



GAZDASÁGI
VERSENYHIVATAL

Deontological rules of auditors restrict competition

The case concerns the deontological rules (Code of Conduct) adopted by the Chamber of Hungarian Auditors (hereinafter: Chamber) in relation to the advertising activity of auditors. The Chamber qualified as an association of undertakings pursuant to Article 81 of the Treaty, the Code of Conduct proved to be a decision of an association of undertakings. The provisions on advertising restrict competition as defined in Article 81(1) and they do not satisfy the conditions of Article 81(3).

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:

Paragraph C.4.1:

- prohibition on persuasive texts;
- prohibition on comparison with other auditor, auditor companies;
- prohibition on advertising fee information;
- prohibition on praising the speed and on qualifying the service in a manner that makes other auditor's same or similar services recognisable.

Paragraph C.4.2:

- defining the ambit of information to be published in trade magazines, newspapers.

Paragraph C.4.3:

- prohibition on recruiting clients;
- prohibition on comparative advertising at conferences or other events.

Given the modifications made to the Code of Conduct during the proceeding there was no need to prohibit the further continuation of the infringement.

The Competition Council did not find it necessary to impose a fine on the Chamber.

Undertakings involved

The Chamber is a public body, which means an entity with registered members based on the principle of self-government prescribed by law. The Chamber pursues many activities, inter alia it elaborates and publishes the deontological rules of auditors, supervise the members' compliance with them and in the case of an infringement it adopts decisions accordingly.

Facts

Paragraph C.4. of the Code of Conduct says the following about auditors' advertising:

C.4. Advertisements, offers

4.1. Advertisements and offers may not contain persuasive texts and comparisons with other auditors or audit firms. It is prohibited to refer to personal contacts and to evoke excessive expectations in any other way. The advertisement may not contain any information on the remuneration. The speed and the professional quality of the auditing service should not be praised in a manner that other auditors' identical or similar services could be recognised.

4.2. The author of a publication published in a trade magazine or newspaper may identify the audit firm he works for and may indicate his positions in social associations or public bodies next to his name. It is prohibited to indicate any further information.

4.3. It is prohibited to organise any events for the expressed purpose of recruiting clients. Auditors and audit firms may advertise themselves at events and conferences where they may describe their experiences gathered in their work and may express their opinion on professional issues, but in doing so they shall refrain from advertising and praising themselves in a manner that other auditors' identical or similar services could be recognised.

The Code of Conduct entered into force on 1 July 2004.

On 3 December 2005, the Chamber adopted a new version of the Code of Conduct, including the rules on advertising. The modifications reflected the comments made by GVH during the investigation. The new provisions entered into force on 1 February 2006. These rules were not the subject of the investigation.

Legal assessment

According to the Competition Council, since the members of the Chamber pursue their activities 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 auditors provide.

The Chamber was regarded as an association of auditors, who can be regarded as undertakings for the purposes of Article 81 of the EC Treaty, consequently the Chamber is an association of undertakings under community competition law.

The Competition Council also examined whether the decision of the Chamber might be a state decision according to the conditions elaborated by the ECJ in its Wouters, Reiff, Delta and CNSD judgements. The Chamber, established by auditors pursuing economic activities, had to be regarded as an association of undertakings pursuant to Article 81 when it adopted the Code of Conduct. The Chamber, as an association of undertakings adopted decisions affecting the market of auditing services. According to the Competition Council, the fact that the Minister of Finance oversees the Chamber's decisions did not entail the inapplicability of competition law, it cannot hinder that the GVH initiates a proceeding against the conduct. Moreover, the lack of finding of an infringement by the Minister of Finance had no influence on the assessment of the GVH in the investigated case.

The main question in relation to "decision of an association of undertakings" was whether the Chamber's decision (Code of Conduct) is a state action not infringing competition law or a decision of private entities. The Act on the Chamber of Auditors provides that the Minister of Finance oversees the operations of the Chamber.

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

- What is the composition of the Chamber and its decision-making bodies, what is the status of its members?
- What kind of interests are taken into account when the above-mentioned regulation is adopted, what is the role of the public interest?
- What kind of influence can the Minister of Finance (the state) exert on the Chamber and indirectly on the content of the Code of Conduct? Does the state reserve the power to make a decision of last resort?

The Competition Council established that the general meeting of the delegates, as the main decision-making body of the Chamber is exclusively composed of members of the profession, namely of auditors. The president, vice-presidents and the presidency are elected by the general meeting from among the members. The state can have no influence on the composition of the decision-making bodies. As regards the public interest criterion, there is no detailed regulation on it, moreover there are no provisions, which could hinder members from exclusively taking into account their own interest when adopting various regulations of the Chamber.

With regard to the decision of last resort, the Competition Council established that in its interpretation this would mean an unrestricted power to withdraw or alter the Chamber's decisions or eventually even replace them by the own decisions, when the minister is satisfied with the "result". According to the Competition Council the minister does not exercise such power in relation to the Chamber's decisions.

The relevant product market was defined as the market of auditing services, the relevant geographic market was defined as the territory of Hungary.

The Competition Council assessed whether paragraph C.4. of the Code of Conduct on Advertising restricts the freedom of the members to advertise, thereby having the object and/or effect of restricting competition between the members of the auditing profession.

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. The Competition Council established that the Wouters exception does not provide an unconditional 'exemption' for auditors from the application of the competition rules on their behaviour. It has to be examined whether the restrictions inherent in the decision are necessarily related to the attainment of the public interest represented by the profession and whether they are indispensable and proportionate. On the other hand the Competition Council established in the case of auditors that the alleged provisions of the Code of Conduct are not aiming the achievement of any acceptable public interest. The Competition Council did not think that the restrictions were disproportionate or not indispensable, rather it did not see the chain of causation between the restrictions and the goals presented by the Chamber.

Concerning the prohibitions contained in paragraph C.4., the Competition Council found that each of them restricted competition to an appreciable extent necessary for the application of Article 81(1). The Chamber is the national organization of auditors and the provisions of the Code of Conduct are compulsory on all member auditors. If an auditor pursues an activity in breach of the Code of Conduct it commits an ethic offence, which can be sanctioned with ethic penalties, inter alia with a fine or by exclusion from the Chamber.

The prohibition on persuasive texts might be the same as a total ban on advertising. Based this rule, since the borderline cases were not defined exactly, only certain behaviour not using any texts would have been allowed. According to the Competition Council, persuasion cannot be prohibited, since the aim of advertising is to persuade consumers to choose the advertised firm. The only exceptions were advertisements infringing the fairness of competition.

Comparative advertising is not prohibited by law as it allows undertakings to highlight their advantages, thereby achieving business success. Comparison based on real and truthful information has no negative effects on consumers. The prohibition in the Code of Conduct

therefore restricted competition. There can be auditing firms, which provide better services, the emphasising of which can be an advantage.

The Competition Council did not accepted the Chamber's opinion that the advertising of fees was in all circumstances misleading and unreasonable. Price competition is an important element of the competition between service providers therefore the limitation of price information was a restriction of competition.

The prohibition on praising the speed and quality of the service (in a manner that makes other auditor's same or similar services recognisable) concerned a special form of comparative advertising. Accordingly this provision was also restrictive of competition.

Paragraph C.4.2. limited the ambit of the information to be published in advertisements, consequently this was a restriction on the content of advertisements, which qualified as a restriction of competition.

According to the Competition Council an event organized for the recruitment of clients aims the acquisition of customers, which is the legitimate goal of advertising. Therefore the limitation on this type of events constitutes a restriction of competition as well. The other restriction in paragraph C.4.3. is again a special ban on comparative advertising.

The Code of Conduct limited the freedom of the Chamber's members, thereby having the object and/or effect of restricting competition between auditors.

The positive effects referred to by the Chamber are connected with the profession of auditing in itself and with the activity of the Chamber and particularly not with the restrictive deontological rules that are subject to this investigation.

The defending party by declaring in the Code of Conduct certain advertising activities as prohibited for all of its members, significantly restricted competition, thereby infringing the prohibition contained in Article 81(1) of the EC Treaty.

According to the Competition Council, the fear of misleading and untruthful advertisements cannot serve as a justification for the absolute ban of comparative advertising. The Code of Conduct hindered the method, namely comparison, while intending to take steps against the special content.

According to the Chamber the quality of auditing services is always the same. The Competition Council accepted this declaration only with respect to the final product of the auditing service, that is the clause certifying the annual report by the auditor. There can be differences between auditors and auditing companies with regard to the financial security they can provide for their liability for damages and their goodwill, individual undertakings can

have different capacities, which would entail different speed in performing the work. The declaration in itself that all the auditors perform same quality end results due to the regulation in force and to the activity of the Chamber does not entail that the service in its entirety would be the same for all customers. Even the differences in fees asked by various auditors indicate that customers do not treat all services as equal. The extensive prohibition of advertising might risk that auditors do not put emphasis on the quickness and capital intensiveness of their activity, since those advantages cannot be communicated properly towards their customers.

During the proceeding the Chamber did not present any arguments that would justify the restrictions under Article 81(3). According to both Hungarian and Community competition law the burden of proof rests on the party claiming the benefit of Article 81(3). The Competition Council established effects contrary to the conditions of Article 81(3).

Since the Code of Conduct, as a decision of an association of undertakings extended over the whole of the territory of a Member State (Hungary) trade between Member States was affected.