Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 17 September 2015 [1]

Case C-179/14

European Commission
v

Hungary

(Failure of a Member State to fulfil obligations — Article 49 TFEU — Freedom of establishment — Article 56 TFEU — Freedom to provide services — Directive 2006/123/EC — Articles 14 to 16 — Issue of meal vouchers on advantageous tax conditions — Restrictions — Justification — Monopoly)

1. With this application, the European Commission asks the Court to declare that, by adopting the new national rules which came into force on 1 January 2012 concerning the issue of meal vouchers, leisure vouchers and holiday vouchers, Hungary failed to fulfil its obligations under Article 14, point 3, Article 15(1), (2)(b) and (d), and (3), and Article 16 of Directive 2006/123/EC [2] and Articles 49 TFEU and 56 TFEU.

2. In the first part of its application the Commission considers, in essence, that those rules make the issuing of the Széchenyi electronic card ('SZÉP' card) henceforward subject to restrictive conditions such that only financial institutions having their registered office in Hungary can issue the card, [3] which is said to be contrary to the provisions of Directive 2006/123 concerning the freedom of establishment and the freedom to provide services.

3. In the second part of its application, the Commission considers in essence that the rules are also contrary to Articles 49 TFEU and 56 TFEU in so far as they confer on a public utility foundation, namely the Magyar Nemzeti Üdülési Alapítvány (Hungarian National Recreation Foundation, 'HNRF'), a monopoly on the issue of vouchers which entitle the employees of an undertaking to obtain benefits in kind in the form of ready-prepared meals ('Erzsébet vouchers').

4. In this Opinion I shall begin by requesting the Court to declare the application admissible, with the exception of the imprecise plea concerning the requirement for a contractual relationship of at least five years with a mutual society for issuing the SZÉP card.

5. I shall then set out the reasons why I consider, first, that the Hungarian rules concerning the SZÉP card are contrary to Article 14, point 3, Article 15(1), (2)(b) and (3) and Article 16 of Directive 2006/123 and, secondly, that the complaint concerning the infringement of Article 15(2)(d) of the Directive should be rejected as unfounded.

1 — Original language: French.

2 — Directive of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

3 — The card can be used by the employees of an undertaking to obtain a benefit in kind in the form of catering services, accommodation or leisure services.

6. Finally, I shall consider the reasons why it seems to me that the application should be upheld with regard to the complaint concerning the Erzsébet vouchers.

I – The legal context

A – *EU law*

1. The Treaty on the Functioning of the European Union

7. According to the first paragraph of Article 49 TFEU:

'Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.'

8. The first paragraph of Article 56 TFEU provides as follows:

'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.'

2. Directive 2006/123

9. Section 2, entitled 'Requirements prohibited or subject to evaluation', of Chapter III of Directive 2006/123, which relates to 'freedom of establishment for providers', consists of Articles 14 and 15.

10. Article 14, concerning 'prohibited requirements', provides as follows:

'Member States shall not make access to, or the exercise of, a service activity in their territory subject to compliance with any of the following:

…

(3) restrictions on the freedom of a provider to choose between a principal or a secondary establishment, in particular an obligation on the provider to have its principal establishment in their territory, or restrictions on the freedom to choose between establishment in the form of an agency, branch or subsidiary;

…'

11. Article 15 of the Directive, relating to 'requirements to be evaluated', provides as follows:

'1. Member States shall examine whether, under their legal system, any of the requirements listed in paragraph 2 are imposed and shall ensure that any such requirements are compatible with the conditions laid down in paragraph 3. Member States shall adapt their laws, regulations or administrative provisions so as to make them compatible with those conditions.

2. Member States shall examine whether their legal system makes access to a service activity or the exercise of it subject to compliance with any of the following non-discriminatory requirements:

…

(b) an obligation on a provider to take a specific legal form;

…

(d) requirements, other than those concerning matters covered by Directive 2005/36/EC [4] or provided for in other Community instruments, which reserve access to the service activity in question to particular providers by virtue of the specific nature of the activity;

…

3. Member States shall verify that the requirements referred to in paragraph 2 satisfy the following conditions:

(a) non-discrimination: requirements must be neither directly nor indirectly discriminatory according to nationality nor, with regard to companies, according to the location of the registered office;

(b) necessity: requirements must be justified by an overriding reason relating to the public interest;

(c) proportionality: requirements must be suitable for securing the attainment of the objective pursued; they must not go beyond what is necessary to attain that objective and it must not be possible to replace those requirements with other, less restrictive measures which attain the same result.

…'

12. Chapter IV of Directive 2006/123, entitled 'Free movement of services', includes Article 16, 'Freedom to provide services', which reads as follows:

'1. Member States shall respect the right of providers to provide services in a Member State other than that in which they are established.

The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory.

Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect the following principles:

(a) non-discrimination: the requirement may be neither directly nor indirectly discriminatory with regard to nationality or, in the case of legal persons, with regard to the Member State in which they are established;

(b) necessity: the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment;

4 — Directive of the European Parliament and of the Council of 7 September 2005 concerning the recognition of professional qualifications (OJ 2005 L 255, p. 22).

(c) proportionality: the requirement must be suitable for attaining the objective pursued, and must not go beyond what is necessary to attain that objective.

2. Member States may not restrict the freedom to provide services in the case of a provider established in another Member State by imposing any of the following requirements:

(a) an obligation on the provider to have an establishment in their territory;

…

3. The Member State to which the provider moves shall not be prevented from imposing requirements with regard to the provision of a service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment and in accordance with paragraph 1 …

…'

B – *Hungarian law*

1. The system of benefits in kind

13. Paragraph 71 of Law No CXVII of 1995 on income tax permits employers to provide their employees with benefits in kind under advantageous tax conditions.

14. The system of benefits in kind was considerably modified by Law No CLVI of 2011 amending certain tax laws and other laws relating to those tax laws. [5] In accordance with Paragraph 477 thereof, the Law came into force on 1 January 2012. Paragraph 71 of the Law on income tax, as amended by Law No CLVI of 2011, provides as follows:

'1. The following shall be treated as benefits in kind provided to the employee by the employer:

(a) the portion of income not exceeding the amount of the minimum wage per person per tax year, paid to the employee personally and in respect of the members of his family through holiday services supplied in the holiday residence owned or managed by the employer;

(b) at the employer's option,

(ba) the portion of income not exceeding HUF 12 500 granted for the consumption of meals in the framework of services classified as catering services at the place of work (canteen), at the catering facility operating at the employer's site (including cheques and/or electronic vouchers issued by the employer or the person operating the catering facility, for use only at the catering facility (canteen) operating on the employer's site, which may be used for the purposes and with the value stated above), and/or

(bb) on the income received in the form of Erzsébet vouchers, the portion of income not exceeding HUF 5 000 per month, paid for each month or part-month of the legal relationship which forms the basis for that benefit (even retrospectively in the same tax year);

(c) with regard to the [SZÉP card],

5 — 'Law No CLVI of 2011'.

(ca) assistance limited to a maximum of HUF 225 000 in the same tax year if it comes from several issuers, transferred to the card's 'accommodation' sub-account, which can be used for obtaining the accommodation services referred to in [Government Decree No 55/2011 of 12 April 2011 regulating the issue and use of the Széchenyi leisure card [6]];

(cb) assistance limited to a maximum of HUF 150 000 in the same tax year if it comes from several issuers, transferred to the card's 'catering' sub-account, which can be used for obtaining the catering services referred to in the [SZÉP] Decree and supplied at hot-food points (including catering at the place of work);

(cc) assistance limited to a maximum of HUF 75 000 in the same tax year if it comes from several issuers, transferred to the card's 'leisure' sub-account, which can be used for obtaining the services referred to in the [SZÉP] Decree which are intended to serve the purposes of leisure, recreation and staying healthy;

…'

2. The SZÉP card

15. Paragraph 13 of the SZÉP Decree provides as follows:

'Any service provider within the meaning of Paragraph 2(2)(d) of Law No XCVI of 1993 on mutual insurance funds ('Law on mutual societies') shall be authorised to issue the card — with the exception of natural persons and service providers connected by contract with the said service provider — which was formed for an unlimited period or for a limited period of not less than five years from the start of the issuing of cards and which, jointly with a commercial company, recognised under the Law [on commercial companies] as a group of companies or in fact operating as such, or jointly with a mutual society as defined in Paragraph 2(2)(a) of the Law on mutual societies, with which the service provider has maintained a contractual relationship for not less than five years — with the exception of the activities of managing deposits and investments — fulfils all the following conditions:

(a) has an office open to customers in each municipality of Hungary with a population of more than 35 000 inhabitants;

(b) has itself, in the course of its last complete financial year, issued at least 100 000 payment instruments other than cash in the framework of its payment services;

(c) has at least two years' experience in the issue of electronic voucher cards conferring a right to benefits in kind within the meaning of Paragraph 71 of the Law on income tax and has issued more than 25 000 voucher cards according to the figures for its last complete financial year.

…'

16. Under Paragraph 2(2)(d) of the Law on mutual societies, 'service provider' is defined as follows:

'"service provider": any natural or legal person and commercial company without legal personality which, on the basis of the contract with the mutual society, carries out on behalf of the latter transactions that are within the scope of the latter's activities and make those activities possible or promote them, or which itself provides its own services to the mutual society, with the exclusion of providers of health insurance services …'.

6 — 'SZÉP Decree'.

17. According to Paragraph 1 of the Law on commercial companies:

‘1. This Law governs the formation, organisation and functioning of commercial companies having a registered office in Hungary … .

2. … in addition, this Law governs the formation and functioning of recognised groups of companies …’

18. Paragraph 2 of the Law provides as follows:

‘1. A commercial company may be constituted only in a form provided for by this Law.

2. Certain forms of companies akin to partnerships and limited partnerships shall not have legal personality. Private limited companies and public limited companies shall have legal personality.’

19. Under Paragraph 55 of the Law:

‘1. In accordance with accounting law, a commercial company which is required to file annual consolidated accounts (controlling company) and a public limited company or private limited company over which the controlling company exercises decisive influence within the meaning of accounting law (controlled company) may decide to operate as a recognised group of companies by drawing up a control agreement among themselves in order to attain their common commercial objectives.

…

3. The fact that operation as a recognised group of companies is registered in the commercial and companies register shall not create a legal person that is distinct from the commercial companies forming part of the group.’

20. Paragraph 64(1) of the Law on commercial companies provides as follows:

‘The provision made by Paragraph 60 shall be applicable even where there is no control agreement and no registration as a recognised group of companies, provided that, as the result of long-standing, uninterrupted cooperation of at least three years between the parent company and the subsidiary company or companies, the commercial companies belonging to the same group of companies carry on their business according to the same commercial strategy and their actual conduct ensures that the advantages and disadvantages of operating as a group are shared in a way which is foreseeable and balanced.’

21. Paragraph 2(b) of Law No CXXXII of 1997 on branches and commercial agencies of undertakings which have their registered office abroad (‘Law on branches’) defines ‘branch’ as follows:

‘“branch”: any operating unit without legal personality of the foreign undertaking, having commercial independence, which has been registered in the national commercial and companies register in its capacity as a branch of a foreign undertaking, as an independent form of company’.

3. Erzsébet vouchers

22. In accordance with Paragraph 3, point 87, of the Law on income tax, as amended by Paragraph 1(5) of Law No CLVI of 2011, Erzsébet vouchers are defined as follows:

‘‘Erzsébet vouchers’: vouchers issued by the [HNRF] in electronic form or in paper form which may be used to purchase ready-to-eat meals …’

23. Erzsébet vouchers are part of the Erzsébet programme, which is governed by Law No CIII of 2012 on the Erzsébet programme.

24. Under Paragraph 1 of that Law:

‘The objective of the Erzsébet programme is to reduce significantly, in the existing framework, the number of socially deprived persons and, in particular, children, who are unable to have something to eat several times every day, to benefit from healthy food suitable for their age or to enjoy either the state of health necessary for learning or the recreation necessary for restorative purposes.’

25. Paragraph 2 of the Erzsébet Law provides as follows:

‘1. For the purposes of this Law, the following terms shall have the following meanings:

(a) “Erzsébet programme”: any programme and any service with a social aim organised and carried out by the State in order to achieve the objectives referred to in Paragraph 1, without the aim of making a profit in the market;

(b) “Erzsébet vouchers”: vouchers issued by the [HNFR] which may be used:

(ba) for purchasing ready-to-eat meals …;

2. The Erzsébet programme shall be carried out by the HNRF.

…’

26. The HNRF is a public interest foundation registered in Hungary. It may use the resources allocated to it for the purposes of social holidays, the provision of related services and other programmes of a social nature.

27. Paragraph 6 of the Law on the Erzsébet programme provides as follows:

‘1. The [HNRF] may, for the purpose of carrying out tasks connected with the Erzsébet programme, conclude agreements with civil-society bodies, commercial companies and any other natural or legal person.

2. In order to carry out the public tasks defined [in the law], the State shall promote the establishment, development and operation of hotels and camp sites used as a base for holidays for disadvantaged persons and for programmes for games and children.’

28. Article 7 of the Law concerns its entry into force.

II – Pre-litigation procedure

29. The Commission took the view that by adopting the new national rules concerning meal vouchers, leisure vouchers and holiday vouchers, Hungary had failed to fulfil its obligations under Articles 9, 10, 14, point 3, Article 15(1), (2)(b) and (d), and (3), and, Article 16 of Directive 2006/123/EC and Articles 49 TFEU and 56 TFEU, and on 21 June 2012, the Commission sent Hungary a letter of formal notice.

30. By letter in reply of 20 July 2012, Hungary stated that the introduction of the restrictions referred to by the Commission was justified by overriding reasons relating to the public interest. At the same time, Hungary submitted some draft amendments to the provisions concerning the SZÉP card so as to harmonise them with EU law. Regarding the Erzsébet vouchers, in the annex to its reply, Hungary sent the new provisions concerning the Erzsébet programme and its objectives, which had been adopted in July 2012.

31. By letter of 22 November 2012, the Commission sent Hungary a reasoned opinion in which it maintained that the Hungarian rules concerning the SZÉP card and the Erzsébet vouchers did not comply with the provisions indicated in the letter of formal notice.

32. By letter of 27 December 2012, Hungary replied to the reasoned opinion, repeating, in essence, the observations made in the letter of 20 July 2012 and continuing to deny any infringement.

33. The Commission, finding Hungary's replies unsatisfactory, brought the present action by application of 10 April 2014.

III – Forms of order sought

34. The Commission claims that the Court should:

— declare that, by introducing and retaining the SZÉP card scheme governed by the SZÉP Decree (and amended by Law No CLVI of 2011), Hungary has infringed Directive 2006/123 in so far as:

  — Paragraph 13 of the SZÉP Decree, read in conjunction with Paragraph 2(2)(d) of the Law on mutual societies, Paragraph 2(b) of the Law on branches and Paragraphs 1, 2(1) and (2), 55(1) and (3), and 64(1) of the Law on commercial companies, precludes the issue of the SZÉP card by branch undertakings and thereby infringes Articles 14, point 3, and 15(2)(b) of Directive 2006/123;

  — Paragraph 13 of the SZÉP Decree, read in conjunction with Paragraphs 1, 2(1) and (2), 55(1) and (3), and 64(1) of the Law on commercial companies, Paragraph 2(2)(d) of the Law on mutual societies and Paragraph 2(b) of the Law on branches, does not recognise, for the purposes of fulfilment of the conditions laid down in Paragraph 13(a) to (c) of the SZÉP Decree, the activity of groups whose parent company is not formed in accordance with Hungarian law and whose members do not operate in the forms of company provided for by Hungarian law and thereby infringes Article 15(1), (2)(b) and (3) of Directive 2006/123;

  — Paragraph 13 of the SZÉP Decree, read in conjunction with Paragraphs 1, 2(1) and (2), 55(1) and (3), and 64(1) of the Law on commercial companies, Paragraph 2(2)(d) of the Law on mutual societies and Paragraph 2(b) of the Law on branches, restricts to banks and financial institutions the possibility of issuing the SZÉP card as they are the only entities able to meet the conditions laid down by Paragraph 13 of the SZÉP Decree and thereby infringes Article 15(1), (2)(d) and (3) of Directive 2006/123;

— Paragraph 13 of the SZÉP Decree infringes Article 16 of Directive 2006/123 inasmuch as it requires, for the issue of the SZÉP card, the existence of an establishment in Hungary;

— in the alternative, in so far as the provisions of Directive 2006/123 referred to in the first indent do not apply to the national provisions referred to in that indent, declare that the SZÉP card scheme governed by the SZÉP Decree infringes Articles 49 TFEU and 56 TFEU;

— declare that the system of Erzsébet vouchers governed by Law No CLVI of 2011 and by Law No CIII of 2012 establishing a monopoly in favour of public bodies for the issue of vouchers for cold meals, which entered into force without an appropriate transitional period or measures, infringes Articles 49 TFEU and 56 TFEU in so far as Paragraphs 1(5) and 477 of Law No CLVI of 2011 and Paragraphs 2(1) and (2), 6 and 7 of Law No CIII of 2012 lay down disproportionate restrictions;

— order Hungary to pay the costs.

35. Hungary contends that the Court should:

— dismiss the Commission's application as unfounded with regard to the part concerning the SZÉP card system and as inadmissible with regard to the part relating to the Erzsébet vouchers system;

— in the alternative, dismiss the application as unfounded with regard to both systems;

— order the Commission to pay the costs.

IV – The application

A – *Admissibility*

1. Main arguments of the parties

36. In its defence, Hungary submits that the complaint concerning the Erzsébet vouchers is inadmissible on the ground that the point of the Commission's heads of claim relating to it is ambiguous.

37. According to Hungary, first of all, that point of the heads of claim refers erroneously to 'Paragraphs 1 and 5' of Law No CLVI of 2011, instead of to Paragraph 1(5) thereof. Hungary submits, secondly, that it does not understand why Paragraph 477 of that Law and the provisions relating to the Law on the Erzsébet programme, namely Paragraphs 2(1) and (2), 6(1) and (2), and 7, which are referred to in the form of order sought by the Commission in the application, constitute an infringement of EU law. Third, Hungary contends that, in the light of the national provisions cited by the Commission, it seems that there are objections to all the legislation relating to the Erzsébet programme, which contradicts the Commission's assertion that the application does not relate to measures of social policy implemented in the framework of that programme.

38. The Commission submits that Hungary's contentions cannot be accepted.

2. 2. My assessment

39. After explaining the reasons why, like the Commission, I consider that the pleas of inadmissibility relating to the legislation concerning the Erzsébet vouchers must be rejected, I think it necessary to consider the admissibility of the complaints relating to the SZÉP card.

a) Admissibility of the complaint relating to the Erzsébet vouchers

40. First, I note that, in the reply, the Commission recognised the error in the reference to Law No CLVI of 2011, by pointing out that the correct reference is not to Paragraphs 1 and 5 of the Law, but rather to Paragraph 1(5) thereof. The Commission then sent a separate letter with a corrigendum on the point. Like the Commission, I do not think that the error compromises the correct understanding of the application.

41. Secondly, it seems to me clear from paragraph 74 of the application that the Commission's action is directed at only one part of the Hungarian legislation concerning Erzsébet vouchers and not at all social policy measures implemented in the framework of the Erzsébet programme. In fact, in paragraph 74 of the application the Commission states that the action 'relates to the Erzsébet voucher scheme only in so far as it provides that the employer's contribution to the purchase of ready-to-eat meals can be considered a benefit in kind only if the meal is purchased with the aid of Erzsébet vouchers'.

42. Therefore the reference, in the form of order sought in the application, to the two national laws introducing the new scheme of Erzsébet vouchers, and more specifically to certain national provisions relating to the definition of the vouchers and the entry into force of the scheme, seems to me relevant.

43. In addition, like the Commission, I consider that Hungary, by virtue of the principle of sincere cooperation, ought to have pointed out at the pre-litigation stage any inconsistencies concerning the national provisions called into question by the Commission.

44. In any event, I think that the complaint concerning Erzsébet vouchers, as set out in the form of order sought in the application, did not prevent Hungary from putting forward its arguments and therefore did not limit its rights of defence. On that point I note that, in its rejoinder, Hungary asserted that 'it [was] possible to raise arguments of substance against the Commission's complaints'.[7]

45. I therefore consider that the action must be ruled admissible with regard to the complaint concerning the Erzsébet voucher scheme.

b) Admissibility of the complaints concerning the SZÉP card

46. On reading the application, I do not find it absolutely clear with regard to certain complaints concerning the legislation relating to the SZÉP card, in particular because of inconsistency between the actual body of the application and the part setting out the form of order sought.

7 — Paragraph 6.

47. In that respect, I note that in the application the Commission states that the requirement for an undertaking to be able to meet the conditions laid down in Paragraph 13 of the SZÉP Decree by concluding an agreement with a mutual society, provided that the contractual relationship has existed for at least five years, 'infringes Article 49 TFEU because it restricts without good reason the number of undertakings that are able to issue the SZÉP card'. [8] However, there is no trace of this plea in the form of order sought in the application.

48. When questioned on this point at the hearing, the Commission stated that, in its view, that condition did not fall within the scope of Directive 2006/123 and should therefore be assessed in the light of Article 49 TFEU. In addition, the Commission considered that the condition, taken together with the other conditions set out in Paragraph 13 of the SZÉP Decree, was covered by Article 15(2)(d) of Directive 2006/123, prohibiting requirements which reserve access to the service activity in question to particular providers by virtue of the specific nature of the activity. According to the Commission, that plea is therefore indirectly covered by the third head of claim in the form of order sought in the application.

49. Apart from the fact that the Commission's statement of reasons is very succinct with regard to that alleged infringement, I find that it does not meet the requirements in terms of consistency and precision developed in settled case-law based on what is now Article 120(c) of the Court's Rules of Procedure. [9]

50. According to the case-law, the application initiating proceedings must state the subject-matter of the proceedings and a summary of the pleas in law and that statement must be 'sufficiently clear and precise' as to enable the defendant to prepare its defence and the Court to rule on the application. It is therefore necessary for the essential points of law and fact on which a case is based to be indicated coherently and intelligibly in the application itself and for the form of order sought to be set out unambiguously so that the Court does not rule *ultra petita* or indeed fail to rule on a complaint. [10]

51. In addition, the Court has stated that it may of its own motion examine whether the requirements laid down in Article 120(c) of the Rules of Procedure are satisfied. [11]

52. The Court has also held that, 'in an action brought under Article 258 TFEU, the application must *set out the complaints coherently and with precision*, so that the Member State and the Court can know exactly the full extent of the alleged infringement of EU law, a condition which must be satisfied if the Member State is to be able to present an effective defence and the Court to determine whether there has been a breach of obligations, as alleged'. [12]

53. I therefore consider that the present action should be ruled inadmissible with regard to the plea in law concerning the requirement for a contractual relationship of at least five years with a mutual society, as stated in Article 13 of the SZÉP Decree.

8 — Paragraph 64.

9 — Under that provision, an application of the kind referred to in Article 21 of the Statute must state the subject-matter of the proceedings, the pleas in law and arguments relied on and a summary of those pleas in law.

10 — See judgments in *Commission* v *Spain* (C-211/08, EU:C:2010:340, paragraph 32); *Commission* v *Portugal* (C-458/08, EU:C:2010:692, paragraph 49), and *Commission* v *Poland* (C-678/13, EU:C:2015:358, paragraph 16 and the case-law cited).

11 — See judgments in *Commission* v *Estonia* (C-39/10, EU:C:2012:282, paragraph 25 and the case-law cited) and *Commission* v *Poland* (C-281/11, EU:C:2013:855, paragraphs 121 to 123). See also, to that effect, judgment in *Commission* v *Czech Republic* (C-343/08. EU:C:2010:14, paragraph 25).

12 — See judgment in *Commission* v *Spain* (C-375/10, EU:C:2011:184, paragraph 11 and the case-law cited). Emphasis added.

B – *Substance*

54. Before looking at the complaint concerning the Erzsébet vouchers, I shall consider the complaints relating to the SZÉP card.

1. Complaints concerning the SZÉP card

a) Applicability of Directive 2006/123

i) Main arguments of the parties

55. In its application, the Commission considers that the question whether the Hungarian legislation on the SZÉP card complies with EU law must be examined, primarily, by reference to Directive 2006/123. Only if the directive is not applicable will it be necessary, according to the Commission, to determine whether the legislation is compatible with EU law in the light of Articles 49 TFEU and 56 TFEU.

56. According to the Commission, Directive 2006/123 is applicable in the present case since the issue and use of the SZÉP card is not one of the services expressly excluded from the scope of the directive. The Commission points out that the SZÉP Decree cannot be classified as being in the 'field of taxation' within the meaning of Article 2(3) of Directive 2006/123 [13] or as relating to a 'financial service' within the meaning of Article 2(2) (b) thereof. [14]

57. It is clear from the case-file that, prior to the present action, Hungary had contended that Directive 2006/123 was not applicable because the activity of issuing and using the SZÉP card, as laid down by the national law at issue, was a financial service and was therefore outside the scope of the directive.

ii) My assessment

58. Like the Commission, I think there is no doubt that Directive 2006/123 is applicable: I take that view for the following reasons.

59. First of all, the scope of Directive 2006/123 was determined by the negative, [15] that is to say, it applies to services supplied by providers established in a Member State, [16] with the exception of those expressly excluded by the directive.

60. Like the Commission, I consider that the activity of issuing the SZÉP card does not fall within the field of taxation within the meaning of Article 2(3) of Directive 2006/123 and that it is not a financial service relating to payments within the meaning of Article 2(2)(b), so that the directive is applicable in the present action.

13 — Article 2(3) states that the Directive 'shall not apply to the field of taxation'.

14 — This provides that Directive 2006/123 does not apply to 'financial services, such as banking, credit, insurance and re-insurance, occupational or personal pensions, securities, investment funds, payment and investment advice, including the services listed in Annex I to Directive 2006/48/EC [of the European Parliament and of the Council of 14 June 2006 concerning access to, and taking up, the business of credit institutions (OJ 2006 L 177. p. 1)]'.

15 — See Chabaud, L., 'La directive 2006/123 du Parlement européen et du Conseil du 12 décembre 2006 relative aux services dans le marché intérieur. Les exclusions explicites: article 2', *La directive 'services'*, Brussels, Bruylant, 2011, p. 35, in particular p. 39.

16 — See Article 2(1) of the directive.

61. Regarding the field of taxation, it appears from the documents in the file that the national provisions in question do not relate to benefits in kind or the actual tax aspects of the SZÉP card system, but concern only the activity of issuing the card, which confers a right to benefits in kind. Consequently, the subject matter of the national provisions does not fall within the field of taxation.

62. Regarding classification as a 'financial service', I observe, like the Commission, that, under Paragraph 2(2)(a) of the SZÉP Decree, the SZÉP card 'serves only to identify the employee receiving the aid, the members of his family and his employer, and also to identify the provider of the service and is not suitable for storing electronic money or carrying out direct payment transactions'. In that context, the activity of issuing the card cannot be described as a 'financial service' relating to payments.

63. Secondly, I consider, like the Commission, that the services offered by means of instruments such as the SZÉP card are not governed by any other EU legislation which specifically concerns financial services. On that point the Commission observes, correctly, that neither Directive 2007/64/EC [17] nor Directive 2009/110/EC [18] covers the activity of issuing vouchers identical to the SZÉP card.

64. The exclusion of financial services from the scope of Directive 2006/123 is explained by the existence of specific provisions of EU law on that subject. [19]

65. Furthermore, although Hungary claimed, during the pre-litigation procedure, that the SZÉP card could be regarded as a financial service, I find no trace of that argument in the pleadings before the Court.

66. Therefore, as the activity in question is not covered by specific legislation concerning financial services and does not fall within the field of taxation, it comes within the scope of Directive 2006/123.

67. Taking all the foregoing matters into account, I consider Directive 2006/123 to be applicable.

68. The question whether Directive 2006/123 effected full harmonisation was not raised by the parties. However, as with the issue of whether the directive is applicable, consideration of this question is a necessary preliminary.

69. It has consistently been held that a national measure in a sphere which has been the subject of full harmonisation at EU level must be assessed in the light of the provisions of the harmonising measure and not those of primary law. [20] Exhaustive harmonisation would mean that recourse to grounds of justification not referred to by Directive 2006/123, that is to say, the grounds expressly provided for by Articles 52 TFEU and 62 TFEU or certain overriding reasons relating to the public interest developed by case-law, would not be possible. [21]

17 — Directive of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market, amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (OJ 2007 L 319, p. 1). See Article 3(k) of Directive 2007/64.

18 — Directive of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions, amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC (OJ 2009 L 267, p. 7). Article 1(4) of Directive 2009/110 refers to Article 3(k) of Directive 2007/64.

19 — According to numerous writers on financial services, the adage *Specialia generalibus derogant* applies. Accordingly, Directive 2006/123 is said to be the general law applicable because no other specific legislation exists. See Clabaud, op. cit., pp. 39 and 40. To my mind, that view is confirmed by recital 18 of Directive 2006/123. By virtue of the first sentence of that recital, 'financial services should be excluded from the scope of this Directive since these activities are the subject of specific Community legislation aimed, as is this Directive, at achieving a genuine internal market for services'.

20 — See judgment in *UPC DTH* (C-475/12, EU:C:2014:285, paragraph 63 and the case-law cited).

21 — See Lemaire, C., 'La directive, la liberté d'établissement et la libre prestation des services. Confirmations, innovations?', *Revue Europe*, June 2007, no 6, special issue 10, p. 15, para. 42, and Huglo, J.-G., 'Droit d'établissement et libre prestation de services', *Jurisclasseur Europe*, Part 710, paras. 7, 73 and 101.

70. This question has been discussed by academic lawyers. [22]

71. In a recent judgment [23] the Court, for the first time, gave a ruling on that question holding that 'an interpretation of Article 3(3) of Directive 2006/123 to the effect that Member States may justify, on the basis of primary law, a requirement prohibited by Article 14 of that directive would deprive that provision of any practical effect by ultimately undermining the *ad hoc harmonisation* intended by that directive'. [24]

72. On that point the Court followed the Opinion of Advocate General Cruz Villalón in the case which gave rise to that judgment. [25] According to the latter, 'as a result of its nature as a horizontal instrument covering a wide range of services (all those which are not expressly excluded from its material scope), the Services Directive is not aimed at the general harmonisation of the substantive provisions governing different services at national level, but there are particular areas which are *specifically* harmonised in full by the directive'. [26] He added that, in his view, such specific harmonisation in full occurs in the case of Articles 14 and 16 of Directive 2006/123. [27]

73. Therefore, according to the Court, Directive 2006/13 effected full harmonisation with regard to Article 14 concerning the freedom of establishment for services within its scope. I think the same solution should be applied to Articles 15 and 16 of the directive. As in the case of Article 14, the EU legislature drew up there a list of restrictive requirements to be removed from the internal legal systems of the Member States. [28]

74. It follows that the question whether the Hungarian legislation complies with EU law must be considered in the light of Directive 2006/123.

b) Determining the fundamental freedom concerned

i) Main arguments of the parties

75. While the Commission considers that the Hungarian legislation on the SZÉP card should be examined with reference to the freedom of establishment and the freedom to provide services, Hungary takes the view that only the freedom of establishment is relevant.

76. Hungary asserts that the card can be issued only by a company with an establishment in the territory of the Member State where the services are provided.

77. In that respect, Hungary considers that the issuers of SZÉP cards should be firmly rooted in the economic and social life of Hungary, which would be inconceivable in the case of a service which was provided temporarily. In addition, the Commission's argument regarding cross-border services, to the effect that the SZÉP card can be recharged at a distance or that the necessary infrastructure for the

22 — See Huglo, J.-G., op. cit., paragraphs 7, 55, 73, 99 and 101; Lemaire, C., op. cit., paragraph 42, and Hatzopoulos, V., 'Que reste-t-il de la directive sur les services?'. *Cahiers de droit européen*, nos 3-4, 2007, p. 299, in particular pp. 323 and 324.

23 — Judgment in *Rina Services and Rina* (C-593/13, EU:C:2015:399).

24 — Paragraph 37. Emphasis added.

25 — Opinion of Advocate General Cruz Villalón in *Rina Services and Rina* (C-593/13, EU:C:2015:159).

26 — Point 22 of the Opinion. See, to the same effect, the Opinion of Advocate General Cruz Villalón in Joined Cases *Duomo Gpa and Others* (C-357/10 to C-359/10, EU:C:2011:736, point 61). In that connection, in the Proposal for a Directive of the European Council and of the Parliament on services in the internal market (COM(2004) 2 final), the Commission stated that the Proposal was based on a 'targeted harmonisation' and that the harmonisation concerned the removal of certain types of requirements (pp. 9 and 10).

27 — Point 24 of that Opinion.

28 — See, to that effect, the Opinion of Advocate General Cruz Villalón in Joined Cases *Duomo Gpa and Others* (C-357/10 to C-359/10, EU:C:2011:736, point 61) and Hatzopoulos. V., op. cit., p. 351, paragraph 3.1.2.1.3.

functioning of the system can be created without being in Hungary, is entirely theoretical. Hungary adds that the hypothesis of services from neighbouring countries and services at regional level is unrealistic and disregards the actual logic of the SZÉP card which requires providers accepting it to exist throughout Hungary.

ii) My assessment

78. Unlike Hungary, I consider that Paragraph 13 of the SZÉP Decree should be assessed by reference both to the articles of Directive 2006/123 relating to the freedom of establishment and to those on the freedom to provide services.

79. It has consistently been held that, 'as regards the definition of the respective scope of the principles of freedom to provide services and freedom of establishment, it is necessary to establish whether or not the economic operator is established in the Member State in which it offers the services in question … Where that operator is established in the Member State in which it offers the service, it falls within the scope of the principle of freedom of establishment, as defined in Article [49 TFEU]. On the other hand, where the economic operator is not established in the Member State of destination, it is a transfrontier service provider covered by the principle of freedom to provide services laid down in Article [56 TFEU]'. [29]

80. I observe that Directive 2006/123 codified that case-law, [30] so that those principles apply also where the directive is applied.

81. Thus, to determine whether an operator's activity is covered by the freedom of establishment under Articles 14 and 15 of Directive 2006/123, or the freedom to provide services under Article 16, it is necessary first to ascertain whether the operator is established or not or intends to set up an establishment in a Member State other than his Member State of origin.

82. In the present case, as the Commission has stated without being contradicted on that point by Hungary, the conditions referred to in Paragraph 13 of the SZÉP Decree apply without distinction to undertakings established in Hungary and to undertakings established in other Member States.

83. For that reason I note that those conditions amount, in essence, to requiring a 'permanent establishment' in Hungary for any undertaking wishing to issue the SZÉP card.

84. In my view, the requirement for a permanent establishment could be covered by the freedom to provide services 'and' the freedom of establishment. [31] Such a requirement would be covered by the freedom to provide services if the operator concerned were not established in Hungary and wished to provide the service in question on a cross-border basis. On the other hand, if the operator concerned had a secondary establishment in Hungary or wished to set up an establishment in that Member State, the same requirement would then be covered by the freedom of establishment. [32]

85. Furthermore, I am not persuaded by Hungary's argument that, because of the complexity of the activity of issuing the SZÉP card, the issuer should be firmly rooted in the economic and social life of Hungary so that a cross-border service would be impractical.

29 — See judgment in *Duomo Gpa and Others* (C-357/10 to C-359/10, EU:C:2012:283, paragraph 30 and the case-law cited). See also *Commission* v *Spain* (Case C-514/03, EU:C:2006:63, paragraph 22 and the case-law cited).

30 — See recital 77 of the directive.

31 — See, to that effect, *Commission* v *Spain* (C-514/03, EU:C:2006:63, paragraph 22).

32 — See, to that effect, *Commission* v *Italy* (Case C-439/99, EU:C:2002:14, paragraph 21 and the case-law cited) and *Liga Portuguesa de Futebol Profissional and Bwin International* (C-42/07, EU:C:2009:519, paragraph 46).

86. Like the Commission, I consider, first, that an undertaking established in a Member State other than Hungary which decided to issue the SZÉP card in that Member State has a right to use the infrastructure necessary there for the purpose of providing its service to undertakings and cannot be obliged to establish itself there for that purpose [33] and, secondly, the possibility cannot be ruled out that, in the present case, undertakings established in Member States other than Hungary may be interested in carrying on an activity of that kind in Hungary.

87. I therefore consider that, depending on the particular situation, one freedom or the other may be involved. It will be seen that, in both cases, the requirement for a permanent establishment in Hungary, in my view, constitutes an infringement of the relevant provisions of Directive 2006/123.

88. Before examining the first complaint, I wish to point out that, in its letter of formal notice and also in its reasoned opinion, the Commission alleged that the Hungarian SZÉP card scheme infringed Articles 9 and 10 of the directive. As no such allegation of infringement was included in the application, it should be regarded as having been dropped by the Commission, which thereby limits the subject matter of the application, which is clearly not a ground of inadmissibility. [34]

c) First complaint: infringement of Articles 14, point 3, and 15(2)(b) of Directive 2006/123

89. First of all, at the hearing the Commission made it clear that, as regards the first complaint, relating to the exclusion of branches of foreign company, only Article 14, point 3, of Directive 2006/123 was, in its view, infringed. The Commission therefore dropped the reference to Article 15(2)(b). Consequently, my assessment will be confined to the alleged infringement of Article 14, point 3.

i) Main arguments of the parties

90. In its application, the Commission submits that Paragraph 13 of the SZÉP Decree is discriminatory and infringes Article 14, point (3), of Directive 2006/123 in so far as it, Paragraph 13, prevents Hungarian branches of foreign commercial companies from issuing the SZÉP card.

91. According to the Commission, Article 14, point (3), of the directive clearly prohibits, with no possibility of justification, making access to, or the exercise of, a service activity in Hungarian territory subject to a restriction on the freedom of a service provider to choose between a principal or a secondary establishment.

92. According to Hungary, the exclusion of branches of foreign companies is justified by the overriding reasons relating to the public interest accepted in the Court's case-law and in Directive 2006/123, namely the protection of consumers or persons using services [35] and the protection of creditors. Only undertakings that are properly integrated into Hungarian economic life can carry on the activity of issuing SZÉP cards, which implies that they must be undertakings established in Hungary.

33 — See, to that effect, judgment in *Commission* v *Italy* (C-145/99, EU:C:2002:142, paragraph 22 and the case-law cited).

34 — See, to that effect, judgment in *Commission* v *Bulgaria* (C-198/12, EU:C:2014:1316, paragraph 16 and the case-law cited).

35 — Hungary states that 'the consumers or the persons using services are employees holding a SZÉP card'.

ii) My assessment

93. It is clear from the documents in the file that the first complaint is based on the Commission's interpretation of Paragraph 13 of the SZÉP Decree, read in conjunction with the Law on mutual societies and the Law on branches; according to that interpretation, a branch of a foreign undertaking is not covered by the definition of 'service provider' and is therefore unable to issue the SZÉP card. As that interpretation has not been disputed by Hungary, I shall consider it established.

94. Like the Commission, I consider that the fact that a branch of a foreign undertaking cannot issue the SZÉP card is a restriction of the freedom of establishment for the purposes of Article 14, point (3), of Directive 2006/123.

95. In fact, the foreign undertaking could thus issue the card only if it set up a principal establishment in Hungary. However, such a requirement is expressly prohibited by that provision.

96. To be precise, under Article 14, point (3), access to, or the exercise of, a service activity must not be made subject, by the Member States, to compliance with any requirement that would restrict the freedom of a provider to choose between a principal or a secondary establishment, in particular an obligation on the provider to have its principal establishment in their territory.

97. In addition, no ground of justification, as claimed by Hungary, can be permitted, since the requirements listed in Article 14 of Directive 2006/123 cannot be justified. [36]

98. As the Court has stated, the fact that no justification is possible follows both from the wording of Article 14 and the general scheme of Directive 2006/123. [37]

99. First, the title of Article 14 indicates that the requirements listed in points 1 to 8 of that Article are 'prohibited'. [38]

100. Secondly, the general scheme of Directive 2006/123 is based, with regard to freedom of establishment, on a clear distinction between prohibited requirements and those subject to evaluation. While the former are governed by Article 14 of that directive, the latter are subject to the rules laid down in Article 15. [39]

101. In order to conduct the evaluation prescribed by Article 15(1) of Directive 2006/123, Member States must examine whether, under their legal system, any of the requirements listed in paragraph 2 thereof are imposed and then ensure that any such requirements are compatible with the conditions of non-discrimination, necessity and proportionality referred to in Article 15(3). [40]

102. Article 15(3)(b) of the Directive provides the definition of 'necessary'. Accordingly, a requirement referred to in Article 15(2) must be considered necessary if it is justified by an overriding reason relating to the public interest.

103. However, no such possibility of justification is provided for with regard to the 'prohibited' requirements listed in Article 14 of Directive 2006/123. [41]

36 — See judgment in *Rina Services and Rina* (C-593/13, EU:C:2015:399, paragraph 28).

37 — Ibid., paragraph 29.

38 — Ibid., paragraph 30.

39 — Ibid., paragraph 31.

40 — Ibid., paragraph 32.

41 — Ibid., paragraph 35.

104. It follows that the requirement for a permanent establishment laid down in Paragraph 13 of the SZÉP Decree, which prevents the Hungarian branch of a foreign undertaking from issuing the SZÉP card, infringes Article 14, point (3), of Directive 2006/123.

105. Therefore the first complaint must be upheld.

d) The second complaint: infringement of Article 15(1), (2)(b) and (3) of Directive 2006/123

i) Main arguments of the parties

106. The Commission observes that, by virtue of Paragraph 13 of the SZÉP Decree, an undertaking may fulfil the requirements laid down by that Paragraph not only individually, but also jointly with a group of companies recognised by the Law on commercial companies.

107. Nevertheless, in the Commission's submission, Paragraph 13, when read in conjunction with Paragraphs 1(1), 2(1), 55(1) and (3), and 64 of the Law on commercial companies, permits an undertaking to fulfil, jointly with a group of companies, the conditions for the issue of the SZÉP card only if the commercial companies of the group are formed in accordance with Hungarian law, have their registered office in Hungary and take the legal form of public or private limited companies.

108. Thus, according to the Commission, an undertaking is not able to fulfil the conditions in Paragraph 13 of the SZÉP Decree for issuing the SZÉP card by joining with a commercial company established in a Member State other than Hungary. The same is true if the undertakings belonging to the group have their registered office in Hungary and are constituted in accordance with Hungarian law, but do not operate in the legal form of public or private limited companies.

109. The Commission considers that those requirements are contrary to Article 15(2)(b) of Directive 2006/123, which states that an undertaking cannot be obliged to take a specific legal form. In addition, the Commission considers that such requirements are discriminatory and that Hungary has not provided any reasons justifying them or established their necessary and proportionate character, so that they must be considered contrary to Article 15(3) of the directive.

110. According to Hungary, the restrictions relating to groups of undertakings are justified by the overriding reasons relating to the public interest already mentioned.

ii) My assessment

111. If the service provider fulfils the conditions for issuing the SZÉP card jointly with another undertaking and thus as a group of companies,[42] does the requirement for the commercial companies which are members of the group, including the parent company, to be formed in accordance with Hungarian law, which would mean that they have a registered office in Hungary and that they take the legal form of public or private limited companies, infringe Article 15(2)(b) of Directive 2006/123?

112. It appears from the documents in the file that those two requirements, the first relating to the registered office and the second to the particular legal form, arise from Paragraph 13 of the SZÉP Decree, read in conjunction with Paragraphs 1, 2(1) and (2), 55(1) and (3), and 64(1) of the Law on commercial companies.

42 — At the hearing Hungary pointed out that that situation would arise only where the provider was unable on its own to meet the requirements of Paragraph 13 of the SZÉP Decree.

113. Although, like the Commission, I consider that those requirements do not comply with Directive 2006/123, I cannot agree with the Commission's interpretation of Article 15(2)(b) of the directive in so far as the Commission considers that both requirements fall within the scope of that provision.

114. In my view, the two requirements must be examined separately. Unlike the Commission, I consider that the registered office requirement falls within the scope, not of Article 15(2)(b) of the Directive, but of Article 14, point 1, or Article 16(2)(a), depending on whether the commercial company of the group of companies concerned wishes to set up an establishment in Hungary or to provide the service in question from across the border.

115. I shall therefore confine my assessment to the requirement relating to legal form, as described by the Commission in its application.

116. Like the Commission, I find that the requirement for undertakings operating as a group of companies to be constituted in the legal form of public or private limited companies falls within the scope of Article 15(2)(b) of Directive 2006/123. [43]

117. As the Commission rightly submits, that requirement does not permit undertakings to comply with the conditions for issuing the SZÉP card by relying on the experience acquired by a commercial company constituted in a legal form other than that laid down by Hungarian law and it even excludes undertakings whose registered office is in Hungary but which do not operate in the form required.

118. To my mind, such a requirement is a serious obstacle to the establishment of service providers originating from Member States other than Hungary, as they could be compelled to change their legal form or structure. [44]

119. It is clear from Hungary's defence that it does not dispute the restrictive nature of that requirement. On the other hand, it considers that the requirement is justified by the protection of consumers and creditors, but gives no details as to its necessity and proportionality. Indeed, Hungary merely submits that only undertakings in the legal form of public or private limited companies have the experience and the infrastructure required for carrying on the activity of issuing the SZÉP card and for meeting the requirements concerning guarantees which arise from the nature of that business.

120. Although those grounds may be overriding reasons relating to the public interest within the meaning of Article 15(3)(b) of Directive 2006/123, [45] justifying the requirement for a particular legal form, I do not consider such a requirement to be appropriate for ensuring that the objectives pursued are attained. The risks inherent in the activity of undertakings issuing the cards, as described by Hungary, such as insolvency, are not directly connected with the legal form of the undertakings. [46] Thus, I do not understand in what way that requirement is appropriate for guaranteeing the protection of consumers and creditors.

121. Accordingly, the second complaint must be upheld in so far as it relates to the requirement concerning a particular legal form.

43 — In several judgments the Court has recognised the restrictive nature of such a condition (see, inter alia, to that effect, judgments in *Commission* v *Italy* (C-439/99, EU:C:2002:14, paragraph 32), *Gambelli and Others* (C-243/01, EU:C:2003:597, paragraph 48), *Commission* v *Portugal* (C-171/02, EU:C:2004:270, paragraphs 41 to 44), and *Commission* v *Spain* (C-514/03, EU:C:2006:63, paragraph 31)).

44 — See the handbook on the implementation of the Services Directive, the English version of which is available at the internet address http://ec.europa.eu/internal-market/services-dir/guides/handbook-en.pdf. The handbook is not legally binding, but it may assist the interpretation of Directive 2006/123.

45 — The concept of 'overriding reason relating to the public interest' is defined in recital 40 of the Directive, which refers in particular to the protection of consumers and creditors.

46 — See, to that effect, judgment in *Commission* v *Spain* (C-514/03, EU:C:2006:63, paragraph 32).

e) Third complaint: infringement of Article 15(1), (2)(d) and (3) of Directive 2006/123

i) Main arguments of the parties

122. According to the Commission, Paragraph 13 of the SZÉP Decree, read in conjunction with Paragraphs 1, 2(1) and (2), 55(1) and (3), and 64(1) of the Law on commercial companies, Paragraph 2(2)(d) of the Law on mutual societies and Paragraph 2(b) of the law on branches, restricts to banks and financial institutions established on the Hungarian market the possibility of issuing the SZÉP card, that is to say, to three banks whose registered office is in Hungary, which are the only entities capable of fulfilling the conditions laid down in Paragraph 13 of the SZÉP Decree.

123. According to the Commission, Paragraph 13 thus reserves access to the service activity in question to particular providers by virtue of the specific nature of the activity and thereby infringes Article 15(2)(d) and (3) of Directive 2006/123 in so far as those conditions are indirectly discriminatory and are neither necessary nor proportionate.

124. As to whether the conditions are indirectly discriminatory, the Commission considers that the issue conditions set out in Paragraph 13(b) and (c) of the SZÉP Decree, concerning, respectively, the issue by the provider of at least 100 000 payment instruments other than cash in the course of its last complete financial year and not less than two years' experience of issuing electronic vouchers on the Hungarian market, prevent new undertakings from entering the market concerned and can be met only by undertakings already present in the Hungarian market.

125. With regard to the overriding reasons relating to the public interest upon which Hungary relies to justify those restrictions, namely the protection of consumers and creditors, the Commission observes that, taken individually, they comply with the Court's case-law and with Article 4, point 8, of Directive 2006/123.

126. Nevertheless, according to the Commission, those reasons do not satisfy the requirements regarding necessity and proportionality. On that point the Commission submits (i) that Hungary has not shown to what extent its new legislation constitutes a response to the practical problems which are said to have arisen under the previous law, (ii) that in most Member States the issue of instruments identical to the SZÉP card is not subject to comparable requirements, (iii) that the protection of consumers and creditors against the risks of insolvency and inefficiency of card issuers may be ensured by less restrictive measures such as, for example, systems for the supervision of issuers, for deposit management of amounts put into circulation, bank guarantee systems, the setting up of a telephone calling service or the recruitment of sales representatives, (iv) that the Court has already found that a requirement identical to that relating to the opening of an office in all municipalities with a population of more than 35 000 inhabitants is contrary to EU law[47] and (v) that even credit institutions are not subject to such strict conditions.

127. Hungary contends, first, that the strict issue conditions applying to the SZÉP card are justified by the above-mentioned overriding reasons relating to the public interest.

47 — The Commission refers to the judgment in *Commission* v *Italy* (C-465/05, EU:C:2007:781, paragraphs 87 and 88 and the case-law cited).

128. Hungary adds that the risks in the operation of the card system, in particular the risk of insolvency, centre on the issuer of the card.[48] Therefore, to provide the best protection for the employer, the employee and the person accepting the SZÉP card, it was necessary to adopt rules with strict conditions for the issue of the card. Furthermore, according to Hungary, the need for that cannot be called into question by the fact that other Member States do not impose such strict conditions.

129. With regard to observance of the principle of proportionality, Hungary considers that the issue conditions were adopted while taking account of the anticipated range of the SZÉP card system. According to Hungary, bearing in mind the actual figures, the above-mentioned conditions cannot be regarded as unnecessary or disproportionate.[49]

130. Finally, Hungary sets out the reasons why it considers that the issue conditions in Paragraph 13(a) to (c) of the SZÉP Decree are justified, necessary and proportionate.

131. Regarding the requirement in Paragraph 13(a) of the SZÉP Decree for an issuer of the SZÉP card, or the group of companies of which it forms part, to have an office open to customers in every municipality in Hungary with more than 35 000 inhabitants,[50] Hungary submits that it aims to ensure that every cardholder can raise questions concerning the card by means of personal contact close to his or her home.

132. Regarding the requirement in Paragraph 13(b) of the SZÉP Decree for an issuer of the SZÉP card, or the group of companies of which it forms part, to have issued, in the course of its last complete financial year, at least 100 000 payment instruments other than cash in the framework of its payment services, Hungary considers that, in view of the resulting amounts transiting via the card, only undertakings with a stable financial base, undoubted experience in the management of large sums and in the issue of means of payment other than cash can issue the SZÉP card.

133. Regarding the requirement in Paragraph 13(c) of the SZÉP Decree for an issuer to have issued more than 25 000 voucher cards in the previous year and to have at least two years' experience of that activity, this ensures, according to Hungary, that the issuer has experience of the functioning of electronic cards identical to SZÉP cards.

ii) My assessment

134. First of all, I would point out that the Commission refers expressly to the conditions laid down by Paragraph 13 of the SZÉP Decree, read in conjunction with the other national provisions mentioned in its application. Accordingly, with its third complaint, it refers not only to the issue conditions specifically provided for in points (a) to (c) of Paragraph 13, but also to the conditions already examined relating to the need to have a principal establishment in Hungary in order to be able to issue the SZÉP card individually or as a group of companies. Therefore, this complaint is concerned with the requirements as a whole.

48 — In its defence, Hungary adds that, in the operation of the SZÉP card, the key role is played by the undertaking that issues the card. If an employer decides to grant his employees the benefit of the card, he concludes an agreement with one or more issuers of the card and informs them of the value of the benefits to be granted to employees. The issuers of the card then open a register of names of electronic vouchers and enter the amounts in accordance with the employer's instructions. When employees subsequently purchase a service with the SZÉP card, the consideration for the service is paid by the card issuer several days later to the persons who accept the card. Hungary points out that, in that system, the circulation of money can take place only with the cooperation of the issuer. It adds that, if the issuer were to become insolvent, the employees' money would also disappear because they only hold vouchers which in themselves have no monetary value and the persons accepting the card will not receive the consideration for the services already supplied.

49 — According to the defence, at the end of April 2014, 970 000 persons possessed a SZÉP card and 22 000 cards had already been distributed by the issuing undertakings to family members of employees. In 2013 employers paid HUF 68 billion (EUR 227 million) on SZÉP cards. Expenses paid with the cards in 2013 totalled HUF 68 billion, which represents more than 20 million transactions. Up to now, the issuing undertakings have concluded 55 000 agreements with points accepting SZÉP cards.

50 — In its defence Hungary specifies that there are 25 towns with more than 35 000 inhabitants.

135. Next, I consider, like the Commission, that the conditions laid down in Paragraph 13 of the SZÉP Decree, taken together, constitute not direct, but indirect discrimination based on the location of the registered office.

136. On that point I observe that none of the above-mentioned conditions expressly allows the activity of issuing SZÉP cards to be carried on only by companies which have their registered office in Hungary and consequently, there is no question of direct discrimination.

137. Nevertheless, it is clear from the documents in the file that only finance companies with their registered office in Hungary would be capable, de facto, of fulfilling the conditions laid down in Paragraph 13 of the SZÉP Decree, and that has not been disputed by Hungary.

138. As this is a matter of indirectly discriminatory conditions based on the location of the registered office, those conditions cannot constitute requirements which reserve access to the service activity in question to particular providers by virtue of the specific nature of the activity, as referred to in Article 15(2)(d) of Directive 2006/123. That provision covers only 'non-discriminatory requirements'. [51]

139. In my view, it follows that those conditions, taken together, do not fall within the scope of the above-mentioned provision, but rather within that of Article 14, point 1, of Directive 2006/123, which prohibits discriminatory requirements based indirectly on the location of the registered office. [52]

140. I therefore consider that the Commission has misinterpreted Article 15(2)(d) of Directive 2006/123, which cannot apply in the present case.

141. I would add that, even if the Court were to find that provision applicable, I consider that the activity of issuing meal vouchers and leisure and holiday vouchers is not characterised by a 'specific nature' which makes it necessary to reserve access to that activity to particular providers. In Member States other than Hungary, issuing those vouchers is an activity frequently taken up by private operators other than financial institutions. [53]

142. In those circumstances, the third complaint must be rejected as unfounded.

f) Fourth complaint: infringement of Article 16 of Directive 2006/123

i) Main arguments of the parties

143. Contrary to Hungary, the Commission considers that Article 16 of Directive 2006/123 is applicable in the present case. In the Commission's view, the SZÉP card could be issued by an undertaking established in a Member State other than Hungary, in particular, by exercising its right to use, in Hungary, the infrastructure necessary for the purpose of providing its service. In addition, according to the Commission, such an undertaking could also provide its services in a cross-border manner without having any substantial infrastructure in Hungary.

51 — Article 15 of the Directive states twice that it applies only to non-discriminatory requirements. According to paragraph 2(d), the Member States must examine whether their legal system makes access to a service activity or the exercise of it subject to compliance with 'non-discriminatory requirements' which reserve access to the activity in question to particular providers by virtue of the specific nature of the activity. Likewise Paragraph 3(a) provides that the Member States must verify that the requirements referred to in Paragraph 2 satisfy the condition of 'non-discrimination', which is that requirements must be neither directly nor indirectly discriminatory, according to the location of the registered office of the companies.

52 — It should be observed that, where the requirements referred to in Article 15 of the directive are discriminatory, they fall within the scope of Article 14 and must automatically be regarded as inadmissible. See, to that effect, D'Acunto, S., 'Directive Service (2006/123/CE): radiographie juridique en dix points', *Revue du droit de l'Union européenne*, no 2-2007, p. 261, in particular p. 291.

53 — In Belgium and France, for example, private operators offer similar services.

144. According to the Commission, by providing that a SZÉP card issuer must have a permanent establishment in Hungary, Paragraph 13 of the SZÉP Decree infringes Article 16(2)(a) of Directive 2006/123 in so far as that requirement does not observe the principles of non-discrimination, necessity and proportionality, as listed in Article 16(1) of the Directive.

ii) My assessment

145. The conditions referred to in Paragraph 13 of the SZÉP Decree amount, as I have already shown, to requiring a service provider who wishes to issue the SZÉP card to have a permanent establishment in Hungary. It will be recalled that only undertakings which have their 'registered office' in Hungary and have an 'office' open to customers in every municipality of Hungary with a population of more than 35 000 may issue the card.

146. Does the requirement for a permanent establishment in Hungary constitute a prohibited restriction within the meaning of Article 16 of Directive 2006/123?

147. In my opinion, the answer to that question must be in the affirmative.

148. First, Article 16(2)(a) of Directive 2006/123 clearly prohibits that requirement.

149. Under that provision, the Member States cannot restrict the freedom to provide services of a provider established in another Member State by requiring the provider to have an 'establishment' in their territory.

150. In that regard I note that the concept of establishment, as used in Directive 2006/123, is a broad concept capable of encompassing undertakings with their registered office in the Member State of intended operation, which are therefore principal establishments, and also secondary establishments in the form of an office, for example.

151. According to recital 37 and Article 4, point 5 of the directive, that concept involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period. This requirement may also be fulfilled where a company is constituted for a given period. Lastly, recital 37 states that an establishment does not need to take the form of a subsidiary, branch or agency, but may consist of an office managed by a provider's own staff or by a person who is independent but authorised to act on a permanent basis for the undertaking, as would be the case with an agency.

152. I therefore consider that the conditions laid down in Paragraph 13 of the SZÉP Decree, which make the issue of the SZÉP card subject to the requirement of having a registered office and a number of offices in Hungary, fall within the scope of Article 16(2)(a) of Directive 2006/123 and must therefore be regarded as prohibited on the basis of that provision.

153. *Secondly, I note that the case-law regards such a requirement as the very negation of the freedom to provide services.* [54]

54 — See judgments in *Commission* v *Italy* (C-101/94, EU:C:1996:221, paragraph 31); *Commission* v *Italy* (C-439/99, EU:C:2002:14, paragraph 30 and the case-law cited), and *Commission* v *Portugal* (C-518/09, EU:C:2011:501, paragraph 71).

154. The requirement for an undertaking to have its establishment in the Member State in which the service is provided runs directly counter to the freedom to provide services inasmuch as it makes it impossible for service providers established in other Member States to provide services in that State. [55] Undertakings wishing to issue the SZÉP card in Hungary would thus be obliged either to give up that service or to set up a permanent establishment in Hungary, which amounts to requiring them to carry on their professional activity in Hungary on a stable and continuous basis. [56]

155. In view of the foregoing considerations, I find that the obligation mentioned in Article 16(2)(a) of Directive 2006/123 is an example of the requirements that a Member State cannot in principle impose in the case of services provided in its territory by an undertaking established in another Member State and has already been found incompatible with Article 56 TFEU by the Court.

156. In my view, Article 16(2) of Directive 2006/123, like Article 14, constitutes a 'black list' and therefore contains certain requirements which are prohibited per se. [57]

157. As the case-law has already held those requirements to be incompatible with Article 56 TFEU, there is a strong presumption that they cannot be justified by one of the four public interest objectives referred to in Article 16(3) of Directive 2006/123, [58] as they will not normally be proportionate. [59]

158. In view of the foregoing, I am of the opinion that Article 16(3) of Directive 2006/123 does not apply to the requirements listed in Article 16(2), so that the requirement for an establishment in Hungary cannot be justified.

159. It follows that, by obliging undertakings to have a permanent establishment in its territory, Hungary has failed in its obligations under Article 16 of Directive 2006/123.

160. Accordingly, the fourth complaint must be upheld.

g) Infringement of Articles 49 TFEU and 56 TFEU

i) Main arguments of the parties

161. In its application, the Commission submits, in the alternative, that if Directive 2006/123 were not applicable, the national provisions concerning the issue conditions of the SZÉP card would have to be assessed in the light of Article 49 TFEU and also Article 56 TFEU, given that a provider could provide the service in question in Hungary with or without an establishment there. Thus, the freedom to provide services cannot be regarded as entirely secondary by comparison with the freedom of establishment and cannot be connected with it.

55 — See, to that effect, *Commission* v *Austria* (C-257/05, EU:C:2006:785, paragraph 21 and the case-law cited); *Commission* v *Italy* (C-465/05, EU:C:2007:781, paragraph 84 and the case-law cited); *Commission* v *Germany* (C-546/07, EU:C:2010:25, paragraph 39), and *Commission* v *Portugal* (C-518/09, EU:C:2011:501, paragraph 71 and the case-law cited).

56 — See, to that effect, *Commission* v *Portugal* (C-518/09, EU:C:2011:501, paragraph 70).

57 — See, to that effect, Sibony, A.-L., and Defossey, A., 'Liberté d'établissement et libre prestation de services', *Revue trimestrielle de droit européen*, 2009, p. 511; Peglow, K., 'La libre prestation de services dans la directive no 2006/123/CE — réflexion sur l'insertion de la directive dans le droit communautaire existant', *Revue trimestrielle de droit européen*, no. 1, 2008, p. 67, in particular points 56, 61 and 62, and also D'Acunto, S., op. cit., who finds that 'the list of obstacles in Article 16(2) is a black list of prohibited obstacles like that in Article 14, with the single (and important) difference that, according to the directive, the second list is exhaustive whereas that in Article 16 is merely illustrative (p. 296).

58 — According to that provision, the Member State to which the provider moves remains free to impose requirements with regard to the provision of a service activity, where those requirements are justified for reasons of public policy, public security, public health or the protection of the environment and provided they are not discriminatory and are necessary and proportionate.

59 — See point 7.1.3.4 of the Commission handbook mentioned in footnote 44.

162. According to the Commission, an infringement of Article 49 TFEU has to be found because, first, the Hungarian provisions referred to in with the context of the first, second and third complaints constitute restrictions of the freedom of establishment and do not meet the requirements of necessity and proportionality and, secondly, the introduction of the new conditions of issue has been carried out without an appropriate transitional period, which undermines the principle of proportionality. [60]

163. With regard to Article 56 TFEU, the Commission states that, for the same reasons as those put forward in connection with the fourth complaint, the requirement for a permanent establishment in Hungary constitutes a discriminatory restriction which Hungary has not shown to be either necessary or proportionate, with the result that it infringes Article 56 TFEU.

164. Regarding the claim that there was not a sufficient transitional period, Hungary considers that the Commission has not produced any evidence substantiating its allegations. In addition, as regards tax and social policy, business undertakings cannot expect the law to remain unchanged.

ii) My assessment

165. Since I consider that Directive 2006/123 is applicable in the present case, there is no need to examine the relevant national law by reference to Articles 49 TFEU and 56 TFEU.

166. Consequently, the Commission's alternative complaint must be rejected.

2. The complaint concerning the Erzsébet vouchers

167. First of all, it is clear from the documents in the file that the Commission and Hungary start from the premise that the HNRF is a 'company' within the meaning of the TFEU to which Articles 49 TFEU and 56 TFEU will be applicable. I shall therefore take this as an established fact.

a) Main arguments of the parties

168. In its application the Commission submits that the Hungarian legislation on the issue and use of Erzsébet vouchers infringes Articles 49 TFEU and 56 TFEU.

169. The Commission explains at the outset that its action relates to the voucher system only in so far as it provides that the employer's contribution to the purchase of ready-to-eat meals can be regarded as a benefit in kind only if the purchase is made with the aid of the vouchers. Consequently, the Commission's action does not relate to the other social policy measures under the Erzsébet programme such as, for example, direct aid targeted at socially disadvantaged persons.

170. According to the Commission, the issue of Erzsébet vouchers is an economic activity within the scope of the FEU Treaty. In support of its position, the Commission states (i) that in the past that activity was carried on in Hungary by commercial companies and that remains the case in a number of Member States, (ii) that the issue of Erzsébet vouchers is not a social measure because they are given at the employer's discretion up to an amount determined by the employer, irrespective of their employees' social situation, so that the principle of solidarity does not come into play, there is no

60 — According to the Commission, without a transitional period, undertakings entering into long-term framework contracts with their contracting partners will have had difficulties in adapting in such a short time to the new legal context, which will have led to a sharp drop in their turnover and to job losses.

State control and the State does not fix the amount of benefits and (iii) the issue of Erzsébet vouchers cannot be described as an 'activity connected with the exercise of official authority' within the meaning of Articles 51 [61] TFEU and 62 [62] TFEU, as there is no direct and specific connection with the exercise of official authority.

171. The Commission also points out that the Hungarian legislation restricts the issue of Erzsébet vouchers by conferring on a single operator an exclusive right in respect of the organisation and promotion of the economic activity, with the result that any other operator established in a Member State other than Hungary, or established in Hungary, is unable to issue the vouchers.

172. The Commission submits that such a restriction of the freedom to provide services and the freedom of establishment cannot be justified by social policy objectives. The Commission adds that the need to preserve the cohesion of the taxation system cannot be a valid justification either, inasmuch as the rules relating to the issue of Erzsébet vouchers and those relating to their taxation are independent of each other.

173. According to the Commission, the Hungarian legislation is, furthermore, disproportionate inasmuch as (i) less restrictive measures exist as regards financing social objectives by means of benefits in kind, such as imposing a once-only levy on such benefits, reducing tax relief by the same amount or the purchasing of Erzsébet vouchers by the Member State before they are distributed to the most destitute persons and (ii) the monopoly scheme has been set up without an appropriate transitional period with regard to undertakings already operating in the market for the issue of Erzsébet vouchers.

174. According to Hungary, the activity of issuing Erzsébet vouchers is not an economic activity because it does not take place under market conditions or with a view to making a profit, nor does it aim at accumulating interest. The revenue from issuing the vouchers may be used only for purposes of social assistance in a spirit of solidarity.

175. Hungary adds that the activity of issuing Erzsébet vouchers is under State control because it is created, regulated and supervised by the State. According to Hungary, the Member State is free to determine whether and to what extent those benefits may be granted. Likewise, it can also decide to issue the vouchers itself instead of opening that activity to the market. In Hungary, the State has decided to carry on that activity itself through the HNFR, which was created by the Government and a number of business and trade federations.

176. In addition, Hungary contends that the issue of vouchers giving rise to tax advantages is integrated in the social protection system to whose resources that activity contributes; that is in conformity with the principle that EU law is not to undermine the competence of the Member States to organise their social security systems while ensuring the financial equilibrium of those systems.

177. According to Hungary, the issue of Erzsébet vouchers is an activity in relation to which the freedom to provide services is, by definition, excluded because the meal vouchers are meaningful only in the context of Hungary's own tax and social policy. It is for Hungary to decide whether or not it wishes to introduce such vouchers in the framework of its tax or social system and the vouchers can be distributed only on the basis of the rules and tax advantages obtaining in Hungary.

61 — Under the first paragraph of Article 51, 'the provisions of this Chapter shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority'.

62 — Article 62 TFEU, referring to Article 51, makes the exception relating to activity connected with the exercise of official authority applicable to the freedom to provide services.

178. Hungary points out that the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, entitled 'Towards Social Investment for Growth and Cohesion — including implementing the European Social Fund 2014-2020,[63] encourages the use of innovative approaches to financing in the social sector, of which the Erzsébet vouchers, according to Hungary, are one example.

179. If the Court were to take the view that the activity concerned is an economic activity, Hungary considers alternatively that organising that activity in the form of a public monopoly is compatible with EU law.

180. Hungary adds that, in terms of the principle of proportionality, entrusting the activity concerned to a public-law entity which has to dedicate its entire income to a defined objective is a more efficient means of attaining the objective in question than organising the activity on the basis of the market or by taxing that activity.[64] In support of its argument Hungary refers here to the relevant case-law concerning games of chance.[65]

181. Regarding the alleged absence of a sufficient transitional period, Hungary states that, in the matter of tax and social policy, operators cannot expect the law to remain unchanged. In that regard Hungary points out, first, that changes in the law could have been foreseen from April 2011, when the SZÉP Decree was adopted, so that service providers had the benefit of a longer period than the Commission claims, secondly, Erzsébet vouchers are only one form of benefits in kind entailing tax advantages, representing approximately 8% of the total benefits provided to employees by operators and, third, those operators, who issue a wide range of other vouchers, including meal vouchers, continue to do so. Therefore, according to Hungary, the change in the rules has not affected the market share of meal vouchers and the providers have not been driven from the market.

i) My assessment

182. Before I begin my assessment, I note that the parties have not raised the questions as to (i) whether the Hungarian legislation relating to Erzsébet vouchers falls within the scope of Directive 2006/123 and (ii) whether the Directive has been the subject of full harmonisation. The Commission appears to assume that the directive is not applicable since it examines the conformity of the legislation in the light of Articles 49 TFEU and 56 TFEU.

183. However, those questions are important. As I have already said, if it were to be found that Directive 2006/123 is applicable to the activity of issuing Erzsébet vouchers and that it has brought about full harmonisation in that field, the examination of that legislation could not be undertaken in the light of the FEU Treaty, but only by reference to the directive.

184. Is the activity of issuing Erzsébet vouchers, which is exclusively carried on by the HNRF, within the scope of Directive 2006/123?

185. I think the reply to that question must be in the negative.

186. Article 1 of Directive 2006/123 relates to its subject matter and the first sub-paragraph of Article 1(3) states that the directive does not deal with the abolition of monopolies providing services.

63 — COM (2013) 83 final/2.

64 — Defence, paragraph 70.

65 — *Läärä and Others* (C-124/97, EU:C:1999:435, paragraph 41). On the other hand, at paragraph 26 of its rejoinder, Hungary submits that the case-law relating to services providing games of chance cannot be applied to the issuing of Erzsébet vouchers precisely because there is not, and cannot be, a cross-border factor, nor are there any risks like those that may be involved in games of chance. Therefore, regarding the question whether the case-law relating to games of chance is applicable, Hungary's reasoning is inconsistent.

187. Recital 8 of the Directive provides clarification in this regard, stating that 'the provisions of this Directive concerning the freedom of establishment and the free movement of services *should apply only to the extent that the activities in question are open to competition, so that they do not oblige Member States …to abolish existing monopolies*'. [66]

188. In my view, therefore, where an activity is not open to competition, in particular because it is carried on by an existing public monopoly, it falls outside the scope of Directive 2006/123.

189. Consequently, on the basis of the preparatory documents for that directive, [67] I consider that that exclusion is justified, inter alia, by the fact that the directive is not to affect the continued existence of monopolies already providing services. [68]

190. I therefore consider that the activity of a monopoly consisting in issuing meal vouchers, such as Erzsébet vouchers, does not fall within the scope *ratione materiae* of Directive 2006/123. It follows that it is no longer necessary to examine the question relating to the harmonisation of the directive in that field.

191. However, the fact that that activity is excluded from the scope of the directive in no way removes it from the scope of primary law, in particular Articles 49 TFEU and 56 TFEU. [69]

192. It is also necessary for the issuing activity in question to be an economic activity because that kind of activity alone falls within the scope of those articles. That factor will determine the outcome of my assessment. In those circumstances it is not surprising that the parties have put forward numerous arguments to support their respective positions on that point.

193. It has consistently been held that the concept of 'establishment' within the meaning of the Treaty provisions on the freedom of establishment involves the actual pursuit of an 'economic activity' through a fixed establishment in the host Member State for an indefinite period. [70] Therefore the economic activity must be regarded as the reason for the existence of the freedom of establishment.

194. Regarding the freedom to provide services, it is clear from the wording of Article 57 TFEU that the concept of 'services', within the meaning of the treaties, comprises services normally provided against remuneration. The definition of that concept is based on the Court's case-law to the effect that the concept covers any self-employed economic activity normally performed for remuneration. [71] In addition, according to the Court, the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question. [72]

195. It has consistently been held that the concepts of economic activity and the provision of services must be interpreted broadly since they define the field of application of one of the fundamental freedoms guaranteed by the Treaty. [73]

66 — Emphasis added.

67 — Report on the proposal for a Directive of the European Parliament and of the Council relating to services in the internal market (Parliament document A6-0409/2005).

68 — Page 33.

69 — See Michel., V., 'Le champ d'application de la directive "services": entre cohérence et régression?'', *La directive "services" en principe(s) et en pratique*, Bruylant, 2011, p. 49.

70 — See judgment in *VALE Építési* (C-378/10, EU:C:2012:440, paragraph 34 and the case-law cited).

71 — See inter alia, to that effect, judgment in *Smits and Peerbooms* (C-157/99, EU:C:2001:404, paragraph 58).

72 — See judgment in *Humbel and Edel* (263/86, EU:C:1988:451, paragraph 17).

73 — See judgment in *Deliège* (C-51/96 and C-191/97, EU:C:2000:199, paragraph 52 and the case-law cited).

196. In the light of the aforementioned case-law, it is necessary to determine whether the activity of issuing Erzsébet vouchers is unpaid self-employed economic activity[74] because it takes place in return for remuneration.

197. According to the documents in the file, the HNFR issues Erzsébet vouchers on the employer's behalf where the latter chooses to purchase them. As Hungary itself observes in its defence, purchasing the vouchers is economically advantageous for the employer because it goes hand in hand with 'reduced tax liabilities'.[75] I understand that the employer benefits from 'tax relief' in respect of the vouchers purchased and given to employees in the form of benefits in kind.

198. I therefore consider that the activity of issuing Erzsébet vouchers must be considered an economic activity for four reasons.

199. First, I consider that the employer's tax relief is the 'economic consideration' for the issue of Erzsébet vouchers and is in the nature of remuneration as regards the HNFR because, without that revenue, it would be unable to finance the Erzsébet programme.

200. According to the documents in the file, the programme receives no budgetary funding from the State, but only the revenue from the vouchers. Consequently, the activity of issuing the vouchers is the only means of financing the programme. Furthermore, as Hungary points out in its defence, by allowing tax relief for employers in the case of benefits in kind, the State is foregoing significant tax revenue through that relief and the revenue will then be allocated to the Erzsébet programme, which is administered by the HNFR.

201. Secondly, I am not persuaded by Hungary's argument that the activity in question is not an economic activity because of its social purpose.

202. I think, like the Commission, that the nature of the activity must be distinguished from the use of the revenue derived from it. The activity of issuing Erzsébet vouchers is an activity which is economically independent of the fact that the revenue derived from it is used for a social objective.

203. That conclusion follows, it seems to me, from the Court's case-law. In the *Schindler* judgment,[76] concerning the activity of lotteries, the Court held that 'although … the law provides that the profits made by a lottery may be used only for certain purposes, in particular in the public interest, or may even be required to be paid into the State budget, *the rules on the allocation of profits do not alter the nature of the activity in question or deprive it of its economic character*'.[77]

204. On that point, I also observe that a similar conclusion was reached by the Court when assessing the concept of economic activity characterising the concept of undertaking in the context of competition law.[78]

74 — There is no doubt that the activity is not salaried employment. No subordinate relationship can be discerned in the present case.

75 — Paragraph 50.

76 — C-275/92, EU:C:1994:119.

77 — Paragraph 35. Emphasis added.

78 — In the context of competition law, the concept of economic activity characterises the concept of undertaking. The latter concept covers any entity carrying on an 'economic activity', irrespective of its legal status or means of financing. As for the concept of economic activity, it is defined as any activity consisting in offering goods or services on a given market.

205. The Court has stated on several occasions that 'the social aim of [the scheme in question] is not in itself sufficient to preclude the activity in question from being classified as an economic activity'.[79] According to the Court, for the activity not to constitute an economic activity, two other conditions must be fulfilled, namely, first, application of the principle of solidarity and, secondly, control by the State.[80]

206. Although those judgments were given in the context of competition law and relate to the activity of insurance organisations for accidents at work and occupational diseases, I consider that the case-law is relevant, by analogy, to my assessment given that the definition of economic activity at issue conditions the applicability of the rules of the FEU Treaty in the matter of competition law, just as that definition does for the freedom of establishment and the freedom to provide services.

207. Like the Commission, I find that, in the present case, neither of the two conditions referred to in the above-mentioned case-law is fulfilled in relation to the issue of Erzsébet vouchers. The principle of solidarity is not applied because the vouchers can be granted only if the employer so wishes and to the extent determined by him. As the Commission rightly observes, a discretion of that breadth does not ensure that lower-paid employees can be given vouchers on a preferential basis as against those on higher pay. With regard to the second condition concerning State control, Hungary cannot oblige the employer to purchase Erzsébet vouchers or specify the actual recipients of the vouchers or lay down the amount which the employer should attach to the vouchers.

208. I also consider that if the activity of issuing Erzsébet vouchers were to be classified as a social investment instrument identical to the social investment bonds referred to by the Commission Communication mentioned in point 178 above,[81] that would support my conclusion that that activity should be classified as an 'economic activity'. As Hungary points out, the purchase of Erzsébet vouchers would then be a social investment, in return for which the undertaking obtains tax relief, which would then have to be regarded as economic consideration.

209. Third, I consider that Hungary's argument concerning the question whether the activity is an economic activity is inconsistent. Whereas at first Hungary submits that there can be no question of an economic activity, so that Articles 49 TFEU and 56 TFEU do not apply,[82] it goes on to state that those two articles have not been infringed in the present case,[83] which, in my view, presupposes that they were applicable in the first place.

210. Fourth, I consider, like the Commission, that the activity of issuing Erzsébet vouchers cannot be described as an activity which is connected with the exercise of official authority within the meaning of the first paragraph of Article 51 TFEU and Article 62 TFEU.

211. On that point I observe, first, that, as derogations from the fundamental rules of freedom of establishment and freedom to provide services, the first paragraph of Article 51 TFEU and Article 62 TFEU must be interpreted in a manner which limits their scope to what is strictly necessary in order to safeguard the interests which they allow the Member States to protect.[84] It is also clear from settled case-law that the derogation provided for by those provisions must be restricted to activities which in themselves are directly and specifically connected with the exercise of official authority.[85]

79 — See judgment in *Kattner Stahlbau* (C-350/07, EU:C:2009:127, paragraph 42 and the case-law cited).

80 — Ibid., paragraph 43 and the case-law cited.

81 — According to Hungary, Erzsébet vouchers have the same function and the same purpose as social investment bonds. In the Communication, the Commission explains how social investment bonds work, pointing out that, 'with a social impact bond, typically a private investor funds a social service provider to implement a social programme in return for a promise ("bond") from the public sector to reimburse the initial investment and pay a rate of return if the programme achieves predefined social outcomes' (footnote 17).

82 — Defence, paragraphs 45 to 47.

83 — Defence, paragraph 48.

84 — See judgment in *Commission* v *Germany* (C-160/08, EU:C:2010:230, paragraph 76 and the case-law cited).

85 — Ibid., paragraph 78 and the case-law cited.

212. It appears from the documents in the file, in particular Hungary's reply to the reasoned opinion of 27 December 2012, that Hungary merely asserts that the issue of vouchers is classified as a public social task, without adducing proof of a direct and specific connection with the exercise of official authority. Therefore, it cannot be accepted that Articles 51 TFEU and 62 TFEU are applicable to the activity in question.

213. Taking all the foregoing matters into account, I consider that the activity of issuing Erzsébet vouchers is an economic activity which falls within the scope of Articles 49 TFEU and 56 TFEU.

214. It remains to be determined whether the Hungarian legislation in question entails restrictions of the freedom of establishment and the freedom to provide services and, as the case may be, whether those restrictions may be justified.

215. First, Article 106 TFEU was not mentioned by the parties during the written procedure. In reply to a question put at the hearing, the Commission stated that Article 106(2) TFEU [86] would not be applicable in the present case because the issue of Erzsébet vouchers was not a service of general economic interest.

216. Having regard to the documents in the file, I do not have sufficient information to assess the question whether the activity of issuing Erzsébet vouchers is a service of general economic interest. Nevertheless, I observe that Article 106(1) TFEU, which refers to other articles of substantive law of the FEU Treaty, prevents the Member States from enacting or maintaining in force any measure contrary to Articles 49 TFEU and 56 TFEU, particularly in relation to undertakings to which they grant special or exclusive rights. [87]

217. Secondly, I find that it is clear from the case-law that Articles 49 TFEU and 56 TFEU require the elimination of restrictions on the freedom of establishment and the freedom to provide services and that all measures which prohibit, impede or render less attractive the exercise of those freedoms must be regarded as constituting such restrictions. [88]

218. The Court has already characterised a restriction on the above-mentioned freedoms in a case relating to national legislation similar to that in issue in the present case in so far as that legislation conferred exclusive powers on tax advice centres alone to provide taxpayers with certain tax advice and assistance services. [89]

219. In that case the Court found that, regarding the freedom to provide services, the legislation in question, by reserving those activities to those centres, 'completely prevents access to the market for the services in question by economic operators established in other Member States'. [90]

86 — Under that provision, 'undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties … in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them'.

87 — See, to that effect, judgments in *Vlaamse Televisie Maatschappij* v Commission (T-266/97, EU:T:1999:144, paragraph 106 and the case-law cited); *United Pan-Europe Communications Belgium and Others* (C-250/06, EU:C:2007:783, paragraphs 14 and 15) and *ASM Brescia* (C-347/06, EU:C:2008:416, paragraph 61).

88 — See judgment in *Commission* v *Italy* (C-465/05, EU:C:2007:781, paragraph 17 and the case-law cited).

89 — See judgment in *Servizi Ausiliari Dottori Commercialisti* (C-451/03, EU:C:2006:208, paragraph 32).

90 — Ibid., paragraph 33. See also, to that effect, *Dickinger and Ömer* (C-347/09, EU:C:2011:582, paragraph 41 and the case-law cited), where a restriction of the freedom to provide services was found in relation to games of chance.

220. Regarding the freedom of establishment, the Court has held that such legislation, by restricting the right to set up tax advice centres to certain legal entities with their registered office in Italy, 'is liable to make more difficult, or even completely prevent, the exercise by economic operators from other Member States of their right to establish themselves in Italy with the aim of providing the services in question'. [91]

221. I would add that the General Court of the European Union has also held that 'the Flemish rules granting the exclusive right to [a private television company broadcasting in Dutch, established in Flanders] make it impossible for a competing company from another Member State which wishes to broadcast, from Belgium, television advertising intended for the Flemish community as a whole to establish itself in Belgium. That finding alone is a sufficient indication of an impediment to freedom of establishment'. [92]

222. In the present case the Hungarian rules grant exclusive rights to the HNFR to issue the Erzsébet vouchers.

223. In view of the above-mentioned case-law, the fact that the HNFR is given the exclusive right to issue the vouchers constitutes, to my mind, a restriction of the freedom to provide services in so far as access to the market for the issue of the vouchers is totally excluded.

224. In addition, it would be possible, in my opinion, for a provider without an establishment in Hungary to issue meal vouchers such as Erzsébet vouchers. As the Commission rightly observed at the hearing, an activity of that kind can be carried out at a distance, in particular over the Internet or by telephone and those modes of operation are already in use for the issue of vouchers for services in Belgium.

225. With regard to the freedom of establishment, I consider that the Hungarian rules in question prevent other undertakings wishing to issue Erzsébet vouchers from establishing themselves in Hungary and the rules thus constitute a restriction of that freedom.

226. It has consistently been held that restrictive provisions of national legislation which apply to any undertaking carrying on, or seeking to carry on, an activity in the territory of the host Member State such as that at issue in the present case, may be justified where they serve overriding requirements relating to the public interest, provided that they are suitable for securing the attainment of the objective which they pursue and do not go beyond what is necessary in order to attain it. [93]

227. Regarding the justification for the restrictive national rules, I find that Hungary's arguments are not entirely clear. In its pleadings Hungary puts forward mainly three grounds of justification, namely the necessity of maintaining the coherence of the tax system, improving the national diet and financing the social benefits system.

228. Hungary puts forward no arguments in support of maintaining the coherence of the tax system. Like the Commission, I do not understand how the activity of issuing Erzsébet vouchers by a monopoly maintains the coherence of the tax system.

229. Regarding improvement of the national diet, Hungary produces no argument to show that the system of issuing Erzsébet vouchers, as put into practice, is necessary and is the most appropriate measure for attaining that objective.

91 — Ibid., paragraph 34.

92 — See judgment in *Vlaamse Televisie Maatschappij* v *Commission* (T-266/97, EU:T:1999:144, paragraph 114).

93 — See judgments in *Servizi Ausiliari Dottori Commercialisti* (C-451/03, EU:C:2006:208, paragraph 37 and the case-law cited) and *DKV Belgium* (C-577/11, EU:C:2013:146, paragraph 38 and the case-law cited).

230. As regards the objective of financing the social benefits system, Hungary merely asserts, first, that under the present system the issue of vouchers giving rise to tax benefits is integrated in the social protection system and operates as a part of the system of supplying social resources, secondly, that it is settled case-law that EU law should not interfere with the power of the Member States to manage their social security systems, including the national provisions for ensuring the financial equilibrium thereof, and, third, that the Erzsébet vouchers are the only resource for activities financed through the Erzsébet programme and that, without the revenue from the vouchers, it would not be possible to finance a project of such magnitude from the State budget.

231. According to Hungary, if the objective of financing social benefits could be attained by other means, a more efficient means of attaining that objective would be to entrust the activity in question to a public-law entity which has to devote its entire income to a specified objective.

232. In that connection, it has consistently been held that the Member States have power to organise their social security systems. [94] Nevertheless, the Court has made it clear that those Member States must, in exercising that power, ensure that the provisions of the FEU Treaty, in particular those relating to the principles of the freedom of establishment and the freedom to provide services, are not infringed. [95] Furthermore, by virtue of that case-law, it is accepted that the risk of seriously undermining the financial equilibrium of the social security system may constitute an overriding reason relating to the public interest capable of justifying an obstacle to those principles. [96]

233. In the present case, as the Commission correctly observes, Hungary has produced no evidence to show that such a risk of seriously undermining the financial equilibrium of the social security system exists.

234. In addition, I consider, like the Commission, that even if an overriding reason relating to the public interest existed, Hungary would have to show in what way the exclusive grant to the HNFR of the right to issue Erzsébet vouchers constituted a necessary and proportionate measure for attaining the objective of financing social benefits.

235. It is for the competent national authorities to show, on the one hand, that their legislation is necessary for attaining the objective pursued and, on the other hand, that it complies with the principle of proportionality. [97]

236. Having regard to the information available, it has not been shown conclusively that Hungary has considered the question whether the objective pursued could be attained by other, less restrictive, means. [98] Hungary merely asserts that the system, as put in place, is the most efficacious measure, but adduces no cogent evidence on the point.

237. In those circumstances, I consider that the Court is not in a position to determine whether the conditions of necessity and proportionality are fulfilled in the present case.

238. Furthermore, as the Commission observes, less restrictive measures could have been put in place by Hungary to attain the objective of financing social benefits.

94 — See, to that effect, judgment in *Kattner Stahlbau* (C-350/07, EU:C:2009:127, paragraph 37 and the case-law cited).

95 — Ibid., paragraph 74 and the case-law cited.

96 — Ibid., paragraph 85 and the case-law cited.

97 — See judgment in *Commission* v *Portugal* (C-438/08, EU:C:2009:651, paragraph 47 and the case-law cited). See also, to that effect. *Leichtle* (C-8/02, EU:C:2004:161, paragraph 45) and *Commission* v *Italy* (C-260/04, EU:C:2007:508, paragraph 33 and the case-law cited).

98 — See, to that effect, judgment in *Commission* v *Austria* (C-320/03, EU:C:2005:684, paragraph 89).

239. I also consider, like the Commission, that a transitional period of slightly more than one month [99] seems insufficient to give the operators concerned a reasonable chance to adapt to the new circumstances. [100] That conclusion must follow from the fact that in the present case, the new circumstances gave rise to a monopoly situation in the market for the issue of meal vouchers with the benefit of a tax relief, which entails the ousting of existing operators from that market and a fall in their turnover. [101]

240. Lastly, contrary to Hungary, I consider that the reference to the case-law relating to games of chance in order to argue that the establishment of a public monopoly for the issue of Erzsébet vouchers is justified and proportionate is not relevant.

241. The Court has consistently held that a Member State may, at its discretion, legitimately confer on a single operator rights to organise and promote games of chance. [102]

242. Nevertheless, the Court has also made clear that, first, the choice of a system of conferring an exclusive right on a single operator pursues the specific objective of protecting consumers against excessive expenditure on gambling and preventing the risk of fraud arising from the large amounts that can be won from gambling and, secondly, the restrictions resulting from that choice must also meet the requirements of non-discrimination and proportionality. [103]

243. In the present case, as the Commission rightly observes, negative effects of that kind arising from gambling, namely addiction and fraud, do not exist in relation to the activity of issuing Erzsébet vouchers. It follows that, in my view, those findings in case-law cannot be applied to the present case.

244. In view of all the circumstances set out above, I consider that the complaint relating to Erzsébet vouchers should be upheld.

V – Conclusion

245. In the light of the foregoing considerations, I propose that the Court should:

— declare the action for failure to fulfil obligations inadmissible in relation to the plea concerning the requirement for a contractual relationship of at least five years with a mutual society, as referred to by Paragraph 13 of Government Decree No 55/2011 of 12 April 2011 regulating the issue and use of the Széchenyi leisure card;

— declare that the action for failure to fulfil obligations is admissible and well-founded inasmuch as it complains that Hungary has:

  — by depriving branches of foreign companies of the possibility of issuing the Széchenyi electronic card, failed to fulfil its obligations under Article 14, point 3, of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market;

99 — Between the enactment of Law No CLVI of 2011 on 12 November 2011 and its entry into force on 1 January 2012.

100 — See, to that effect, judgment in *Commission* v *Austria* (C-320/03, EU:C:2005:684, paragraph 90).

101 — In that connection, I note, like the Commission, that even if the operators concerned can still issue vouchers which continue to benefit from an advantageous tax rate, such as gift vouchers and back-to-school vouchers, the market shares of such vouchers are small compared with Erzsébet vouchers. According to the Commission, for 2012, the year immediately after the change in the law, Erzsébet vouchers had a market share of 11.5%, whereas that of gift vouchers was 0.4% and that of back-to-school vouchers was 0.9%.

102 — See, to that effect, judgments in *Läärä and Others* (C-124/97, EU:C:1999:435 paragraphs 35, 37 and 39); *Sporting Exchange* (C-203/08, EU:C:2010:307, paragraph 37) and *Dickinger and Omer* (C-347/09, EU:C:2011:582, paragraphs 48 and 49).

103 — Ibid., respectively, paragraphs 37 and 39; paragraphs 31 and 36; paragraphs 48 and 50.

— by restricting to groups whose members are constituted in the legal form of companies provided for by Hungarian law the right to issue that card, failed to fulfil its obligations under Article 15(1), (2)(b) and (3) of Directive 2006/123;

— by requiring the existence of a permanent establishment in Hungary in order to be able to issue that card, failed to fulfil its obligations under Article 16(2)(a) of Directive 2006/123;

— by conferring, upon a public body, without an appropriate transitional period or measures, exclusive rights to issue vouchers enabling employees to obtain benefits in kind in the form of ready-to-eat meals, failed to fulfil its obligations under Articles 49 TFEU and 56 TFEU;

— dismiss the action as to the remainder;

— order the European Commission and Hungary to bear their own costs.