



GAZDASÁGI
VERSENYHIVATAL

The rules of the Hungarian Bar Association restrict competition

The case concerned the deontological rules adopted by the Hungarian Bar Association (hereinafter Code of Conduct) in relation to the advertising activity of attorneys and the written position of the Bar Association's presidency in which it gives extensive rules on the outlook and content of the websites of an attorney. The Bar Association qualified as an association of undertakings pursuant Article 81 of the Treaty, the Code of Conduct and the written position proved to be a decision of an association of undertakings. Certain provisions of the above mentioned regulations restrict competition as defined in Article 81(1) and they do not satisfy the conditions of Article 81(3). A fine of HUF 5 million was imposed on the Bar Association. (An appeal was lodged against the decision of GVH, and the court suspended the execution.)

The decision

The Competition Council found the following provisions to be restrictive of Article 81 of the EC Treaty and Article 11 of the Hungarian Competition Act:

Code of Conduct

11.1 The attorney is obliged to abstain from all kind of dishonest acquisition of clients, especially he may not utilize agents and procurers. The attorney may not give any financial or other compensation to anybody else only because he recommended him for the right demanding person.

11.2 The attorney may not produce the reputation of semblance of his own personality, as if he could perform better service in matter with certain authorities than other attorneys so as he could settle the matter quicker.

11.3 The attorney may not way rumour and spread that he may undertake and perform certain cases at more favourable conditions than other lawyers do it. He may not compare his activity to that of other attorneys.

The indirect ban on advertising other than allowed in 11.4.

11.4(a) The attorney may not publish the establishment, the transfer of his office or his sub-office, the change of the phone/fax number for more than two months.

11.4(c) second sentence: The form of publication however may not be highlighting in terms of the font type or the size of the advertisement.

11.4(e) second sentence: The advertisement may contain exclusively the name, address, phone number of the attorney (of the attorney's office), as well of the time of his availability, furthermore, the activity itself.

Written position of the Bar Association's presidency

The content of the attorney's homepage may not serve the popularisation of the attorney or its services, moreover it may not serve as an advertisement.

It is prohibited to use effective slogans or any other elements qualifying as an advertising.

The attorney's homepage cannot contain an offer for legal advising, or any other legal services provided by attorneys, neither a call for offer, nor a fee-offer, it cannot contain any direct or indirect communication or comparison concerning the fees applied by the attorney.

The attorney's homepage cannot contain a call or offer for a contract of services, any downloadable contract of services or power of attorney.

Clients represented and cases dealt with may not be named on the attorney's homepage.

The Competition Council prohibited the Bar Association from applying these rules as of 30 days after receiving the Council's decision. The Competition Council obliged the Bar Association to publish the Competition Council's decision on its homepage and in the Official Journal of the Hungarian Bar Association, furthermore to communicate it to the competent

ethical committees. The Competition Council obliged the Bar Association to eliminate the situation violating the competition rules until 15 September 2006. Finally, the Competition Council imposed a fine of HUF 5 million (approx. EUR 20 000).

Undertakings involved

The Bar Association is a public body of attorneys with registered members based on the principle of self-government prescribed by law. Acting as an attorney is conditional on registration at the competent local bar's registry. The Bar Association, as the body with national competence, can adopt compulsory regulations and guidelines on attorneys, the infringement of which can entail even expulsion from the bar. Consequently the entry to the market of legal services and the exit from it, which can happen due to the infringement of regulations and guidelines, depends on the decisions of the Bar Association.

Procedure and – where relevant – ECN co-operation

In November 2004 the Gazdasági Versenyhivatal initiated a proceeding against the Bar Association based on a complaint, which alleged the restrictive nature of the advertising rules contained in the Code of Conduct. According to the complaint, the Code of Conduct and the written position of the Bar Association's presidency on the content of attorneys' websites limits their ability to apply new technologies and in general the possibility to advertise.

Facts

Paragraph 11 of regulation 8/1999 of the Bar Association on deontological rules deals with advertising. Written position 1/2001 of the Bar Association's presidency regulates the content of attorneys' websites in relation to advertising. The scope of both the Code of Conduct and the written position of the presidency covers all registered Hungarian attorneys and since 1 May 2004 European Community lawyers.¹

The Code of Conduct contains the following provisions on the advertising of attorneys:

11. The attorneys' advertisement

¹ 'European Community lawyer' lists attorneys coming from an EEA country registered at the Bar Association.

11.1 The attorney is obliged to abstain from all kind of dishonest acquisition of clients, especially he may not utilize agents and procurers. The attorney may not give any financial or other compensation to anybody else only because he recommended him for the right demanding person.

11.2 The attorney may not produce the reputation of semblance of his own personality, as if he could perform better service in matter with certain authorities than other attorneys so as he could settle the matter quicker.

11.3 The attorney may not way rumour and spread that he may undertake and perform certain cases at more favourable conditions than other lawyers do it. He may not compare his activity to that of other attorneys.

11.4 It is not qualified as prohibited advertisement, when the attorney (the attorney's office):

publishes the establishment, the transfer of his office or his sub-office, the change of the phone/fax number within two months the longest.

Informs his clients that the sphere of his professional activity has changed, it was extended, resp.

Publishes the name, the residence of his office, that of his sub-office, the phone and fax number, his language knowledge, his sphere of activity (for instance in telephone directory, in classified directory, in yellow pages, etc.) on a place giving publicity for everybody. The form of publication however may not be highlighting in terms of the font type or the size of the advertisement.

Publishes as an expert, makes declarations in written and electronic medias.

Carries on other attorney's activity prescribed in the legal rules – among others real estate trade, organization of owner occupied houses, etc. – and he publishes these information in connection with these activities through advertisement. The advertisement may contain exclusively the name, address, phone number of the attorney (of the attorney's office), as well of the time of his availability, furthermore, the activity itself.

The written position of the Bar Association's presidency gives extensive rules on the outlook and content of the websites of an attorney. For example it cannot serve as an advertisement of the attorney, the content is limited to only few information like photo, CV, list of publications, the attorney's practice or language knowledge. The written position prohibits the collection of e-mail addresses, the application of a counter showing visits on the website, the use of banners and hyperlinks. The attorneys' website cannot contain an offer for legal counselling or any other legal service, or a price offer. Attorney should not post on their websites downloadable service agreements and power of attorneys or an offer for service

agreements. Finally attorneys are not allowed to list the names of earlier clients on their websites.

Legal assessment

The Competition Council assessed the above mentioned decisions of an association of undertakings under the Hungarian Competition Act and in addition, in the period beginning with 1 May 2004 under Article 81(1) since the conduct had an effect on trade between Member States from that date. For the period preceding 1 May 2004 the Competition Council applied only the Hungarian Competition Act, since the effect on trade between the EC and Hungary, required by the implementing rules of the Europe Agreement was not present.

According to the Competition Council, since the members of the Bar Association pursue their activities in an agency relation for remuneration, taking the associated financial risks as well, they qualify as an undertaking. The Competition Council applied the concept to be found in the Höfner, Poucet, CNSD, Albany, Pavlov, Wouters and EPI cases. Consequently any entity that is engaged in economic activity, regardless of its legal status and the way in which it is financed must be regarded as an undertaking. That conclusion is not altered by the complexity and technical nature of services lawyers provide. Among the exclusive activities of attorneys the following are economic activities: client representation, defense in criminal cases, legal counsel, preparation of contracts, petitions and other documents, holding valuables deposited with him in connection to the above mentioned activities.

In addition to the activities pursued exclusively by them, attorneys may provide tax consultancy, social security consultancy, financial and other business consultancy, real estate agency, patent agency and other activities regulated in specific other regulations. In the assessment the Competition Council took into consideration that within the activities of attorneys' there are certain segments of non-market activities (when acting under compulsory appointment before courts as part of the administration of justice), which do not come under the scope of competition law.

The Bar Association, established by attorneys pursuing economic activities, must be regarded as an association of undertakings pursuant Article 81 when it adopts the Code of Conduct. The Bar Association, as an association of undertakings adopts decisions affecting the market of legal services. According to the Competition Council, the fact that the Minister of Justice oversees the Bar Association's decisions does not entail the inapplicability of competition law, it cannot hinder the proceedings of the Gazdasági Versenyhivatal. Moreover

the lack of finding of an infringement by the Minister of Justice has no influence on the assessment in the present case.

The main question in relation to “decision of association of undertakings” was whether the Bar Association’s decisions (Code of Conduct, written position) are state actions not infringing competition law or decisions of private entities.

The Act on attorneys provides in Article 121 that the Minister of Justice shall oversee the operations of the Bar Association. The Minister shall, within the scope of his oversight authority, oversee the statutes, rules and regulations, directives and decisions of the bar associations; he shall also oversee their operations as to whether they are in compliance with legal regulation, the statutes and the rules and regulations. Oversight does not include those cases in which there may be judicial proceedings.

The Competition Council examined the following factors when deciding on the issue:

What is the composition of the Bar Association and its decision-making bodies, what is the status of its members?

What kind of interests are taken into account when the above-mentioned regulations are adopted, what is the role of the public interest?

What kind of influence can the Minister of Justice (the state) exert on the Bar Association and indirectly on the content of the Code of Conduct or the written position? Does the state reserve the power to make the decision of last resort?

The Competition Council established that the Bar Association is exclusively composed of members of the profession, namely attorneys. The state can have no influence on the composition of the decision-making bodies, or on the person of the president. As regards the public interest criteria, there is no detailed regulation on it, moreover there are no provisions, which could hinder members from taking into account exclusively their own interest when adopting various regulations of the Bar Association.

With regard to the decision of last resort, the Competition Council established that in its interpretation this would mean an unrestricted power to withdraw, alter the Bar Association’s decisions or eventually even replace it with the own decision, when the minister is satisfied with the “result”. According to the Competition Council the minister does not exercise such power in relation to the Bar Association’s decisions, regulations, since it can proceed against them only in judicial proceedings. Furthermore even the court has only a right to abrogate the regulation concerned and to oblige the Bar Association to initiate new proceedings. This

situation perfectly suits the constitutional requirements of the relation between the state and attorneys.

To sum up, the Competition Council found that when deciding on the issue of state decision, the above mentioned factors (composition of the self-regulatory body, public interest criteria, decision of last resort) had to be assessed together, their overall effect had to be taken into account. Potentially this could mean that where for example the public interest criteria is determined in detail, then a weaker form of final decision would be sufficient for the decision to qualify as a state decision. On the other hand where the power on final decision is strong, the first two factors can be less decisive. In the case of the Bar Association, members, decision makers are exclusively from the profession, and they are not required to take account of public interest. Furthermore the minister has very weak powers in the final decision category. Consequently neither separately, nor taken together pointed these factors in the direction that the Bar regulation should be a state decision.

The Competition Council reviewed the particular provisions by noting that advertising represents an important aspect of competition however individual restrictions do not fall by all means under the scope of Article 81(1) (Wouters exception) and thereby do not infringe competition law. On the other hand the Competition Council established that the Wouters exception does not provide an unconditional 'exemption' for attorneys from the application of the competition rules on their behaviour. It has to be examined whether the restriction inherent in the decision is necessarily related to the attainment of the public interest represented by the profession and whether they are indispensable and proportionate. The Competition Council acknowledges the special characteristics of the legal profession, as did by the lawmaker as well, nevertheless attorneys are not exempted from competition law.

The Competition Council in its assessment, based partly on the arguments of the Bar Association, took into consideration the following profession related core values: independence of attorneys, confidentiality, the free choice of an attorney, the avoidance of conflict of interests. Occasionally the Competition Council considered separately those activities of attorneys, which they do not perform in the interest of the efficient administration of justice and/or which might have an effect on neighbouring markets as well.

Taking into account the above-mentioned aspects, the Competition Council found that paragraph 11.1 restricted competition, since that provision hindered all agency like activities, which included besides personnel solicitation broader type of activities as well. According to the Competition Council vague definition of terms could widen the interpretation of the rules at will, which could keep back undertakings from certain type of advertising activities, thereby hindering competition.

Paragraph 11.2 and 11.3 also infringed the competition rules because the general wording of those rules did not make it possible to differentiate comparative advertising according to particular activities. A ban on comparative advertising was partly regarded as justified and proportionate, provided that due to confidentiality rules the objective characteristics needed for a comparison were not at hand. On the other hand the Competition Council considered the ban unjustified and disproportionate when it was not to be connected with attorney activities linked to the rule of law and the core values of the legal profession serving public interest (e.g. the advertising ban on attorney activities other than the exclusively allocated ones). The Code of Conduct prohibited generally all kind of comparison, without any differentiation to prices or certain activities, therefore the Competition Council found these provisions anticompetitive. The general, undifferentiated ban on comparative advertising was unjustified and disproportionate.

In the Competition Council's assessment, paragraph 11.4 a) proved to be illegal since it limited the publication of a law firm's contact details to two months. Paragraph 11.4 c) restricted competition when due to its wording it unreasonably limited the form and method of attorney advertisings. Paragraph 11.4 e) represented also an unjustified and disproportionate restriction on attorneys' ability to enter other markets.

The Code of Conduct allowed particular advertising activities by specifying them as "not prohibited" advertising or prohibited them expressly. As a result of this formulation, even in the absence of an express ban, everything else is prohibited including advertising on prices. The Competition Council considered this indirect ban also as a restriction of competition pursuant to Article 81(1).

One of the most important indirect restriction is the ban on price advertising. Since price is an important element of competition, even in the case of liberal professions, any rule which limits price advertising is a restriction of competition. When consumers have no price information, may be they are not aware of equally suitable, nonetheless cheaper services, which diminishes the possibility of choosing the right service or changing the service. In the absence of price advertising the search cost of consumers increases, searching becomes more difficult. In the presence of low informed consumers, market players are not induced to compete more vigorously, therefore by prohibiting advertising restriction of competition can be achieved.

In its analysis under Article 81(3) the Competition Council came to the conclusion that paragraphs 11.1, 11.2, and 11.4 did not contribute to improving the distribution of goods, therefore due to the cumulative nature of Article 81(3) conditions, those provision did not satisfy the requirements of that Article.

The written position of the presidency uses the distinction advertisement/non-advertisement, instead of the Code of Conduct's lawful advertisement/unlawful advertisement distinction. The Competition Council did not find the following prohibitions to be restrictive:

The homepage cannot serve more than the ethical and objective information about the attorney's education, activity.

The address of the homepage cannot contain any element that would provide an unjustified advantage for the attorney when somebody uses a search engine for finding the right attorney.

The collection of e-mail addresses, the application of a counter showing visits on the website is prohibited.

The prohibition of the use of banners and hyperlinks.

The homepage cannot use works protected by copyright (e.g. music, literary and audiovisual works). The only exceptions are the moderate and proper graphic works used for the construction of the website. According to the Competition Council those requirements can be originated from the professional dignity of attorneys. The restriction can be view as reasonable and justified limitation aiming to achieve a legitimate goal when it tries to hinder the appearance of extreme advertisings.

The written position prescribed in general that the attorney's homepage cannot serve as an advertising. Furthermore it expressly prohibited any direct or indirect offers on services, fee offers, downloadable service contracts, power of attorneys, or the list of earlier clients and cases. Based on the above the Competition Council found that these provisions point to the absolute prohibition of advertising, which cannot be justified by the core values of the profession, thereby infringing Article 81(1). The provisions did not satisfy the conditions of Article 81(3).

The Competition Council came to the same conclusion under the national competition rules with regard both to the Code of Conduct and the written position.