



**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 2 on Competition and Regulation

COMPETITIVE RESTRICTIONS IN LEGAL PROFESSIONS

-- Hungary --

4 June 2007

The attached document is submitted by the delegation of Hungary to Working Party No. 2 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 4 June 2007.

Please contact Mr Sean Ennis if you have any questions regarding this document [phone number: +33 1 45 24 96 55; Email address: sean.ennis@oecd.org].

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1. Attorneys

1.1 Regulation of entry

1.1.1 Quality standards and entry

1. In Hungary the undergraduate legal education, which takes 5 years of study is open for anybody who meets the application requirements. After obtaining the law degree a lawyer can choose among several professions, one of them is working for a law firm as an attorney candidate. To become an attorney candidate, one should be the citizen of an EEA country, having a clean ethical record and must be registered at the territorial bar association.

2. During the work the candidate must take part in some courses organized by the bar preparing for the special legal exam. After 3 years of work, the candidate may apply for the exam. Passing the exam and taking the oath the candidate becomes an attorney. Nevertheless, to become an attorney it is not obligatory to work as an attorney candidate before: anybody who has a law degree and works in any field of the legal profession for 3 years can apply for the same special legal exam without the need to participate in any additional courses.

3. The special legal exam is organized by the Ministry of Justice, the application fee must be paid for the Ministry (it costs approximately EUR 220) as well.

4. The attorney profession is regulated partly in the Act on Attorneys (1998:XI.) and partly by self-regulation, namely the Hungarian Bar Association and the territorial bar associations.

5. In this profession there is no limitation on the number of suppliers.

6. The membership in a territorial bar association is obligatory. The registration occurs in an administrative procedure where the bar does not have discretionary powers, it can only consider whether the requirements ordered by the Act or the bar's rules are met, namely: law degree, special legal exam, citizenship in any EEA country, clean ethical record, liability insurance, suitable office.

7. Pursuant to the Act, the attorney can be the member of only one of the territorial bars and he can maintain his office and branch offices in the territory of that particular bar. If he wants to re-locate his office to another county he must apply for a re-registration at the territorial bar concerned. The attorney may proceed before any court or authority in Hungary regardless of the location of his office (branch office).

8. The territorial bar keeps distinct registries for attorneys, candidates, law firms, assistant (or employed) attorneys, European Community jurists and foreign legal counsels. Every kind of registration is against a fee¹. Each territorial bar association has the right to determine the amount of the registration fee. The fees are quite considerable, between EUR 800-2500 depending on the decision of the relevant territorial bar (the only exception is the registration fee of the European Community jurists which is determined by the Hungarian Bar Association).

¹ Considering the fact that the Act on Attorneys does not authorize the bars to adopt these registration fees, the Hungarian competition authority has recently brought an action against one of the territorial bars to examine their compatibility with the competition rules. However the registration procedure is considered to be an administrative procedure which forms a state action excluding the possibility of intervention of the competition authority, the decision of the bar on the registration fees constitutes a decision of an association of undertakings which can be investigated by the competition authority.

9. Foreign attorneys may practice in Hungary under different rules. If the person concerned can certify that he is entitled to practise as an attorney in any EEA country he shall practise as a 'European Community jurist' in Hungary. Upon his request he can even be admitted to the territorial bar if he has been practising in Hungary for a minimum of 3 years partly in connection with the Hungarian law and speaks Hungarian at a reasonable level. If he does not want to be the member of the bar he will only be registered in the registry for European Community jurists. The European Community jurist is entitled to pursue any legal activities except the cases of compulsory representation (stipulated in other acts), when he must have a collaboration agreement with an attorney or law firm.

10. Attorneys not coming from any of the EEA countries have the status 'foreign legal counsel' according to the Act. It means that he cannot be the member of the bar and he must be registered in the registry for foreign legal counsels. He can be engaged in legal activities based on a collaboration agreement with an attorney or law firm, and he can provide legal advice concerning the law of the country where he is a registered attorney, concerning international law and legal practice in connection with these.

1.1.2 Exclusive rights

11. The attorneys enjoy some exclusive rights. Unless otherwise stipulated by law, only attorneys are entitled to regularly provide the following services:

- a) represents clients,
- b) provides defence in criminal cases,
- c) provides legal counsel,
- d) prepares contracts, petitions and other documents,
- e) holds valuables deposited with him in connection with the activities stipulated in Paragraphs a)-d).

12. Beyond these general tasks there are some other fields (i.e. incorporation procedures, conveyance of a real estate, review procedures in civil procedures, some criminal procedures) where other acts make the representation of the client obligatory by an attorney.

13. Beside the exclusive tasks attorneys may provide the following services in:

- a) tax consultancy;
- b) social security consultancy;
- c) financial and other business consultancy;
- d) real estate agency;
- e) patent agency;
- f) activities authorized by legal regulation (with the exception of the regulation of local government);
- g) mediator activities in mediation proceedings regulated in specific other legislation;

- h) converting the instrument of constitution of a company - that he has prepared - and the additional appendices of the company's application for registration (notification of amendments) into electronic format;
- i) arbitration in public procurement procedures as governed in specific other legislation, and counseling services related to public procurement procedures;
- j) lobbying regulated in specific other legislation.

14. To ensure the proper proceeding of an attorney the Act determines some conflicts of interest rules and the rule of confidentiality.

1.2 Regulation of market conduct

1.2.1 Fees

15. The attorney's fee is freely agreed by the parties according to the Act. The Hungarian Bar Association is not entitled to determine obligatory or recommended prices. There are two exemptions when the attorney's fee is not subject to negotiations.

16. If the representation of the client is obligatory by law and if the client does not entrust an attorney itself (for example because of his financial situation), the court or the authorities appoint an attorney. The appointed attorney's fee (which is relatively low) is determined in a regulation of the Minister of Justice. The territorial bar must compile a registry for appointed attorneys among all attorneys on the basis of the principle of equality.

17. There is another regulation of the Ministry, which determines the costs of the attorney that can be established in judicial proceedings.

1.2.2 Advertising

18. The Act does not contain any specific provisions on advertisement, however the Hungarian Bar Association has brought some rules in the ambit of their code of conduct, which significantly restrict the advertising possibilities of attorneys. Considering that it cannot be deduced from the Act that the Bar or any territorial bars are entitled to bring restrictive rules in this field, the Hungarian competition authority has recently investigated the code of conduct of the Hungarian Bar. See below point 3.2.

1.2.3 Partnerships and business organisation

19. The law firm is a legal person created to practice law established by its registration at a territorial bar. One or several attorney shall establish and be the members of the law firm.

20. Under the present legislation there is no possibility to establish interprofessional organisations (e.g. integration of law firms and accounting consulting firms), interprofessional cooperation is allowed only in other ways (e.g. involve expert witnesses).

1.3 Institutional framework of self-regulation

1.3.1 Regulatory oversight

21. The territorial bar associations are public bodies with their representatives, administrative apparatus and independent budget within their operational area (generally all counties have their own

territorial bar). The bodies of a territorial bar are the general assembly, which consists of all members of the bar, the presidency, disciplinary committee, conflicts of interest committee and the supervisory board.

22. The general assembly - among others - adopts the budget and the budgetary report, adopts the statutes of the territorial bar, it may provide regional rules and regulations (i.e. the technical requirements of a suitable office) pertaining to the territorial bar's operational area and regional directives.

23. The statutes of the territorial bar association, the rules, regulations and directives shall be sent to the Hungarian Bar Association. The statutes of the territorial bar are binding on its members, and regulations are binding on members of the territorial bar, assistant attorneys and candidates who are registered with the territorial bar.

24. The presidency - among others - decides in the first instance on the admission or registry for attorneys, assistant attorneys, law firms, candidates, European jurists, foreign legal counsels and on the termination of legal practices, determine the amount of the bar association membership fee. Members of the territorial bar associations may appeal decisions of the presidency - by referring to a violation of legal regulation, the statutes or the rules and regulations - to the presidency of the Hungarian Bar Association.

25. The Hungarian Bar Association is a public body and the national organization of attorneys, which has an independent budget and administrative apparatus with the following bodies: plenary meeting, presidency, disciplinary committee, conflict of interest committee, supervisory board, and election committee.

26. The plenary meeting which consists of 100 members (the territorial bars' presidents, one member designated by each of the territorial bars, and members who are proportionately elected by the general assembly of the territorial bars in a manner in which the number of members from each territorial bar is compared to the total number of attorneys) is the supreme decision-making body of the Hungarian Bar Association. The plenary meeting - among others - adopts the budget and the budgetary report, adopts the Statutes and may issue regulations and directives, expresses its opinion and makes suggestions in legislative and judicatory matters that affect attorneys. The plenary meeting shall issue regulations regarding the rules of conduct for the legal profession, procedural rules for admission to the bar, the lowest amount of liability insurance and the insurance companies accepted, as well as, detailed rules for disciplinary proceedings. The Statutes are binding on territorial bars, while the rules and regulations are binding on territorial bars, attorneys, assistant attorneys, foreign legal counsels and candidates.

27. The presidency – among others - decides in the second instance on the admission or registry for attorneys, assistant attorneys, law firms, candidates, European jurists, foreign legal counsels and on the termination of legal practices, determines the financial contributions of territorial bars, overturns decisions of territorial bar presidencies that are in violation of legal regulation, the statutes or the rules and regulations, expresses an opinion and make recommendations in legislative and judicatory matters that affect attorneys.

28. Both of the territorial bars and the Hungarian Bar are concerned in disciplinary issues. Under the Act an attorney commits a disciplinary infraction if he culpably violates his obligations that derive from practice of the law or are stipulated in legal regulation or the code of conduct or, his culpable behaviour outside the realm of legal practice is an affront to the prestige of the legal profession. As the result of a disciplinary proceeding the bar may impose a sanction which could be a censure, fine or expulsion from the bar. On the first instance the territorial bar, on the second instance The Hungarian Bar may proceed against the attorney, in the last resort the judicial review of the decision is also ensured.

29. According to the Act the Minister of Justice oversees the rules, decisions of the territorial bars and the Hungarian Bar Association whether these are lawful. If he finds any violation of a legal regulation he calls upon the bar to terminate its practice. If the bar does not comply with the Minister's request he may seek remedy at courts. The oversight does not include cases in which there may be judicial proceedings.

30. From competition aspects the territorial bar's or the Hungarian Bar's activities can constitute state actions (i.e. at the registration procedure) or economic activities where it acts as an association of undertakings having regard to the fact that the attorney is considered to be an undertaking. In the latter case the decisions and rules of the bars may be subject to antitrust scrutiny.

31. The Hungarian competition authority consistently articulates that the fact that the Minister of Justice oversees the bar's rules does not entail the inapplicability of competition law, it cannot hinder the proceedings of the competition authority. Moreover the lack of finding of an infringement by the Minister has no influence on the assessment of the competition procedure.

1.3.2. Application of competition law

32. There were two proceedings against bars up till now. In the first case one of the territorial bar wanted to have a recommended price list exempted which was rejected by the competition authority. In the other case the competition authority investigated the code of conduct of the Hungarian Bar and one of the written positions of the Hungarian Bar's Presidency, which ruled out almost all kind of advertisements for attorneys. The competition authority found that for the purpose of competition law the Bar is an association of undertakings and the code is a decision of association of undertakings. As to the restriction of competition, it took into consideration that advertising represents an important aspect of competition however individual restrictions do not fall by all means under the scope of Article 81(1)² therefore examined whether the restriction inherent in the decision is necessarily related to the attainment of the public interest represented by the attorneys and whether they are indispensable and proportionate. The competition authority established that the special characteristics of the profession do not provide an unconditional 'exemption' for attorneys from the application of the competition rules on their behaviour, consequently the concerned provisions infringed Article 81(1), moreover the conditions of 81(3) were not fulfilled, therefore the authority prohibited the almost overall ban on advertisement. Besides imposing a fine (approx. EUR 18.000), the competition authority obliged the Hungarian Bar to eliminate the situation violating the competition rules until 15 September 2006. The competition authority's decision, of which execution is stayed due to the parties appeal, is now under judicial review. See more on this case annex 1.

² Wouters exception: In Case C-309/99 the European Court of Justice said: „However, not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 85(1) of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience (see, to that effect, Case C-3/95 Reisebüro Broede [1996] ECR I-6511, paragraph 38). It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives. (p. 97.)

2. Notaries

2.1 *Regulation of entry*

2.1.1 *Quality standards and entry*

33. Hungary belongs to the countries where the Latin notary system prevails. This means that notaries are assigned a dual role as holders of a public authority and liberal professionals. Generally the regulatory restrictions in this profession are based on the public authority characterisation that notaries have. According to the Act on notaries (1991: XLI) the notary forms part of the judiciary.

34. To become a notary one shall have a Hungarian citizenship, law degree, special legal exam, clean ethical record, the right to vote and at least 3 years of practice as deputy notary (substitutable with 3 years of practice as a judge, attorney, prosecutor or legal counsel), and at last, shall make a statement on his financial standing.

35. There is a limitation on the number of suppliers; the number of the notaries are determined by a regulation of the Minister of Justice. The empty positions are filled by notaries chosen by the Minister of Justice. The notary is appointed by the Minister for an undetermined period of time (the relief of his office is made also by the Minister). With the appointment the notary becomes automatically the member of a territorial notary chamber.

2.1.2 *Exclusive rights*

36. Only the notary may make certain public deeds. The public deeds made by a notary are directly executable in case of non-compliance. The notary may make authentic deeds about the followings: wills, attestations, abstracts, certificates and copies.

37. He is authorized to proceed in probate of a will in non-judicial proceedings. In general the decisions brought by the notary in non-judicial proceedings are subject to judicial review in the same manner as the decisions of municipal courts.

38. The notary is appointed for a specific geographic area. This means that there are activities (i.e. probate of a will) where territorial exclusivity is stipulated by law, however in other cases (i.e. verification of signatures for companies, authentic copies) the client can choose freely among the notaries irrespectively of their geographical competence.

2.2 *Regulation of market conduct*

39. Because of the public authority characteristics of the profession, according to the Act the notary shall act for both parties, must be neutral and impartial.

2.2.1 *Fees*

40. The fees are fixed by a regulation of the Minister of Justice in accordance with the Minister of Finance, which leaves little room for differentiating the prices.

2.2.2 *Advertising*

41. The Act does not contain any rule on advertisement. However, the code of conduct of the notaries prohibits any kind of advertisements stating that the notarial activities cannot be subject to competition.

2.2.3 Partnerships and business organisation

42. The notary may maintain a notary's office only with other notaries appointed to the same location. The establishment of a notary's office is conditional on the approval of the territorial chamber, where the chamber shall only examine if the office corresponds to the regulatory requirements. The regulation on notary's office, which is a legal person, is similar to the limited liability companies with some exceptions: 50% of the voting rights and the management must be held by notaries, the founders shall be natural persons, the partnership cannot affect the notary's individual services and liability, the notary cannot be instructed. Non-notary person may be the member of a notary's office only if he meets the following criteria: Hungarian citizen, having right to vote and clean ethical record and the approval of the Minister. At last, the notary's office is established by incorporation at the registry court, however it may begin its operation after it was registered by the Hungarian Chamber for Notaries.

2.3 Institutional framework of self-regulation

2.3.1 Regulatory oversight

43. The territorial chambers are public bodies. Among others the chamber adopts the budget and the budgetary report, determines the amount of the chamber membership fee, expresses its opinion and makes suggestions in legislative and judicatory matters that affect notaries.

44. The presidency of the chamber shall - among others - oversee the operation and behaviour of the notaries, deputy notaries and candidates operating in the chamber's operational area, initiate disciplinary proceeding against notaries, register and control the notaries' statement of financial standing.

45. The Hungarian Chamber of Notaries is a public body. Its duties are - among others - initiating legislation and expressing opinions affecting notaries, determining the contributions of the territorial chambers, funding social and charity institutions, keeping registries i.e. on wills and rights of pledge, giving expert opinions if requested, maintenance of archives. It may issue directives regarding the rules of conduct, the operation of the territorial chambers, the application of the order on remuneration of notaries, the examination of the notaries' operation and the professional continuing education.

46. According to the Act, the Minister of Justice oversees the rules, decisions and constitutions of the chambers and the Hungarian Chamber of Notaries whether these are lawful. If he finds any violation of a legal regulation he calls upon the chamber to terminate its practice. If the chamber does not comply with the Minister's request he may seek remedy at the courts. The oversight does not include cases in which there may be judicial proceedings.

47. Beyond that it is the president of the county courts who shall oversee the operation of the notary from legal aspects and may request the chamber to investigate the operation of the notary. The disciplinary proceeding may take place before county courts.

2.3.2 Application of competition law

48. Notaries represent the state in all of their activities, they operate state functions and exercise state authority, therefore their activity – unlike that of many other liberal professions or even government bodies in certain cases – is not regarded as a business or market activity which could fall within the scope of the competition law in Hungary. They are also regulated in terms of mandatory service providing, exclusive rights, and prices. Therefore currently the Hungarian Competition Authority does not see any possibility to enforce competition law in this field, however it has declared its view repeatedly in order to have the legislation changed several times.

49. In May 27, 2005 the Hungarian Competition Authority published a recommendation for the Parliament and the concerned parties („Recommendation of the Gazdasági Versenyhivatal concerning the review of the regulation of notarial service”)³. Regarding to the public authority status the competition authority drew the legislators’ attention to think over and as far as possible narrow down the scope of exclusivity (e.g. the necessity of the form of public deeds in certain cases, the obligation of using authentication by notaries). Both in case of regulatory and competing market services the necessity of supply and conduct restrictions should be re-considered, for instance whether the restriction on territorial competence or on the number of notaries is objectively justified and necessary or authenticity and professional integrity could be assured without such restrictions, through other means. As in the present legislation it is not clear what circumstances the Minister should take into consideration when the fixed fees and tariffs are determined, and what is the economic content of the fees, the competition authority recommended to set up a more differentiated price system, in which the primary purpose of the regulation of fees would 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 does not allow the generation of unjustified excess income, monopoly profit in the sector because based on preserved activities and territorial monopoly positions. According to the competition authority the fixed tariffs are justified only in those cases where the notaries have territorial monopoly with mandatory service providing and the clients could not choose among the notaries. In these procedures the fees would be a kind of procedural fee to cover the cost of the procedure on the basis of non-profitability. On the other hand in those cases where the activities of the notary are deemed to be competing, the fees should cover the expenditures of an efficient undertaking and ensure a certain profit. However, such a legislation would face difficulties because it should take into consideration the significant differences that can be observed in the conditions of demand and supply, as well as in profitability in the different geographical markets. Another possibility could be to leave a wider scope for the parties to negotiate about the price (parallel to this to give room for the notaries to inform the consumers about the fees), however in case of relatively vulnerable clients (mostly natural persons) the maintenance of maximum fees would be justified to ensure protection of consumer interests.

50. Unfortunately until now there has been no change in the rules, only that the number of notary posts was raised last year.

³ <http://www.gvh.ionlab.net/index.php?l=e&m=5&id=3877>

ANNEX 1

Case Vj-180/2004 Hungarian Bar Association (ECN number 666)

1. Executive summary

The case concerns the ethical code 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 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 do not satisfy the conditions of Article 81(3).

2. 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 advertisement.
- 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, cases dealt with cannot be named on the attorney’s homepage.

51. The Competition Council prohibits 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 obliges 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 18 000).

3. Undertakings involved

52. 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, of which infringement 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.

4. Procedure

53. In November 2004 the Gazdasági Versenyhivatal initiated proceedings 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.

5. Facts

54. 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.⁴

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

⁴ ‘European Community lawyer’ indicates attorneys coming from an EEA country registered at the Bar Association.

- 11. The attorneys' advertisement
- 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):
 - a) publishes the establishment, the transfer of his office or his sub-office, the change of the phone/fax number within two months the longest.
 - b) Informs his clients that the sphere of his professional activity has changed, it was extended, resp.
 - c) 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.
 - d) Publishes as an expert, makes declarations in written and electronic medias.
 - e) 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.

56. 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.

6. Legal assessment

57. 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 has 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.

58. 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.

59. 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 regulation. 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.

60. 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.

61. 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.

62. 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.

63. 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 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?

64. 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.

65. 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 right in relation to the Bar Association's decisions, regulations, since it can object 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.

66. To sum up, the Competition Council finds 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) has to be assessed together, their overall effect has 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 point these factors in the direction that the Bar regulation should be a state decision.

67. 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 the lawmaker as well, nevertheless attorneys are not exempted from competition law.

68. 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.

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

70. Paragraph 11.2 and 11.3 also infringes the competition rules because the general wording of those rules does 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.

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

72. The Code of Conduct allows particular advertising activities by specifying them as "not prohibited" advertising or by prohibiting 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 Article 81(1).

73. 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.

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

75. The Written position of the presidency uses the distinction advertisement/not 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.

76. The Written position prescribes in general that the attorney's homepage cannot serve as an advertisement. Furthermore it expressly prohibits 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 do not satisfy the conditions of Article 81(3).

77. 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.