Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

1 February 2017 *

(Failure of a Member State to fulfil obligations — Article 49 TFEU — Freedom of establishment — Notaries — Nationality requirement — Article 51 TFEU — Connection with the exercise of official authority)

In Case C-392/15,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 20 July 2015,

**European Commission**, represented by H. Støvlbæk and K. Talabér-Ritz, acting as Agents,

appellant,

v

**Hungary**, represented by M.Z. Fehér, G. Koós and by M.M. Tátrai, acting as Agents,

defendant,

supported by:

**Czech Republic**, represented by M. Smolek, J. Vláčil and D. Hadroušek, acting as Agents,

intervener,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, E. Regan, J.-C. Bonichot, A. Arabadjiev (Rapporteur) and S. Rodin, Judges,

Advocate General: M. Szpunar,

Registrar: X. Lopez Bancalari, Administrator,

having regard to the written procedure and further to the hearing on 29 September 2016,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: Hungarian.

## Judgment

1 By its application, the European Commission asks the Court to declare that, by imposing a nationality requirement for access to the notarial profession, Hungary has failed to fulfil its obligations under Article 49 TFEU.

## Legal context

*The general organisation of the notarial profession in Hungary*

2 In the Hungarian legal system notaries carry out their activities as independent professionals. The organisation of the notarial profession is governed by közjegyzőkről szóló 1991. évi XLI. törvény (Law No XLI of 1991 on notaries) (*Magyar Közlöny* 1991/109, 'the Law on notaries').

3 Under Article 1(1) of that legislation, notaries have the power to authenticate instruments in order to provide impartial legal services to the parties with a view to avoiding disputes.

4 Under Article 1(4) of that legislation, notaries are to carry out official tasks relating to the application of the law which are part of the public service of justice, within the framework of the powers conferred on them by law.

5 Article 2(1) of that legislation provides that, in the course of their activities, notaries are subject only to the law and may not receive instructions.

6 Article 10 of the Law on notaries provides that notaries are liable, in accordance with the Civil Code, for any damage which they cause. In addition, they are required to be covered by insurance, during the whole period of their activities, for any damage caused.

7 Pursuant to Article 31/A(1) of that legislation, notaries may carry out their activities either individually or as part of an office. Article 31/E of the same law stipulates that the constitution and functioning of the office do not have an impact on the personal legal status of notaries, as defined by the Law on notaries, in particular their obligation to exercise their duties personally, and their ethical and material responsibilities.

8 Notaries' fees are fixed by the közjegyzői díjszabásról szóló 14/1991. IM rendelet (Order No 14/1991 of the Minister of Justice establishing notaries' fees) of 26 November 1991 (*Magyar Közlöny* 1991/130).

9 With respect to the conditions for access to the position of notary, Article 17(1)(a) of the Law on notaries provides that only a Hungarian national may be appointed as a notary.

*The activities of a notary in Hungary*

10 Article 1(1) of the fizetési meghagyásos eljárásról szóló 2009. évi L. törvény (Law No L of 2009 on the procedure relating to orders for payment) (*Magyar Közlöny* 2009/85, 'the Law on the procedure relating to orders for payment'), provides that the procedure for issuing orders for payment is a simplified non-contentious civil procedure for the recovery of pecuniary claims for which notaries are competent.

11 Under Article 2 of that legislation, that procedure has the same effect as proceedings before a court.

12 Article 9(1) of the Law on the procedure relating to orders for payment provides that, subject to certain exceptions, applications for the issuance of orders for payment submitted electronically are allocated automatically and in equal numbers amongst the notarial offices in accordance with the system of the National Chamber of Notaries of Hungary.

13 Under Article 18(1) and (3) of the Law on the procedure relating to orders for payment, as part of the procedure for issuing orders for payment, there is no need to hear the party or to initiate proceedings for the production of evidence.

14 Under the relevant provisions of that legislation and those of the bírósági végrehajtásról szóló 1994. évi LIII. törvény (Law No LIII of 1994 on judicial enforcement, *Magyar Közlöny* 1994/51), at the request of the creditor, the notary is to proceed with the enforcement of the order for payment, without the debtor being heard, where the order in question has, in the absence of a statement of opposition, become binding. Enforcement of the order is necessary in order to implement enforcement measures against the debtor in order to recover the debt.

15 Article 52(2) of the Law on the procedure relating to orders for payment provides that the notary who issues an order for payment is competent to issue an order for the enforcement of the order for payment.

16 Article 2(1) of the hagyatéki eljárásról szóló 2010. évi XXXVIII. törvény (Law No XXXVIII of 2010 on the procedure relating to inheritance matters) (*Magyar Közlöny* 2010/35, 'the Law on the procedure relating to inheritance matters') states that the procedure relating to inheritance matters is a non-contentious civil law procedure.

17 Under Article 2(2) of that law, the procedure followed by notaries has the same effect as proceedings before first instance courts.

18 It is apparent from a reading of Article 1 in conjunction with Article 3(1) of that law that the procedure relating to inheritance matters consists in determining, by decision of the notary, which person, and on what basis, is, at the outcome of the procedure, to benefit from what right and to assume what obligation relating to the estate, part thereof or to a specific item of property.

19 Pursuant to Article 10 of that legislation, the notary is to settle the issues raised during the procedure relating to inheritance matters by formal decision.

20 Under Article 13(1) of the Law on the procedure relating to inheritance matters, subject to certain exceptions, no evidentiary hearing is to be held, but parties interested in the settlement of the estate and participants in the procedure may attach documents in support of the claims of other persons.

21 As part of the procedure relating to inheritance matters, the notary may adopt provisional measures in accordance with the conditions laid down in particular in Articles 32 to 34 of that law.

22 In accordance with Article 43 of that law, the notary may inter alia take preparatory measures for convening a meeting relating to the estate. In addition, he may examine whether it is appropriate to interrupt the procedure relating to the inheritance, whether he should recuse himself or whether he is territorially incompetent. The notary may also take measures to remedy the shortcomings of the inventory of the estate.

23 Article 46(1) of that law provides that where there is an indication that the deceased has drawn up an instrument disposing of assets upon death, the notary must invite the administrative department or the person who has it in his possession to communicate it to him.

24 Furthermore, if the conduct of the procedure relating to the inheritance requires information or a document within the possession of a court, an administrative department, another state body, a local authority, a body or other person managing such information, the notary may, under Article 16(1) of the Law on the procedure relating to inheritance matters, request that the information be sent to him or that the document be produced. Under Article 16(2) of that law, the notary's application may be rejected only if access to that information or document infringes a law or a regulation.

25 The notary is to transfer full or provisional title to the estate. Under Article 81(1) of the Law on the procedure relating to inheritance matters, if there is a dispute among the heirs and legatees as to which items of movable property form part of the estate, the notary is to proceed with the transfer of the uncontested movable property, indicating, however, that the claims on the movable property in dispute may be settled by a court.

26 In accordance with Article 83(1) of that law, the notary is to transfer the inheritance with full title where there is no legal obstacle to the transfer and (i) either there is only one heir who has asserted a claim over the estate and, according to the available information, no other person has any claim over the estate who is entitled by law to a share thereof, a gift upon death, a material bequest, a gift of public interest, or (ii) as part of the procedure relating to the inheritance, there is no legal dispute in respect of the transfer of the estate, or there is only a secondary dispute.

27 Under Article 85(1) of the Law on the procedure relating to inheritance matters, the notary is to transfer the inheritance with provisional title if it cannot be transferred with full title. Article 86 of that law lays down the order of precedence applicable to the transfer in that case.

28 Provisional title to the estate formally becomes full title, under Article 88 of the Law on the procedure relating to inheritance matters, (i) if the beneficiary does not attest that an action relating to the inheritance has been brought before the court in order to obtain recognition of a claim which has not been taken into account in the formal decision to transfer provisional title and in respect of which there is an inheritance dispute, (ii) if the court finds that the action is inadmissible or unfounded or terminates the contentious proceedings, or (iii) if the court brings the contentious proceedings to a close without taking a decision on the merits.

29 It is possible to bring an action against the merits of the formal decision of the notary bringing to a close the procedure relating to the inheritance, against the decision of the notary determining the costs of the procedure and requiring the persons concerned to bear them, and against his decision imposing a fine under the conditions set out in Articles 109 to 113 of the Law on the procedure relating to inheritance matters.

30 It follows from Article 1(2) and (3) of the közjegyzői állások számáról és a közjegyzők székhelyéről 15/1991. (XI. 26.) IM rendelet (Order No 15/1991 of the Ministry of Justice relating to the number of notarial positions and notarial offices) of 26 November 1991 (*Magyar Közlöny* 1991/130), that the competence of notaries in Budapest (Hungary) in inheritance matters is determined by their practice district. If several notaries operate in the same district, they take on inheritance matters in alternating months, the procedure relating to a specific estate being taken on by the notary responsible on the day of the death of the deceased.

31 As regards the notary's role when accepting the depositing of payment, the egyes közjegyzői nemperes eljárásokról szóló 2008. évi XLV. törvény (Law No XLV of 2008 relating to non-contentious notarial procedures) (*Magyar Közlöny* 2008/94, 'the Law on non-contentious notarial procedures') provides that the settlement of a debt through the depositing of payment with a notary has the same effect as a payment into court. According to the relevant provisions of that law, if the notary accepts the payment, he endorses the request with the acceptance formula. The notary is to reject the request or to refuse

acceptance thereof if the legal requirements are not fulfilled. He then takes a formal decision. The notary also takes a formal decision in respect of the allocation of the payment. The payment may be handed over only after that decision has become binding.

32 Notaries also prepare authentic instruments. Those instruments become enforceable once the notary has endorsed them with the authority to enforce. According to Article 112 of the Law on notaries, the notary is to endorse the notarial instrument with the authority to enforce if that instrument indicates that an undertaking has been made to provide a service for consideration or unilaterally, the name of the creditor and of the debtor, the purpose of the obligation, the quantity or amount of the obligation, and the terms and period for performance.

33 In order to recover a debt which is recorded in a notarial instrument, the notary, at the request of the creditor and without the debtor being heard, issues an enforcement order. Enforcement is effected by endorsing the instrument with an authority to enforce. The lawfulness of that endorsement may be challenged before a court.

34 Article 195 of the Code of Civil Procedure determines the probative value of the authentic instrument. It follows from paragraphs 6 and 7 of that provision that it is in principle possible to adduce evidence to the contrary as regards authentic instruments. In addition, the judge may ask the person issuing the instrument to confirm its authenticity. Furthermore, under Article 206 of the Code, the judge may freely assess the evidence.

35 As regards the activities of the notary in respect of the prior gathering of evidence, Article 17 of the Law on non-contentious notarial procedures provides that that gathering may be requested before the notary under the conditions laid down in the Code of Civil Procedure, where the applicant has a legal interest in the acquisition of evidence, and in particular in a note being taken of a particularly important fact or circumstance. According to the relevant provisions of the Law on non-contentious notarial procedures, it is not possible to resort to the prior gathering of evidence if civil or criminal proceedings are pending in the case at issue. If the notary takes the view that the conditions for resorting to the prior gathering of evidence are probably not met, he may decide to reject the request; the lawfulness of that decision may be challenged before a court.

36 The notary also intervenes in the pre-litigation procedure for the prior designation of a judicial expert. Under Article 21 of the Law on non-contentious notarial procedures, the notary may be requested to appoint a judicial expert where the finding or assessment of a fact or any other circumstance of importance to the plaintiff requires special technical skills. The notary may not be requested to appoint a judicial expert if judicial proceedings relating to the matter for which the measure is sought are pending, in which the person making the request is an applicant or defendant, or if criminal proceedings are pending against that person. According to the relevant provisions of that law, if the notary takes the view that the conditions for the appointment of a judicial expert are not met, he may decide to reject the request; the lawfulness of that decision may be challenged before a court.

37 The notary also plays a role in the procedure for the annulment of negotiable instruments and lost, stolen or destroyed certificates, governed by Articles 28 to 36 of the Law on non-contentious notarial procedures. The annulment by the notary of those instruments and certificates has the consequence that the rights established therein may not be exercised or the obligations set out therein may not be enforced. Article 29 of that law provides that all notaries are competent to act on an application for annulment.

38 According to the relevant provisions of the Law on non-contentious notarial procedures, the notary, upon being requested to do so, instructs the person or body liable to pay out under the lost, stolen or destroyed instrument not to make payment under it and, where applicable, to make a payment into

court in respect of the amount which has since become due. The formal decision of the notary declaring a negotiable instrument or a lost, stolen or destroyed certificate void has the same effect as a judgment bearing the authority of *res judicata*.

39 Notaries also carry out activities relating to dissolution of registered partnerships concluded between two persons of the same sex who have reached the age of 18 years. That procedure is governed by Articles 36/A to 36/D of the Law on non-contentious notarial procedures. According to the relevant provisions of that law, it is possible to obtain before the notary the dissolution of the registered partnership on the condition that the registered partners request it jointly and freely, that neither registered partner has a child in respect of which the partners jointly assume a maintenance obligation and that the registered partners have reached an agreement, in a notarial instrument or in a private instrument countersigned by a lawyer, on matters relating to the maintenance obligation owed in law by one to the other, on the use of the common dwelling and on the distribution of the joint assets of the partnership. The formal approval of an agreement between the parties has the same effect as an agreement approved by a court, and a formal decision dissolving a registered partnership has the same effect as the judgment of a court. If that agreement cannot be approved or if the conditions for the dissolution of the partnership registered before the notary are not met, the notary refuses the approval of that agreement and rejects the request for dissolution of the partnership.

40 Articles 36/E to 36/G of the Law on non-contentious notarial procedures govern notaries' powers in respect of the maintenance of the register of declarations of partnership. This register contains a mention of any declaration that a partnership, within the meaning of the Civil Code, exists or no longer exists. The declaration shall be entered at the joint request of the partners or, in the event of a declaration of the inexistence of a partnership, at the request of one of them. The notary checks whether the conditions for the registration procedure are met. The formal decision to make an entry in the register of declarations of partnership has the same effect as the judgment of a court.

41 The national register of marriage contracts and the national register of partnership contracts formally certify, until evidence to the contrary is adduced, that the contracts registered therein exist. Under Article 4:65(2) and Article 6:515(3) of the Civil Code, a contract of marriage or partnership may be relied upon with respect to third parties only if it is registered or if the spouses or partners prove that the third party concerned knew or ought to have been aware of its existence and content.

42 Pursuant to Article 36/H(2) of the Law on non-contentious notarial procedures, the National Chamber of Notaries of Hungary is responsible for the operation of the registration system, with notaries making entries in the national register of marriage contracts and in the national register of partnership contracts using the IT applications provided for that purpose. Under Article 36/J(2) of that legislation, the notary is to verify that the legal conditions have been met before registering the agreement in those registers.

43 Notaries also determine, as part of a non-contentious procedure, questions of succession in the event of the death of natural persons or of the dissolution of legal persons which are the subject of entries in the register of charges and sureties.

44 Pursuant to Article 162 of the Law on notaries, notaries are competent to receive all forms of documents, payments, valuables and publicly issued negotiable instruments, with a view to their safekeeping. That law provides that notaries are also competent to assign, at the request of a party, those items to a third party or to deposit them with a court or other authority when preparing a notarial instrument and in connection therewith.

45 Under Article 171/A of the Law on notaries, notaries may, at the request of a party, retain an authentic electronic version of a document in their electronic archives. They must retain it for at least three years.

## Pre-litigation procedure

46 The Commission sent a letter of formal notice to Hungary dated 18 October 2006 requesting that it submit, within two months, its observations on the compatibility of the nationality requirement for access to the notarial profession with Articles 49 and 51 TFEU.

47 Hungary replied to the letter of formal notice by letter of 20 December 2006.

48 Not being persuaded by the arguments put forward by Hungary, the Commission, by letter of 23 October 2007, sent a reasoned opinion to that Member State, to which Hungary replied by letter of 12 February 2008.

49 On 24 May 2011, in the judgments, *Commission* v *Belgium* (C-47/08, EU:C:2011:334); *Commission* v *France* (C-50/08, EU:C:2011:335); *Commission* v *Luxembourg* (C-51/08, EU:C:2011:336); *Commission* v *Austria* (C-53/08, EU:C:2011:338); *Commission* v *Germany* (C-54/08, EU:C:2011:339); and *Commission* v *Greece* (C-61/08, EU:C:2011:340), the Court held that the nationality requirement applied, respectively, in the Kingdom of Belgium, the French Republic, the Grand Duchy of Luxembourg, the Republic of Austria, the Federal Republic of Germany and the Hellenic Republic for access to the notarial profession constituted discrimination on the ground of nationality prohibited under Article 49 TFEU. Hungary intervened before the Court in support of the first five Member States mentioned above.

50 By letter dated 9 November 2011, the Commission drew Hungary's attention to the judgments referred to in the previous paragraph of the present judgment and asked it to specify what measures it had taken or intended to take, on the basis of those judgments, in order to bring its legislation into line with EU law.

51 By letter of 13 January 2012, Hungary replied to that letter by stating that the functions performed by notaries in the Hungarian legal system also covered activities other than those examined by the Court in the cases which gave rise to the judgments referred to in paragraph 49 of the present judgment and that those functions differed by nature from those at issue in those cases.

52 On 27 September 2012, the Commission sent a supplementary reasoned opinion to Hungary, to which that Member State replied by letter of 30 November 2012.

53 After examining the amendments which Hungary had in the meantime made to its legislation relating to notaries' activities, the Commission concluded that the infringement persisted and therefore sent, on 10 July 2014, a further supplementary reasoned opinion to that Member State.

54 By a letter of 18 September 2014, Hungary responded to that opinion, setting out the reasons for its view that the position adopted by the Commission was unfounded.

55 In those circumstances, the Commission decided to bring the present action.

## The action

### *Arguments of the parties*

56 The Commission submits that the activities carried out by notaries in the Hungarian legal system fall within the scope of Article 49 TFEU.

57 In that regard, the Commission observes, first, that, in so far as they are not an employee of the State, but are engaged in independent professional practice, in which they provide services for remuneration, and as part of which they are liable for tax, notaries carry out an economic activity.

58 Second, notaries carry out a substantial part of their activities in competitive conditions within the limits of their respective territorial jurisdictions. That is the case with respect in particular to the drafting of authentic instruments and the annulment of lost, stolen or destroyed negotiable instruments and certificates. In addition, requests for orders for payment made on paper and verbally may be addressed to any notary.

59 Third, the activities carried out by notaries in the Hungarian legal system, as part of their tasks consisting in issuing orders for payment, enforcing them and acting in inheritance matters, are ancillary or preparatory in relation to the exercise of official authority or activities which leave intact the discretion and decision-making powers of the administrative or judicial authorities and which do not involve the exercise of decision-making powers, powers of enforcement or powers of coercion.

60 The Commission argues, fourth, that the fact that notaries act in the public interest does not necessarily imply that they take part in the exercise of official authority within the meaning of the first paragraph of Article 51 TFEU.

61 Fifth, notaries are subject to the same tax and financial rules as a company. Furthermore, the notarial office has legal personality and is subject to the provisions of Hungarian law relating to private limited companies.

62 Finally, notaries are exclusively liable for the actions carried out in the course of their professional activity; those actions do not entail State liability.

63 The Commission submits, secondly, that the activities carried out by notaries in the Hungarian legal order have no connection with the exercise of official authority within the meaning of the first paragraph of Article 51 TFEU, as interpreted by the Court.

64 In that regard, the Commission submits that the first paragraph of Article 51 TFEU must be given an autonomous and uniform interpretation. In so far as it provides for an exception to freedom of establishment for activities participating in the exercise of official authority, that provision should also be interpreted strictly and the exception should be restricted to activities which, of themselves, involve a direct and specific participation in the exercise of official authority. The concept of official authority implies the exercise of a decision-making power going beyond the ordinary law and reflecting the ability to act independently of, or even contrary to, the will of other persons.

65 The functions exercised by the notary do not involve the exercise of decision-making powers, powers of enforcement or powers of coercion. They are preventive in nature and are therefore ancillary or preparatory to the exercise of official authority. Factors such as the regulated nature of notarial activities, the fact that notaries are considered by Hungarian criminal law as exercising official authority, the territorial jurisdiction of notaries, their irremovability, the incompatibility of the notarial profession with the exercise of other functions and the fact that notaries may not refuse a client do not call that conclusion into question.

66 As regards, first, the order for payment procedure, the Commission submits that notaries carry out an ancillary activity with which they have been entrusted in order to relieve the pressure on the judiciary. Since that procedure concerns only pecuniary claims which are undisputed and outstanding, notaries have no decision-making power in respect of the parties. Notaries' powers are thus limited to the completion of procedural formalities. They may not issue an order other than that for payment and are not competent to hear the challenge to a claim. Moreover, the order for payment issued by the

notary becomes final and enforceable only if it is not disputed by the debtor within the allotted time period. Finally, the fact that that order has significant legal effects is not sufficient to demonstrate direct and specific participation in the exercise of official authority.

67 According to the Commission, the same considerations apply in respect of the activity performed by notaries in the context of the European order for payment procedure set out in Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (OJ 2006 L 399, p. 1).

68 As regards, second, the enforcement of the order for payment, the Commission maintains that notaries have no discretion or decision-making powers. They do not settle disputes, hear the parties or request the production of evidence, but merely enforce orders for payment which are not disputed. The enforceability of those orders does not confer on notaries a power of enforcement. Notaries merely render the claim indisputable until proved otherwise, without deciding on the merits of the challenge to the claim. The endorsement of the order for payment with the authority to enforce is therefore an ancillary and preparatory activity.

69 As regards, third, the procedure relating to inheritance matters, the Commission observes that this is a non-contentious civil procedure, during which it is possible for the parties to conclude an agreement which the notary confirms by way of a formal decision. The fact that, under Hungarian law, an estate which is the subject of a dispute may be transferred by a notary only with provisional title demonstrates that notaries are not empowered to settle a dispute during the procedure on inheritance matters. Nor does the transfer of the estate with full title by a notary entail the exercise of decision-making powers or powers of enforcement, since that transfer presupposes prior consent or agreement between the parties.

70 Moreover, the formal transfer decision cannot be regarded as final in so far as it is open to challenge before the courts. As to the binding, preparatory or protective measures that notaries may adopt in order to ensure the proper conduct of the procedure relating to inheritance matters, they do not affect the substance of the rights in question and are incidental to the principal task of the notary.

71 Fourth, notaries play only a passive role in the procedure relating to the depositing of monies with a notary. They do not assess challenges. The procedure relating to the depositing of monies with a notary does not, therefore, entail the exercise of any discretion, decision-making powers or powers of enforcement.

72 With respect, fifth, to the drawing up of notarial instruments, the Commission submits that the significance of the legal effects produced by those instruments is not sufficient to demonstrate that that activity is part of the exercise of official authority. The probative value of notarial instruments does not unconditionally bind courts in their assessment of evidence. In addition, it may be possible to adduce evidence to the contrary. The enforceability of those instruments admittedly allows the creditor to continue enforcing the debt without having to bring an action before the courts. However, the role of notaries in that regard is limited to verifying compliance with the conditions legally required for endorsing the act with the authority to enforce. Notaries therefore have no decision-making powers or powers of enforcement.

73 As regards, sixth, the procedure for the prior gathering of evidence before the notary, the Commission observes that the main purpose of that procedure is the prior securing of evidence in order to arrive at a positive outcome in subsequent criminal or civil proceedings. The activity exercised by notaries as part of that procedure is therefore manifestly of an ancillary or preparatory nature.

74 Seventh, the Commission considers that the procedure for appointing a judicial expert is closely linked to other procedures before notaries, such as the procedure for issuing an order for payment or the procedure relating to inheritance matters, which are not part of the exercise of official authority.

75 The Commission submits, eighth, that notaries' powers in respect of the annulment of lost, stolen or destroyed negotiable instruments and certificates do not relate to the legal status of those documents, but only to the possibility of replacing them. That notarial activity is therefore not part of the exercise of official authority.

76 Ninth, the Commission submits that, with regard to the dissolution of registered partnerships, notaries are only entitled to verify whether the legal conditions applicable to the dissolution by mutual agreement of registered partnerships are met. For that reason, they have no real discretion or decision-making power in that regard.

77 As regards, 10th, the maintenance of the register of declarations of partnership, of the national register of marriage contracts and of the national register of partnership contracts, the Commission submits that the registration by notaries of acts in those registers produces effects only as a result of the contracts or other acts which the parties have freely entered into. The notary's intervention thus presupposes the prior existence of an agreement or a consensus between the parties.

78 As regards, 11th, the determination of questions of succession in the event of the death of natural persons or of the dissolution of legal persons which are the subject of entries in the register of charges and sureties, the Commission submits that the maintenance of that register is excluded from the scope of the exercise of official authority, because it relates only to non-contentious procedures.

79 Finally, the Commission argues, 12th, that the safekeeping of instruments by and the deposit of monies, valuables and negotiable instruments with notaries are complementary and passive activities which do not involve the exercise of decision-making powers, powers of enforcement or coercion, or the examination of possible challenges thereto.

80 Hungary, supported by the Czech Republic, submits, first, that the activities carried out by notaries in the Hungarian legal system do not fall within the scope of Article 49 TFEU.

81 Notaries are not engaged in economic or commercial activities inasmuch as: their appointment is contingent upon the successful completion of a competition; they operate in a specific territory and as part of a specific office; the scope of their activities is not freely determined, but is fixed by law; they carry out their tasks in full independence; they carry out, under Article 1(4) of the Law on notaries, an 'official activity relating to the application of the law'; their fees are not freely negotiated; and, having regard to the procedure for issuing an order for payment or dealing with inheritance matters, their profession is exempt from competition.

82 Moreover, even when working as part of an office, notaries carry out their duties in person. They act not in the public interest, but 'in the interest of the clients who turn to [them]'.

83 Finally, notaries' actions indirectly incur the liability of the State.

84 Hungary, supported by the Czech Republic, submits, secondly, that the activities carried out by notaries in the Hungarian legal system fall, in any event, within the exception set out under Article 51 TFEU. Notaries' status in Hungary is comparable to that of judges and other persons involved in the exercise of official authority. Tasked with the prevention of disputes through the implementation of non-contentious procedures, notaries are part of the system for the administration of justice. They may not refuse a case which falls within their substantive competence and their actions, although carried out as part of non-contentious procedures, have the same effect as judicial decisions. Notaries, like judges, act independently. They also exercise discretion and decision-making powers and may implement official measures of enforcement.

85 Hungary submits, first, that the procedure for issuing an order for payment is intended to relieve the pressure on the judiciary. By issuing, at the request of a creditor, an order requiring the debtor to pay a sum of money without that debtor having to be heard, notaries decide definitively on a question of private law. In practice, only a small percentage of the orders for payment issued by notaries were challenged. Furthermore, notaries in the Hungarian legal system are also competent to issue orders for payment in accordance with Regulation No 1896/2006.

86 Second, the enforcement of the order for payment entails, according to Hungary, direct participation in the exercise of official authority because enforcement is a coercive measure leading to the debtor being deprived of property on account of his debt. The existence of legal remedies against notaries' formal decision to proceed with enforcement arises from the need to respect fundamental rights and does not mean that the decision has diminished legal authority. Moreover, that type of remedy does not relate to the question whether or not to order enforcement, but merely on the lawfulness of that decision.

87 As regards, third, the procedure in inheritance matters, Hungary submits that notaries do not merely carry out preparatory tasks in relation to the work of a court but themselves carry out the entire procedure relating to inheritance matters and take the formal decision to transfer the estate. Unlike notaries in the Austrian legal system, notaries in the Hungarian legal system do not intervene as agents of the court but act by virtue of their own power and take all decisions themselves. In addition, they may take protective measures. Moreover, the number of judicial appeals against notaries' decisions in inheritance matters is negligible.

88 As regards, fourth, the procedure relating to the depositing of monies with a notary, Hungary observes that it has the same effect as the procedure relating to payments into court. That is because notaries enjoy public confidence on account of the role they play in the administration of justice and because they are more easily accessible than the courts.

89 Fifth, Hungary argues that the notarial activity consisting in the drafting of authentic instruments is strictly regulated. The official nature of the authentic instrument drawn up by the notary is further attested by the authority to enforce affixed to that instrument when the legal conditions are met. Since that authority makes it possible to enforce a claim by resorting to public measures of enforcement under the same conditions and in accordance with the same procedure as those applicable to the enforcement of a decision by the courts, notaries fulfil the same role as the courts in the context of the settlement and the prevention of disputes. The judgment of 17 June 1999, *Unibank* (C-260/97, EU:C:1999:312), confirms that only acts relating to the exercise of official authority may be deemed enforceable. Moreover, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1) and Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (OJ 2004 L 143, p. 15) confer on undertakings contained in authentic instruments enforceability similar to that of court decisions.

90 Hungary argues, sixth, that the prior gathering of evidence before the notary is a special variant of a non-contentious procedure of the same nature as that initiated before the courts, whose purpose is to gather evidence for the purposes of subsequent contentious proceedings.

91 As regards, seventh, the procedure for appointing a judicial expert, Hungary contends that this is a special variant of a similar procedure before the courts.

92 Hungary notes, eighth, that the annulment of lost, stolen or destroyed negotiable instruments and certificates by the notary is binding and produces the same effect as a judgment which has the force of *res judicata*. That notarial activity therefore affects the rights and obligations of third parties and for that reason entails a direct and specific participation in the exercise of official authority. Hungary

states, however, that while the annulment of a negotiable instrument has the consequence of rendering impossible the exercise of the right which it establishes or the enforcement of the obligation it provides, it does not change the legal relationship underlying that negotiable instrument. The annulment of that instrument simply makes it possible to issue a new negotiable instrument which replaces the previous one.

93 With respect, ninth, to notaries' role in dissolving registered partnerships, Hungary observes that they dissolve registered partnerships on the basis of the mutual agreement of the parties in the context of a non-contentious procedure. Notaries act in the same manner as courts and notarial dissolution produces the same effects as a dissolution pronounced by a court.

94 As regards, 10th, the maintenance of the register of declarations of partnership and the maintenance of the national register of marriage contracts and the national register of partnership contracts, Hungary notes that the formal decision of notaries to enter information into those registers has the same effect as a court judgment which has the force of *res judicata* and affects the enforceability against third parties of the acts concerned.

95 Hungary notes, 11th, that notaries determine questions of succession in the event of the death of natural persons or of the dissolution of legal persons which are the subject of entries in the register of charges and sureties.

96 Finally, Hungary submits that the safekeeping of instruments and the deposit of monies, valuables and negotiable instruments does not entail the exercise of official authority, but that that activity cannot be separated from notaries' other activities because it enables them to perform their other tasks more effectively.

*Findings of the Court*

97 It should be stated at the outset that the Commission's action concerns only the compatibility of the nationality requirement laid down by the Hungarian legislation at issue for access to the notarial profession with the freedom of establishment enshrined in Article 49 TFEU. The action does not relate to the status and organisation of notaries in the Hungarian legal system, or to the conditions of access, other than that of nationality, to the notarial profession in that Member State.

98 Hungary argues that the notarial profession cannot be regarded as an economic activity and that, consequently, it does not fall within the scope of Article 49 TFEU.

99 In that regard, it should be recalled that the Court has already held that freedom of establishment, as set out in Article 49 TFEU, is applicable to the notarial profession (judgment of 10 September 2015, *Commission* v *Latvia*, C-151/14, EU:C:2015:577, paragraph 48 and the case-law cited).

100 According to settled case-law, provision of services for remuneration must be regarded as an economic activity, provided that the work performed is genuine and effective and not such as to be regarded as purely marginal and ancillary (judgment of 20 November 2001, *Jany and Others*, C-268/99, EU:C:2001:616, paragraph 33 and the case-law cited).

101 It is not disputed that, under the Hungarian legal system, notaries practise as independent professionals which entails, as the main activity, the provision of several separate services for remuneration.

102 It must also be borne in mind that Article 49 TFEU is intended to ensure that all nationals of all Member States who establish themselves in another Member State for the purpose of pursuing activities there as self-employed persons receive the same treatment as nationals of that State, and it

prohibits, as a restriction on freedom of establishment, any discrimination on grounds of nationality resulting from national legislation (see, inter alia, judgment of 10 September 2015, *Commission* v *Latvia*, C-151/14, EU:C:2015:577, paragraph 52 and the case-law cited).

103 In the present case, the national legislation at issue reserves access to the notarial profession to Hungarian nationals, thus enshrining a difference in treatment on the ground of nationality which is prohibited in principle by Article 49 TFEU.

104 Hungary submits, however, that the activities of notaries are outside the scope of Article 49 TFEU because they are connected with the exercise of official authority within the meaning of the first paragraph of Article 51 TFEU.

105 As regards the concept of the 'exercise of official authority' within the meaning of that provision, its interpretation must take account, in accordance with settled case-law, of the character as EU law of the limits imposed by that provision on the permitted exceptions to the principle of freedom of establishment, so as to ensure that the effectiveness of the Treaty in the field of freedom of establishment is not frustrated by unilateral provisions of the Member States (judgment of 1 December 2011, *Commission* v *Netherlands*, C-157/09, not published, EU:C:2011:794, paragraph 56 and the case-law cited).

106 It is also settled case-law that the first paragraph of Article 51 TFEU is an exception to the fundamental rule of freedom of establishment. As such, that derogation must be construed in such a way as to limit its scope to what is strictly necessary for safeguarding the interests which it allows the Member States to protect (judgment of 1 December 2011, *Commission* v *Netherlands*, C-157/09, not published, EU:C:2011:794, paragraph 57 and the case-law cited).

107 In addition, the Court has repeatedly held that the exception in the first paragraph of Article 51 TFEU must be restricted to activities which in themselves are directly and specifically connected with the exercise of official authority (judgment of 1 December 2011, *Commission* v *Netherlands*, C-157/09, not published, EU:C:2011:794, paragraph 58 and the case-law cited).

108 In that respect, the Court has had occasion to rule that the exception in the first paragraph of Article 51 TFEU does not extend to certain activities that are ancillary or preparatory to the exercise of official authority (see, to that effect, judgments of 13 July 1993, *Thijssen*, C-42/92, EU:C:1993:304, paragraph 22; of 29 October 1998, *Commission* v *Spain*, C-114/97, EU:C:1998:519, paragraph 38; of 30 March 2006, *Servizi Ausiliari Dottori Commercialisti*, C-451/03, EU:C:2006:208, paragraph 47; of 29 November 2007, *Commission* v *Germany*, C-404/05, EU:C:2007:723, paragraph 38; and of 22 October 2009, *Commission* v *Portugal*, C-438/08, EU:C:2009:651, paragraph 36), or to certain activities whose exercise, although involving contacts, even regular and organic, with the administrative or judicial authorities, or indeed cooperation, even compulsory, in their functioning, leaves their discretionary and decision-making powers intact (see, to that effect, judgment of 21 June 1974, *Reyners*, 2/74, EU:C:1974:68, paragraphs 51 and 53), or to certain activities which do not involve the exercise of decision-making powers (see, to that effect, judgments of 13 July 1993, *Thijssen*, C-42/92, EU:C:1993:304, paragraphs 21 and 22; of 29 November 2007, *Commission* v *Austria*, C-393/05, EU:C:2007:722, paragraphs 36 and 42; of 29 Novembre 2007, *Commission* v *Germany*, C-404/05, EU:C:2007:723, paragraphs 38 and 44; and of 22 October 2009, *Commission* v *Portugal*, C-438/08, EU:C:2009:651, paragraphs 36 and 41), powers of enforcement (see, to that effect, inter alia, judgment of 29 October 1998, *Commission* v *Spain*, C-114/97, EU:C:1998:519, paragraph 37) or powers of coercion (see, to that effect, judgment of 30 September 2003, *Anker and Others*, C-47/02, EU:C:2003:516, paragraph 61, and of 22 October 2009, *Commission* v *Portugal*, C-438/08, EU:C:2009:651, paragraph 44).

109 It must therefore be ascertained in the light of the case-law recalled in paragraphs 105 to 108 of the present judgment whether the activities entrusted to notaries in the Hungarian legal system involve a direct and specific connection with the exercise of official authority.

110 As regards the activity of issuing orders for payment, it is common ground that it relates only to pecuniary claims which are undisputed and outstanding. Moreover, orders for payment issued by a notary only become binding if the debtor does not challenge them. The notary's intervention thus presupposes the consent of the debtor.

111 It must therefore be held that a notary's powers to issue an order for payment, which are based entirely on an alignment of the wishes of the creditor and debtor and leave intact the prerogatives of the courts should the parties fail to reach an agreement as to whether the debt is real, do not have any connection with the exercise of official authority.

112 That conclusion is not called into question by Hungary's argument concerning Regulation No 1896/2006. It is clear in particular from recital 9 and Article 1(a) of that regulation that the European order for payment procedure concerns only uncontested pecuniary claims. Furthermore, under Article 18(1) of that regulation, the European order for payment is declared enforceable if no statement of opposition has been sent within the prescribed period. The issuance of the European order for payment imposed by Regulation No 1896/2006 therefore has the same characteristics as those referred to in paragraph 110 of the present judgment.

113 As regards the enforcement of the order for payment, it should be noted that it allows, as Hungary argues, the settlement of the debt that is the subject of the order for payment which has become, in the absence of a statement of opposition, binding.

114 The enforceability thus acquired by the order for payment does not, however, reflect powers held by notaries which are directly and specifically connected with the exercise of official authority. While the notary's endorsement of the order for payment which has become binding with the authority to enforce makes that order enforceable, that enforceability is based on the debtor's failure to dispute the claim to be enforced.

115 As regards the tasks carried out in respect of inheritance matters, it should be pointed out, on the one hand, that under Article 83(1) of the Law on the procedure relating to inheritance matters, notaries may only proceed with the transfer of full title to the estate in the absence of disagreement between the heirs and, on the other, that they are required under Article 85(1) of that law, in the event of disagreement, to transfer provisional title to the estate, with the disagreement being settled by the court as part of the action relating to the inheritance.

116 Since the tasks entrusted to notaries in inheritance matters are carried out on a consensual basis and leave intact the prerogative of the courts in the absence of an agreement between the parties, those tasks cannot, consequently, be regarded as having, in themselves, a direct and specific connection with the exercise of official authority.

117 That conclusion is not called into question by the fact that notaries have, as Hungary argues, the power to adopt certain provisional measures and certain interim measures with a view to the organisation of the succession meeting and to request from various public bodies the communication of certain information and the production of certain documents. It should be stated, in that regard, that those measures are ancillary to the principal task of notaries which is to complete the transfer of the estate (see, by analogy, judgment of 1 December 2011, *Commission* v *Netherlands*, C-157/09, not published, EU:C:2011:794, paragraph 83). As stated in paragraphs 115 and 116 of the present judgment, that task cannot be regarded as directly and specifically connected with the exercise of official authority.

118 As regards the depositing of monies with a notary, it should be noted that that activity does not involve the exercise of decision-making powers, since the role of notaries is limited to verifying compliance with legal requirements.

119 As regards the activity of authentication entrusted to notaries in the Hungarian legal system, it should be pointed out that, as is apparent from Article 112 of the Law on notaries, instruments reflecting unilateral undertakings or agreements freely entered into by the parties are subject to authentication. The notary's intervention thus presupposes the prior existence of an agreement or consensus between the parties.

120 In that regard, the Court has held that the activity of authentication entrusted to notaries does not, of itself, involve a direct and specific connection with the exercise of official authority within the meaning of the first paragraph of Article 51 TFEU (see, by analogy, inter alia, judgment of 24 May 2011, *Commission* v *Belgium*, C-47/08, EU:C:2011:334, paragraph 92).

121 The Court has held, furthermore, that the fact that an activity includes the drawing up of instruments which have probative value and are enforceable does not suffice for that activity to be regarded as directly and specifically connected with the exercise of official authority within the meaning of the first paragraph of Article 51 TFEU (see, to that effect, judgment of 1 December 2011, *Commission* v *Netherlands*, C-157/09, not published, EU:C:2011:794, paragraph 73 and the case-law cited).

122 As far as, in particular, the probative value of notarial instruments is concerned, it must be pointed out that that value derives from the rules on evidence laid down by the Code of Civil Procedure. The probative force conferred by law on a particular document thus has no direct effect on whether the activity which includes the drawing up of the document is in itself directly and specifically connected with the exercise of official authority, as required by the case-law (judgment of 1 December 2011, *Commission* v *Netherlands*, C-157/09, not published, EU:C:2011:794, paragraph 74 and the case-law cited).

123 Moreover, as is apparent in particular from Article 195(6) and (7) of the Code of Civil Procedure, as regards authentic instruments, the possibility remains of submitting evidence in rebuttal.

124 It cannot therefore be argued that a notarial instrument, because of its probative value, unconditionally binds a court exercising its power of assessment, since, as is not disputed, the judge decides in accordance with his own firm conviction in the light of all the facts and evidence gathered in the course of the judicial proceedings. The principle that the court is unfettered in its assessment of the evidence is, moreover, enshrined in Article 206 of the Code of Civil Procedure (see, by analogy, judgment of 1 December 2011, *Commission* v *Netherlands*, C-157/09, not published, EU:C:2011:794, paragraph 76 and the case-law cited).

125 Nor does the enforceability of an authentic instrument reflect powers held by the notary which are directly and specifically connected with the exercise of official authority. While the notary's endorsement of the authentic instrument with the authority to enforce does give it enforceable status, that status is based on the intention of the parties to enter into an act or agreement, after its compliance with the law has been checked by the notary, and to make it enforceable (judgment of 24 May 2011, *Commission* v *Belgium*, C-47/08, EU:C:2011:334, paragraph 103).

126 Moreover, it is common ground that notaries play no role in enforcing performance beyond endorsing a document with the authority to enforce. They therefore have no power of enforcement in that regard.

127 The considerations set out in paragraphs 125 and 126 of the present judgment also apply to the endorsement by the notary of a document with the authority to enforce as part of the settlement of debts recorded in the notarial instruments and the enforcement of formal decisions of the notary.

128 As to Hungary's argument taken from the judgment of 17 June 1999, *Unibank* (C-260/97, EU:C:1999:312), it must be held that the case which gave rise to that judgment did not relate to the interpretation of the first paragraph of Article 51 TFEU but to the interpretation of Article 50 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 306, p. 36). Further, the Court held, in paragraphs 15 and 21 of that judgment, that, in order to endow an act with the character of an 'authentic' instrument within the meaning of Article 50 of that convention, the involvement of a public authority or any other authority empowered for that purpose by the State of origin is needed.

129 As regards the argument of that Member State concerning Regulations No 44/2001 and No 805/2004, the Court has already held that those acts relate to the recognition and enforcement of authentic instruments which are registered and enforceable in a Member State, and do not therefore affect the interpretation of the first paragraph of Article 51 TFEU (see, to that effect, judgment of 24 May 2011, *Commission* v *Belgium*, C-47/08, EU:C:2011:334, paragraph 120). The same is true as regards Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1) which replaced Regulation No 44/2001.

130 As regards notaries' powers in relation to the prior gathering of evidence, it should be noted that the objective of that procedure is to ensure that evidence in the acquisition of which an applicant has a legal interest is collected with a view to the possible subsequent introduction of contentious proceedings, which, however, do not fall within the notary's powers. Thus, the Law on non-contentious notarial procedures provides that it is not possible to resort to the prior gathering of evidence if civil or criminal proceedings are pending in the case. Notaries' powers with respect to the prior gathering of evidence therefore constitute ancillary or preparatory activities with respect to the exercise of official authority.

131 The same applies to the tasks entrusted to the notary as part of the procedure for the appointment of a judicial expert, that procedure being implemented when the establishment or assessment of a fact or any other circumstance which is of significance to the applicant requires special technical skills. In the same way as for the prior gathering of evidence, the notary may not, under Article 21(2) of the Law on non-contentious notarial procedures, appoint a judicial expert if, as regards the question for which the person requesting the measure wishes to obtain an expert opinion, another judicial procedure is pending, in which that person is an applicant or defendant, or if criminal proceedings are pending against him.

132 As regards the notary's power to annul negotiable instruments and certificates which have been lost, stolen or destroyed, it should be noted that, as Hungary points out, it does not render void, in civil law, the legal relationship underpinning the instrument, but only creates the possibility of issuing a new instrument, which replaces the previous one. That notarial power does not therefore entail the exercise of decision-making powers.

133 That conclusion is not called into question by the fact that the notary may instruct the person or body liable to pay out under the lost, stolen or destroyed instrument, not to make payment under it and, where applicable, to make a payment into court in respect of the amount which has since become due. These measures are ancillary and indispensable in relation to the principal task of the notary mentioned in the preceding paragraph of the present judgment.

134 As regards the activities carried out in connection with the dissolution of registered partnerships, it should be pointed out that, under Articles 36/A to 36/D of the Law on non-contentious notarial procedures, the notary is competent to dissolve a registered partnership only where both partners jointly and freely ask for that dissolution, where none of the registered partners has a child in respect of whom the partners jointly assume a maintenance obligation and where the partners have agreed on

matters relating to the maintenance obligation owed by one to the other, the use of the common dwelling and the distribution of the joint assets of the partnership, with the handling of other cases of dissolution of registered partnerships falling within the jurisdiction of the judiciary.

135 It must therefore be held that a notary's powers in matters relating to the dissolution of a registered partnership, which are based entirely on the wishes of the parties and leave the prerogatives of the courts intact in the absence of agreement between the parties, do not have any connection with the exercise of official authority (see, by analogy, judgment of 10 September 2015, *Commission* v *Latvia*, C-151/14, EU:C:2015:577, paragraphs 68 to 70).

136 As regards the entry of information in the register of declarations of partnership and in the national register of marriage contracts and the national register of partnership contracts, the Court has already held that activities relating to measures for the publicity of deeds do not reflect a direct and specific exercise of official authority by the notary (see, by analogy, judgment of 24 May 2011, *Commission* v *Luxembourg*, C-51/08, EU:C:2011:336, paragraph 113).

137 With respect to the determination of questions of succession in the event of the death of natural persons or of the dissolution of legal persons which are the subject of entries in the register of charges and sureties, of the safekeeping of instruments and of the deposit of monies, valuables and negotiable instruments, it should be noted that Hungary does not put forward any argument specifically demonstrating that such activities are connected with the exercise of official authority within the meaning of the first paragraph of Article 51 TFEU.

138 Furthermore, Hungary itself acknowledges that the activity of safekeeping of instruments in electronic archives does not consist in the exercise of official authority within the meaning of that provision.

139 Finally, as regards the particular status of notaries in the Hungarian legal system, it need only be recalled that it is by reference to the nature of the relevant activities themselves, not by reference to that status as such, that it must be ascertained whether those activities fall within the exception in the first paragraph of Article 51 TFEU (judgment of 1 December 2011, *Commission* v *Netherlands*, C-157/09, not published, EU:C:2011:794, paragraph 84).

140 In those circumstances, it must be concluded that the activities of notaries, as defined in the Hungarian legal system at the time that the period laid down in the supplementary reasoned opinion expired, are not connected with the exercise of official authority within the meaning of the first paragraph of Article 51 TFEU.

141 Consequently, the nationality condition required by Hungarian legislation for access to the notarial profession constitutes discrimination on grounds of nationality prohibited by Article 49 TFEU.

142 Having regard to all of the foregoing considerations, it must be held that the Commission's action is well founded.

143 Consequently, it must be held that, by imposing a nationality requirement for access to the notarial profession, Hungary failed to fulfil its obligations under Article 49 TFEU.

**Costs**

144 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party must be ordered to pay the costs if they have been applied for in the other party's pleadings. Since the Commission has requested that Hungary be ordered to pay the costs and the latter has been unsuccessful, Hungary must be ordered to pay the costs.

145 Under Article 140(1) of those rules the Member States and the institutions which have intervened in the case must bear their own costs. Accordingly, the Czech Republic shall bear its own costs.

On those grounds, the Court (First Chamber) hereby:

1. **Declares that, by imposing a nationality requirement for access to the notarial profession, Hungary failed to fulfil its obligations under Article 49 TFEU;**

2. **Orders Hungary to pay the costs;**

3. **Orders the Czech Republic to bear its own costs.**

[Signatures]