



Reports of Cases

Case C-179/14

European Commission v Hungary

(Failure of a Member State to fulfil obligations — Directive 2006/123/EC — Articles 14 to 16 — Article 49 TFEU — Freedom of establishment — Article 56 TFEU — Freedom to provide services — Conditions for issuing vouchers entailing a tax advantage which are provided by employers to their employees and may be used for accommodation, leisure and/or meals — Restrictions — Monopoly)

Summary — Judgment of the Court (Grand Chamber), 23 February 2016

1. *Freedom of establishment — Freedom to provide services — Services in the internal market — Directive 2006/123 — National legislation preventing branches of companies formed in other Member States from issuing leisure cards conferring a tax advantage which are provided by employers to their employees — Not permissible*

(Art. 52(1), TFEU; European Parliament and Council Directive 2006/123, Art. 14, point (3))

2. *Freedom of establishment — Freedom to provide services — Services in the internal market — Directive 2006/123 — National legislation requiring companies issuing leisure cards conferring a tax advantage which are provided by employers to their employees to take the legal form of a commercial company incorporated under national law — Not permissible*

(European Parliament and Council Directive 2006/123, Art. 15(1), (2)(b) and 3(a))

3. *Freedom of establishment — Freedom to provide services — Services in the internal market — Directive 2006/123 — National legislation restricting the issue of leisure cards conferring a tax advantage which are provided by employers to their employees to banks or financial institutions having an office open to customers in each municipality with more than 35 000 inhabitants in the State concerned and a stable infrastructure in that State — Indirect discrimination — Not permissible*

(European Parliament and Council Directive 2006/123, Art. 15(1), (2)(d) and (3))

4. *Freedom of establishment — Freedom to provide services — Services in the internal market — Directive 2006/123 — National legislation making the issue of leisure cards conferring a tax advantage which are provided by employers to their employees conditional upon the existence of a stable establishment in the territory of the Member State concerned — Not permissible*

(Directive 2006/123, Art. 16)

5. *Freedom of establishment — Freedom to provide services — Provisions of the Treaty — Scope — Issue of vouchers for cold meals provided, under advantageous tax conditions, by employers to their employees — Included — National legislation establishing a monopoly in favour of a public body for the issue of such vouchers — Restriction — Justification — None*

(Arts 49 TFEU and 56 TFEU)

1. A Member State fails to fulfil its obligations under Article 14, point (3), of Directive 2006/123 on services in the internal market by introducing and retaining legislation which does not permit branches of companies incorporated in other Member States and established in its territory to operate in that territory as issuers of leisure cards conferring a tax advantage which are provided by employers to their employees. Such a restriction limits, in breach of that provision of the directive, the freedom of a provider to choose between a principal or a secondary establishment and between establishment in the form of an agency, branch or subsidiary.

The prohibition of such a restriction, with no possibility of justification, is intended to ensure the systematic and swift removal of certain restrictions on the freedom of establishment, which are regarded by EU law as adversely affecting the proper functioning of the internal market, and thus pursues an aim which is consistent with the FEU Treaty.

(see paras 42, 44, 46, 48, operative part 1)

2. A Member State fails to fulfil its obligations under Article 15(1), (2)(b) and (3) of Directive 2006/123 on services in the internal market by introducing and retaining legislation that makes the status of issuer of cards conferring a tax advantage which are provided to its employees subject to the condition that the issuer be part of a group of companies in which it takes the form of a commercial company and, more specifically, that of a public limited company, or a private limited company, formed under the law of that Member State, and is the subsidiary of a commercial company governed by that same national law. In such cases the service provider must thus meet all the following conditions: it must have legal personality, it must take, in that regard, the form of a commercial company — and, moreover, one of a quite specific kind — and it must be the subsidiary of a company which is itself a commercial company.

Such conditions thus have the effect of imposing on the issuer a number of obligations relating to its legal form, within the meaning of Article 15(2)(b) of Directive 2006/123. Where those obligations are coupled with the requirement that both the service provider and the controlling company of any group of companies to which that provider may belong be formed in accordance with the law of the Member State concerned, which presupposes that their registered offices are located there, the conditions laid down in Article 15(3)(a) of Directive 2006/123 are not satisfied.

(see paras 64, 65, 67, 68, operative part 1)

3. A Member State fails to fulfil its obligations under Article 15(1), (2)(b) and (3) of Directive 2006/123 on services in the internal market by introducing and retaining legislation that restricts the possibility of issuing cards conferring a tax advantage which are provided by employers to their employees to banks and other financial institutions, since they are the only entities able to meet the conditions laid down by that legislation.

Although such legislation does not entail direct discrimination since it does not include an express condition regarding the location of the registered office of the issuers of such cards, the requirement that the issuer must have, in each municipality of the Member State concerned with more than 35 000 inhabitants, an office open to customers can be satisfied only by banking or financial

establishments whose registered office is in that Member State. Such requirements are thus liable to produce, in fact, the same result as the imposition of a condition relating to the location of a registered office.

Even if such requirements pursue an objective of protecting consumers and creditors by seeking to ensure that issuers of that kind offer adequate safeguards in terms of solvency, professionalism and accessibility, it is still necessary to establish that such requirements satisfy the conditions set out in Article 15(3)(c) of Directive 2006/123, in particular, the condition that the objective pursued cannot be achieved by other, less restrictive measures.

(see paras 71, 86-88, 91, 93, operative part 1)

4. A Member State fails to fulfil its obligations under Article 16 of Directive 2006/123 on services in the internal market where its legislation requires, for the issue of cards conferring a tax advantage which are provided by employers to their employees, the existence of an establishment in its territory. That is the case when the legislation concerned requires all providers wishing to pursue that activity of issuing cards to have, in the Member State concerned, a stable infrastructure from where the business of providing services is actually carried out.

Such a requirement does not, in any event, satisfy the proportionality test set out in Article 16(1)(c) of the directive, since the objectives concerned could be achieved by means of measures that are less restrictive of the freedom to provide services than those resulting from that requirement, assuming that such measures comply with EU law.

(cf. points 105, 107, 116, 117, operative part1)

5. A Member State fails to fulfil its obligations under Articles 49 TFEU and 56 TFEU where its national legislation establishes a monopoly in favour of public bodies for the issue of vouchers which may be used to obtain cold meals and may be provided by employers to their employees, under advantageous tax conditions, as benefits in kind.

First, such an activity is economic in nature in that it is provided for remuneration and falls, on that account, within the ambit of the FEU Treaty provisions on the freedom to provide services. There is no need in that regard for the person providing the service to be seeking to make a profit. Similarly, the fact that the national legislation provides that the profits made from that activity must be used exclusively for certain public interest objectives is not sufficient to alter the nature of the activity in question or to deprive it of its economic character.

Second, in so far as the national legislation concerned confers exclusive rights to carry on an economic activity on a single, private or public, operator, it constitutes a restriction both of the freedom of establishment and of the freedom to provide services.

Lastly, neither social policy considerations, nor considerations relating to the protection of consumers or to tax and wage policies, justify such a restriction.

(see paras 154, 157, 164, 167-173, operative part 2)