimum equipment of the office, surgery etc.;

- whether there is an obligation to obtain liability insurance, and if yes, in what scope; whether liability above a certain amount is limited;
- whether the status act specifies aggravated cases of infringement of the standards, in which case the member can be expelled;
- whether there is a limitation on the duration of such expulsion.

In addition, the legal regulations establishing the organisations provide specific **authorisations** to issue restrictive internal rules, such as:

- specified powers to define the price of service – minimum price, recommended price, pricing rules;
- advertising bans, facilitation of the setting of professional examination requirements;
- assuring and requiring the appropriate pursuit of the profession, the definition of basic professional values (e.g. independence, integrity, propriety);
- regulation of the cooperation between members of the profession, promoting uniform professional practices or non-competition;
- setting barriers to entry, such as number or territorial limitations, qualification requirements, period of practical experience, further training obligation or licensing requirements;
- exclusive rights, definition of reserved tasks;
- forms of activity, such as rules pertaining to inter-professional cooperation and to conflicts of interest.

If the act establishing the self-regulating body contains entry restrictions or restrictive powers in a range narrower than considered necessary by the members, it is possible that the organisation, in its own discretion, adopts self-regulation where the voluntary restrictions undertaken are anti-competitive, i.e., members may adopt regulations that may be **restrictive in their effect** to varying degrees without separate legal authorisation, only pursuant to the authorisation to **self-regulate**:

- provisions resulting in the limitation of price competition, undertaken pursuant to the ethical rules, e.g., prohibition of undercutting prices;
- various degrees of price fixing: setting of indicative prices or minimum prices by the chamber; penalising divergence from the recommended prices, requiring the notification of transaction prices, etc.
- the requirement, as a rule of conduct, to refrain from solicitation of clients in general or in certain areas;
- definition of a field of "operation", active solicitation or service (passive sale) bans concerning customers outside the territory;
- advertising bans of various scope;
- prohibition of the enticement of employees;
- rules hindering employees becoming competitors;
- particular further training or examination requirements or rules, etc.

Thus in the course of the **legislative process**, because of the effect of professionals services on economic competition, **administrative regulatory bodies** must give thorough consideration to the **establishment of self-regulatory bodies** that also perform public functions, **the setting of membership and entry conditions, the scope of authorisation of self-regulatory bodies, and the potential effects on competition**. It is desirable that the number of horizontal self-regulatory bodies, i.e., professional chambers, which have the strongest powers to restrict competition and thus pose the greatest risk to competition, does not increase, and legislation create such entities only **exceptionally, in particularly justified**

cases, where the public body status is justified by important public interests other than the interest in competition.

Thus the legal regulations concerning self-regulating bodies established by law must contain the least possible restrictive elements, and most of the regulations must be **shifted to the scope of self-regulation**, in which case the competition authority can judge, on a case-by-case basis, the effects and reasonability of restrictions, assuring greater flexibility and the potential for correction.

Furthermore, the legislative status rules must be devised along **uniform principles**, and no unjustified differences not supported by objective differences in the market can be allowed in the regulatory arrangements applicable to the various professions.

In the above context, the objective of the GVH is to assure **competition supervision control** when the self-regulations are elaborated in order to prevent the violation of the competition law. Thus, to assure that the **extent of powers** of self-regulation bodies do not exceed their intended scope, it is important right at the **initial steps** of establishing self-regulation to identify the least restrictive arrangements with the help of the competition authority, providing support professional bodies when **requested**. Finally, the GVH continuously monitors the activities of self-regulating bodies so that in case of any restrictive operation or decision, effective action can be taken in its competition supervision authority, and that the costs, benefits and justification of agreements can be assesses, case by case, in light of the characteristics of the market.

Because of the nature of professional regulations outlined above and to assure sound legislative decisions, it is necessary to **evaluate** in detail the existing rules, to comprehensively **review** certain groups of restrictions and to **reconcile** them with competition principles.

In a number o countries around the world, the **reform of state regulation** has been completed, is ongoing or under preparation in service markets where liberalisation is essential. Having recognised this tendency, the OECD, the leading economic policy think tank of the developed countries of the world, announced its own **regulatory reform** programme in 1995, with the purpose of supporting the re-regulation attempts of the member countries. The regulatory reform focuses on adopting less interfering regulation, implemented though general **deregulation** as well as a greater **reliance** on **competition**, markets and **market mechanisms**. It is notable that the reform of state regulation around the world also covers so-called liberal professions. However, the direction of the current reform is clearly the **elimination of** outdated **entry and competition restrictions** that are hardly justifiable by the existing market conditions and developments. Thus the emphasis on competition to enforce **efficiency** and on market processes is one of the key factors underlying the whole concept of the regulatory reform, because it has been proved in a number of countries that the dismantling of competitive restrictions contributes to improved competitiveness and greater economic growth.

To that end, the GVH recommends that **a comprehensive regulatory reform** is commenced from the **competition policy perspective**, with the participation of regulatory authorities, to determine whether the existing rules serve a public interest, whether they are necessary to attain the regulatory objectives, and whether less restrictive arrangements could be identified to achieve those objectives. For the deregulation process to be successful, the coordinated,

government-level **cooperation of all regulatory authorities** responsible for the compliance supervision of the aforementioned professional services, in particular of the line ministries, is necessary. Furthermore, to identify arrangements promoting competition and efficiency, the various regulators must devise sound **impact assessments**, with a uniform approach, to support the drafting of future legislation. The GVH wishes to take an active role in assessing the potential competitive effects of the various elements of regulation, thus assisting regulators in their decisions making.

3. The position of the Commission

In the framework of the Lisbon economic reform programme of the EU up to 2010, the Commission established that professional services have an important role to play to improve the competitiveness of the European economy, and their progress is part of the **Lisbon strategy** of development and employment, which has the primary objective of making the EU the most competitive and dynamic knowledge based economy by 2010.

Accordingly, in 2002 the Commission published its report on the internal market for services[1], than, as a follow-up, in **January 2003**, the **comprehensive analysis of the regulation of liberal professions in different Members States**[2], commissioned by DG Competition and prepared by an independent institute. Relying on an empirical survey conducted in 2002-2003 among the professional bodies of the EU15, the analysis separately reviews the various types of restrictions, and their scope among selected liberal professions (lawyers, notaries, accountants, architects, engineers and pharmacists), comparing the typical regulatory arrangements, taking into account the reasons for regulation, and the quantity and extent of entry and competitive restrictions caused by regulation.

The study and the resulting conclusions were discussed at several events in the autumn of 2003; as a result, the Commission issued its **Communication on competition in professional services[3] on 9 February 2004**. The Communication evaluated the regulatory powers and practices of professional bodies from the competition aspect, and identified and evaluated the range of potential restrictive provisions. It identified the regulatory restrictions potentially hindering competition and most commonly applied by Members States that have no objectively necessary, legitimate public interest attached to them, and defined the directions for action in the forthcoming period.

The Communication establishes that the rules governing professional services serve primarily to enhance the quality of the service, the competence of service providers and consumer confidence. Even though there may be different reasons for regulation, it fundamentally aims

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1 COM(2002) 441 Final of 30.7.2002 „Report from the Commission to the Council and the European Parliament on the State of the Internal Market for Services presented under the first stage of the Internal Market Strategy for Services"

2 "Economic impact of regulation in the field of liberal professions in different Member States – Regulation of professional services" Institute for Advanced Studies, Vienna, 2003 (Ian Paterson, Marcel Fink, Antony Ogus et al.) http://europa.eu.int/comm/competition/publications/prof_services/executive_eng.pdf

3 Communication from the Commission; Report on Competition in Professional Services (Brussels, 9 February 2004, COM (2004) 83); http://europa.eu.int/comm/competition/liberal_professions/final_communication_en.pdf
Stocktaking Exercise on Regulation of Professional Services - Overview of Regulation in the New EU Member States dated November 2004, http://europa.eu.int/comm/competition/liberalization/conference/overview_of_regulation_in_the_eu_professions.pdf

to eliminate problems arising from competition on the market of services. On the other hand, professional regulations in certain cases are found to be more restrictive than **necessary and justified**. Thus the Commission applies the test of **proportionality** to the necessity of professional services, thus they should serve a clearly specified public interest and not result in greater restrictions than necessary.

Accordingly, the Communication defined the following main categories of **potentially restrictive regulations**:

- the setting of mandatory or recommended prices
- advertising restrictions (definition of the place or content of advertising),
- entry restrictions or reserved tasks (qualification requirements, professional examinations, minimum periods of professional experience, exclusive rights to provide certain services),
- business structure regulations (scope for collaboration with other professions, restriction of business structure, ownership restrictions),
- related disciplinary procedures.

According to the Commission, arrangements less restrictive of competition among service providers and more conducive to the legitimate regulatory objectives must be devised and the state and self-regulations in the field of liberal professions must be reviewed. Thus, concurrently with its own stock-taking exercise, the Commission stated that **the national competition authorities and regulators** were primarily responsible for the identification and review of any restrictive arrangements applied by professional bodies and, where necessary, their amendment or, if this is not successful through competition advocacy, the conduct of the appropriate competition supervision proceedings.

As the next step, in 2004 the Commission extended the aforementioned EU15 survey to the **review of the legislative, self-regulatory and ethical practices of the professional bodies of new Member States**, there results of which were published in November 2004[4]. The paper gives a comprehensive review of the types and scope of regulations applied by the professional bodies of the 10 new Member States.

Similarly to old Member States, notaries and pharmacists are the most regulated professions in each new Member State, while legal professions (lawyers, attorneys) have medium-level, and technical professions (architects, engineers) little regulation. In contrast, accounting professions (accountants, external auditors, tax advisors) work in much more liberal regulatory environments in the new Member States.

In case of **accounting service providers**, the most frequent restrictions relate to advertising and inter-professional cooperation. The chambers of **legal professions** regulate mostly the advertising of their members and the ownership structure of their businesses, but they also set the rates for their services in a number of cases. The work of **notaries** can be pursued among legally defined frameworks in every Member State, with a number of reserved rights. Accordingly, their rates are also generally specified, and they must satisfy strict qualification and entry criteria, while the self-regulation of their chambers set additional restrictions. **Technical professions** are subject to similar entry restrictions in most Member States, such as

[4] Stocktaking Exercise on Regulation of Professional Services – Overview of Regulation in the New EU Member States dated November 2004, thpp://europa.eu.int/comm/competitition/liberalization/conference/overview_of_regulation_in_the_eu_professions.pdf

qualification requirements, appropriate experience, and the acquisition of a license. Furthermore, the chambers of some countries set detailed requirements as to the minimum tariffs. **Pharmacists** face quantitative entry restrictions based on demographic or territorial criteria in most Member States, and their advertising and tariffs are also often regulated. In addition, they have exclusive rights to sell prescription drugs, and only some Member States allow the sale of non-prescription drugs outside pharmacies.

On the whole, the responses of chambers reveal that the Czech Republic, the Baltic States and Slovakia are the most regulated countries, while in Hungary and Poland professional rules contain restrictive provisions only in a narrow scope.

4. Recommendation concerning the review of the regulation of notarial services

In Hungary, the activity of notaries is regarded as the **most regulated** liberal profession. Thus, in line with the legislative recommendations and objectives set forth in connection with the competition assessment of professional regulations, the GVH recommends that the regulations pertaining to notarial activities are reviewed and any provisions giving rise to concern are re-regulated.

Act XLI of 1991 on notaries confirms upon notaries the right to perform official (regulatory) activities, as part of the administration of justice by the state, and sets strict rules (personal, material, selection criteria, rules of conflict of interest and exclusion, other procedural safeguards, formal and content requirement of documents, etc.) in order to guarantee impartiality, independence and **authenticity**.

In the present regulatory system, notaries have a **public law status**, and they exercise their public authority pursuant to state authorisation, in the competences specified in the effective legal regulations; their tasks and activities can be considered as **state, regulatory functions**, and the public deeds they issue have the special legal force defined in law (direct enforceability).

According to the position of the GVH, however, notaries pursue their activities as economically independent enterprises, at their own risk, and they perform some of their activities as competing, effectively market, services, thus they have entrepreneurial characteristics. Therefore in cases where the law does not set any geographical or temporal exclusivity (with restrictions on territorial competence or time limit), **competition among notaries** is **not totally excluded** (especially in terms of the quality of service, such as choice of the location of office, customer service hours, speed of services, etc.), even if it can have only limited real effect due to the low number of service providers (especially in rural areas) or other regulatory constraints (e.g. tariffs fixed in legal regulations). In case of the preparation of notarial deeds, the authentication of copies of documents and of signatures, or legal advice, for instance, clients are free to decide which notary to turn to even if the formal requirements of public deeds are specified in law. Due to the regulatory constraints guaranteeing the public authority of notaries, these **competing activities** can be assessed separately, in comparison with similar services provided by other legal professions (such as advocates). However, as they receive the fees for their services from their clients rather than directly from the state, they can influence the choice of clients with their own activities, thereby also affecting the amount of revenues earned. Thus, in case of their market-type activities, they may have an interest in soliciting clients and in boosting their revenues and

profits, resorting to the essential tools of market activities such as advertising or price competition.

Consequently, in case of such activities potentially deemed by the GVH to be competitive, some of the existing strict legal regulations, which fundamentally aim to guarantee the public authority functions, can also be seen as being restrictive.

The **elements of regulation** in the Act on notaries that are regarded as **restrictive** can be summarised as follows:

- Notaries are **appointed**, and only **lawyers** complying with the specified personal criteria, having passed specialised legal examinations and possessing at least 3 years of experience as assistant notaries (or equivalent experience) are eligible, following and application procedure.
- Certain regulatory activities can be performed only by notaries in the scope specified by law (**restricted activity** – public deeds and notarial certificates, estate and other non-litigious notarial procedures).
- Only a **specified number of notaries may operate** in the country (directly entry restriction).
- In the course of their regulatory activities, in particular in non-litigious proceedings, notaries may operate only in the **areas of geographical competence** specified in law. In case of services considered as competitive, they must also operate in their designated area of competence, clients are nevertheless free to chose among notaries (thus passive provision of service, initiated by the client, is allowed, but active solicitation of business outside the area of competence is not).
- The **fees of notaries** are **fixed** in respect of all activities, even though if certain specified conditions rare satisfied, they are allowed to charge lower fees through pre-determined price reductions.
- The range of parallel activities that notaries may perform for consideration is strictly restricted (no other income earning activity is allowed, except for scientific, literary, artistic and sporting activities – **horizontal separation**).
- Notaries may operate their business exclusively under the rules applicable to **sole proprietors**, but not as economic associations or other business entities (**business structure restriction**).
- External investors may not have stakes in their business (**vertical separation**). In contrast, notaries may obtain **ownership** in other enterprises, as long as they comply with the conflict of interest rules.

In case of state, public authority activities, the **purpose of the regulation** is to assure access to services and the continuous availability of notarial services in the entire country, and to guarantee authenticity, impartiality and independence. However, according to the GVH, it is not true for every area of activity that the total exclusion of the possibility of competition is a requisite of authenticity or that the above objective could not be achieved with a regulatory system entailing less restrictions. Thus at present there is no substantive evidence that, for all activities of notaries, including the competing ones, a system containing **less strict** conditions of supply and resulting in greater competition would be unable to guarantee authenticity, reliability and independence.

Therefore it is necessary for the regulator to **examine**, by type of activity (separating exclusively regulatory functions from competing activities), the regulatory objectives, the restrictive regulations applied, and to ascertain their necessity and proportionality.

Thus we consider that in the case of regulatory activities it would be necessary to assess whether **the use of public deeds** and the **obligation to resort to notaries for authentication** is **necessary in every case** specified in the effective legal regulations. Furthermore, both in case of regulatory and **competing**, market-type services the **necessity of supply and conduct restrictions** should be re-considered, for instance if the restriction on territorial competence or on the number of notaries is justified in those cases, or whether authenticity and professional integrity could be assured without those restrictions, through other means.

Following the review of the scope of activities, according to the GVH, a **more differentiated system of fees and prices** would be justified, with the proviso that in case of the various notarial activities the regulation should convey the expectation of fair and equitable remuneration. The primary purpose of the regulation of fees should be to assure that the expenditures on the level of society do not exceed the justified level, that is, the fees should provide incentives for efficient, cost-effective operation, and no unjustified excess income, monopoly profit is generated in the sector because of the potentially preserved activity and territorial monopolies. On the other hand, as an important consideration during the re-regulation process, the maintenance of maximum fees may be justified in case of relatively vulnerable clients (natural persons), while the definition of fees could be left to the bargain of the parties in case of business clients.

The current Act on notaries, in its section on pricing, contains no effective safeguards in the incentive and consumer protection fields, and does not determine how and based on what considerations the minister responsible for the supervision of the sector must define the fees and tariffs of the various notarial services, and the economic content of the various tariff items is also not clarified satisfactorily. According to the effective legal regulations governing administrative service prices, the fees of notarial procedures should cover the justified costs, but they should not be higher than that level, i.e., no profit should be generated. In order to provide more **sound foundations** for the **determination of fees** in the area to be retained as regulated, we should examine how the fee income of notaries could be approximated to justified expenditures. At present, even though notaries performing different combinations and volumes of services incur different costs, they can generate substantially different incomes, thus effective income differences emerge.

Presumably, when establishing notarial tariffs, **fixed** service fees similar to the flat **procedural fees** applied in the administration of justice are **justified** only in those areas where the territorial monopoly of notaries would be preserved for regulatory procedures, and the clients may not chose from among notaries, and the notaries would also have an obligation to supply. Thus in those proceedings the fees (considering that notaries perform official administration of justice activities) should cover all the expenditures, but should not include any profit (not-profit principle).

On the other hand, in the case of notarial activities deemed to be competing, the regulator would generally need to determine a price that covers the expenditures of an efficient enterprise as well as a certain profit. Thus, if we are to determine the tariffs soundly, the relationship of **revenues** from market-type activities and the related **legitimate expenditures** should be examined, so that the regulator does not set rates completely different from real expenditures. In this area the reasons for maintaining regulations should also be considered on their merits.

In these cases, the regulators have difficulties in assuring guaranteed supply and at the same time preventing the extra profits generated as a result of the present restricted competition. In certain geographical markets, there are substantial **differences in supply and demand conditions** and therefore also **in profitability**. Thus in these segmented markets the cross-subsidisation technique cannot be applied, i.e., where in case of reserved activities, the cost and income differences resulting from inequalities of the geographical market are resolved within the firm, by cross-subsidisation between geographical areas. Because of the differences in geographical markets, it is likely that the structure of revenues from the various services is different for each notary, and so is the ratio of fixed and variable costs. Consequently, assuring guaranteed supply and avoidance of the risk of overpricing would demand different rates for notaries with a small number of cases (e.g. those who deal mostly in probate proceedings) and notaries with numerous cases (those in cities, with many public deeds and authentication proceedings).

Thus in case of competing services, the adoption of **maximum prices** instead of fix rates may be justified from the regulatory aspect. Thus, in case of notarial services where choice between notaries is not limited, the present fixed prices should be reconsidered, and work should be started to devise maximum tariffs that would cover fixed expenditures as well as profits. According to the GVH, the authenticity function would not be compromised if clients were allowed to chose from notaries authorised to perform such services, taking into consideration the service fees and differences in prices. **Authenticity**, impartiality, immunity to manipulation and personal integrity should be **assured** though the selection system, the procedural, conflict of interest and **other safeguards**.

Price maximisation as a regulatory intervention can also be justified by the **protection of consumer interests**, because at present, due to the restriction on the number of notaries, the possibility for potential competition is also limited in certain geographical areas by the reserved activities specified by law. Such an amendment of rates could be implemented in the decree of the Minister responsible for compliance supervision, as the Act on notaries does not limits the price regulating powers of the Minister. The elimination of price fixing and the adoption of maximum rates would also be in line with the regulatory principles of the Pricing Act.

Furthermore, as an additional safeguard, an equalisation fund could be set up to **offset territorial-income inequalities**. If the legislator intends to assure satisfactory access by maintaining the entry requirements and, at most, reviewing the number of notarial districts an their adjustment from time to time, i.e., by maintaining the administrative intervention, the survival of rural notaries with small case numbers should be assisted with other safeguards as well, in addition to the tariff structure approximating average legitimate expenditures. As an additional safeguard to avoid overpricing if maximum prices are introduced, notaries could be obliged to set their tariffs in proportion to their costs, and to disclose their fees in their premises or on their homepages (consumer information).

In summary, it may be appropriate to **review, for their necessity and proportionality**, the exclusive activities reserved for notaries, as well as the territorial competence rules and the restriction of the numbers of notaries. The entry restrictions, and in particular the setting of the number of notaries in legislation result in actual monopolies in a number of cases, which in itself may prevent the effects of the adoption of maximum prices being felt by clients in weak positions. However, in preventing illegitimate extra profits not justified by actual costs,

substantive results could be achieved by **eliminating fixed tariffs** in locations where choice exists, and in respect of clients in a strong position, such as purchasers of services.

Simultaneously with the above recommendations, the GVH calls the attention of regulators to the similar **deregulation efforts** and achievements of the **EU Member States**. Considering that the activities of Latin notaries is the most regulated liberal profession in every Member State, each regulatory authority strives primarily to re-regulate or eliminate their reserved activities and the related other restrictions. The regulatory reform of the Dutch Ministry of Justice is an outstanding example; there, the territorial competences, the rage of reserved tasks, the limitation on numbers and the requirements concerning specialisation have been changed; the macro-economic results justified the necessity of that process. Furthermore, a number of competition authorities, including the Polish authority, have examined in supervisory procedures the necessity of regulations pertaining to notaries, such as the provisions concerning advertising, the maximisation of service fees, the fix fees of conveyancing and participation in special training, and they were deemed to be in violation of the competition law. As a general conclusion of the surveys in Member States it was found that competition authorities do not question that some of the notarial services can be brought under the scope of competition law based on pre-defined considerations without bringing into question the public law and authenticity functions of their activities.

In view of the current system of Hungarian regulations pertaining to notaries, which maintains a wide range of restrictions, we consider that **competition** can be **effectively promoted** primarily by **reducing restrictions** arising from the details of regulations **to the minimum necessary level**; in the course of this, the public interest to be protected consists in the peculiar legal safeguards relating to notarial proceedings; these will continue to safeguard the well-defined and clearly identified public interest.

Thus it is not our objective to totally eliminate regulatory constraints, but to **clearly define the public interest** and to set the regulatory constraints intended to achieve these at a level where the necessary safeguards are retained, and more pro-competitive mechanisms can increase the efficiency of satisfying consumer needs and enhance the flexibility of adaptation.