ECLI:EU:C:2016:108

JUDGMENT OF THE COURT (Grand Chamber)

23 February 2016 (*)

(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)

In Case C-179/14,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 10 April 2014,

European Commission, represented by A. Tokár and E. Montaguti, acting as Agents, with an address for service in Luxembourg,

applicant,

v

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

defendant,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, M. Ilešič, L. Bay Larsen, D. Šváby, F. Biltgen and C. Lycourgos, Presidents of Chambers, A. Rosas, E. Juhász, M. Safjan, M. Berger, A. Prechal (Rapporteur) and K. Jürimäe, Judges,

Advocate General: Y. Bot,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 12 May 2015,

after hearing the Opinion of the Advocate General at the sitting on 17 September 2015,

gives the following

Judgment

1 By its application, the European Commission claims that the Court should:

– declare that, by introducing and retaining the Széchenyi leisure card ('SZÉP card') scheme provided for by Government Decree No 55/2011 of 12 April 2011 regulating the issue and use of the Széchenyi leisure card, and amended by Law No CLVI of 21 November 2011 amending certain tax laws and other related measures ('Government Decree No 55/2011'), Hungary has infringed Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36), in so far as:

– Paragraph 13 of Government Decree No 55/2011, read in conjunction with Paragraph 2(2)(d) of Law No XCVI of 1993 on voluntary mutual insurance funds ('the Law on mutual societies'), Paragraph 2(b) of Law No CXXXII of 1997 on branches and commercial agencies of undertakings which have their registered office abroad ('the Law on branches') and Paragraphs 1, 2(1) and (2), 55(1) and (3) and 64(1) of Law No IV of 2006 on companies and firms governed by commercial law ('the Law on commercial companies'), precludes the issue of SZÉP cards by branches and thereby infringes Article 14, point (3), and Article 15(2)(b) of Directive 2006/123;

– Paragraph 13 of Government Decree No 55/2011, read in conjunction with the above-mentioned national provisions, which does not recognise, for the purposes of the conditions laid down in Paragraph 13(a) to (c) of that decree, the activity of groups whose parent company is not a company formed in accordance with Hungarian law and whose members do not operate in the forms of company provided for by Hungarian law, infringes Article 15(1), (2)(b) and (3) of Directive 2006/123;

– Paragraph 13 of Government Decree No 55/2011, read in conjunction with the above-mentioned national provisions, which 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 decree, infringes Article 15(1), (2)(d) and (3) of Directive 2006/123;

– Paragraph 13 of Government Decree No 55/2011 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 previously mentioned in this paragraph do not apply to the aforementioned national provisions, declare that the SZÉP card scheme governed by Government Decree No 55/2011 infringes Articles 49 TFEU and 56 TFEU;

– declare that the system of Erzsébet vouchers governed by Law No CLVI of 21 November 2011 and by Law No CIII of 6 July 2012 on the Erzsébet programme ('the Erzsébet Law') 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 21 November 2011 and Paragraphs 2(1) and (2), 6 and 7 of the Erzsébet Law lay down disproportionate restrictions.

Legal context

EU law

2 Recitals 2, 5, 18, 36, 37, 40, 64, 65 and 73 of Directive 2006/123 state:

'(2) A competitive market in services is essential in order to promote economic growth and create jobs in the European Union. At present numerous barriers within the internal market prevent providers, particularly small and medium-sized enterprises (SMEs), from extending their operations beyond their national borders and from taking full advantage of the internal market. This weakens the worldwide competitiveness of European Union providers. A free market which compels the Member States to eliminate restrictions on cross-border provision of services while at the same time increasing transparency and information for consumers would give consumers wider choice and better services at lower prices.

...

(5) It is therefore necessary to remove barriers to the freedom of establishment for providers in Member States and barriers to the free movement of services as between Member States and to guarantee recipients and providers the legal certainty necessary for the exercise in practice of those two fundamental freedoms of the Treaty. Since the barriers in the internal market for services affect operators who wish to become established in other Member States as well as those who provide a service in another Member State without being established there, it is necessary to enable providers to develop their service activities within the internal market either by becoming established in a Member State or by making use of the free movement of services. Providers should be able to choose between those two freedoms, depending on their strategy for growth in each Member State.

...

(18) 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. Consequently, this exclusion should cover all financial services such as banking, credit, insurance, including reinsurance, occupational or personal pensions, securities, investment funds, payments 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 relating to the taking up and pursuit of the business of credit institutions [(OJ 2006 L 177, p. 1)].

...

(36) The concept of "provider" should cover any natural person who is a national of a Member State or any legal person engaged in a service activity in a Member State, in exercise either of the freedom of establishment or of the free movement of services. The concept of provider should thus not be limited solely to cross-border service provision within the framework of the free movement of services but should also cover cases in which an operator establishes itself in a Member State in order to develop its service activities there. …

(37) The place at which a provider is established should be determined in accordance with the case law of the Court of Justice according to which the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period. … 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. ...

...

(40) The concept of "overriding reasons relating to the public interest" to which reference is made in certain provisions of this Directive has been developed by the Court of Justice in its case law in relation to Articles [49 and 56 TFEU] and may continue to evolve. The notion as recognised in the case law of the Court of Justice covers at least the following grounds: … the protection of the recipients of services; consumer protection; … the protection of creditors …

...

(64) In order to establish a genuine internal market for services, it is necessary to abolish any restrictions on the freedom of establishment and the free movement of services which are still enshrined in the laws of certain Member States and which are incompatible with Articles [49 and 56 TFEU] respectively. The restrictions to be prohibited particularly affect the internal market for services and should be systematically dismantled as soon as possible.

(65) Freedom of establishment is predicated, in particular, upon the principle of equal treatment, which entails the prohibition not only of any discrimination on grounds of nationality but also of any indirect discrimination based on other grounds but capable of producing the same result. Thus, access to a service activity or the exercise thereof in a Member State, either as a principal or secondary activity, should not be made subject to criteria such as place of establishment, residence, domicile or principal provision of the service activity. …

...

(73) The requirements to be examined include national rules which, on grounds other than those relating to professional qualifications, reserve access to certain activities to particular providers. These requirements also include obligations on a provider to take a specific legal form, in particular to be a legal person, to be a company with individual ownership, to be a non-profit making organisation or a company owned exclusively by natural persons …'

3 Article 1 of Directive 2006/123, which is entitled 'Subject matter', provides in paragraph 1:

'This Directive establishes general provisions facilitating the exercise of the freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services.'

4 Article 2 of the directive, entitled 'Scope', provides:

'1. This Directive shall apply to services supplied by providers established in a Member State.

2. This Directive shall not apply to the following activities:

...

(b) 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;

...'

5 Article 4 of Directive 2006/123 provides:

'For the purposes of this Directive:

(1) "service" means any self-employed economic activity, normally provided for remuneration, as referred to in Article [57 TFEU];

(2) “provider” means any natural person who is a national of a Member State, or any legal person as referred to in Article [54 TFEU] and established in a Member State, who offers or provides a service;

...

(4) “Member State of establishment” means the Member State in whose territory the provider of the service concerned is established;

(5) “establishment” means the actual pursuit of an economic activity, as referred to in Article [49 TFEU], by the provider for an indefinite period and through a stable infrastructure from where the business of providing services is actually carried out;

...

(8) “overriding reasons relating to the public interest” means reasons recognised as such in the case law of the Court of Justice, including the following grounds: … the protection of consumers, recipients of services …

…

(10) “Member State where the service is provided” means the Member State where the service is supplied by a provider established in another Member State;

…’

6 Chapter III of Directive 2006/123 is entitled ‘Freedom of establishment for providers’. Section 2 of Chapter III is entitled ‘Requirements prohibited or subject to evaluation’ and Articles 14 and 15 of the directive form part of that section.

7 Entitled ‘Prohibited requirements’, Article 14 of Directive 2006/123 provides:

‘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;

...’

8 Article 15 of the directive, entitled ‘Requirements to be evaluated’, provides, inter alia:

‘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 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.

...

6. From 28 December 2006 Member States shall not introduce any new requirement of a kind listed in paragraph 2, unless that requirement satisfies the conditions laid down in paragraph 3.

...’

9 Chapter IV of Directive 2006/123 is entitled ‘Free movement of services’. Section 1 of that chapter, which is entitled ‘Freedom to provide services and related derogations’, contains Article 16 of the directive, which, under the title ‘Freedom to provide services’, provides:

‘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;

(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. …

...’

Hungarian law

The Income Tax Law

10 Paragraph 71 of Law No CXVII of 1995 on personal income tax ('the Income Tax Law') permits employers to provide benefits in kind to their employees under advantageous tax conditions.

11 Paragraph 71(1) of the Income Tax Law was amended by Law No CLVI of 21 November 2011, the amendment entering into force in accordance with Paragraph 477 Law No CLVI on 1 January 2012. Paragraph 71(1), as amended, provides:

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

...

(b) …

(bb) on the income received in the form of Erzsébet vouchers, the portion of income not exceeding 5 000 [Hungarian forint (HUF) (approximately EUR 16)] [increased to HUF 8 000 (approximately EUR 26) from 1 January 2013] 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) concerning the [SZÉP card],

(ca) assistance limited to a maximum of HUF 225 000 [(approximately EUR 720)] 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];

(cb) assistance limited to a maximum of HUF 150 000 [(approximately EUR 480)] 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 [Government] Decree [No 55/2011] and supplied at restaurants where hot food is served (including catering at the place of work);

(cc) assistance limited to a maximum of HUF 75 000 [(approximately EUR 240)] 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 [Government] Decree [No 55/2011] which are intended to serve the purposes of leisure, recreation and staying healthy;

...'

12 In accordance with Paragraph 3, point 87, of the Income Tax Law, as amended by Paragraph 1(5) of Law No CLVI of 21 November 2011:

'For the purposes of this Law, the following terms shall have the following meanings:

...

(87) “Erzsébet vouchers”: vouchers issued by the [Magyar Nemzeti Üdülési Alapítvány (Hungarian National Recreation Foundation ‘HNRF’)] in electronic form or in paper form which may be used to purchase ready-to-eat meals ….’

Government Decree No 55/2011

13 Under Paragraph 2(2)(a) of Government Decree No 55/2011, the SZÉP card ‘serves only to identify the employee receiving the assistance, 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’.

14 Paragraph 13 of that decree provides:

‘Any service provider within the meaning of Paragraph 2(2)(d) of the Law on mutual societies shall be authorised to issue the [SZÉP] 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 Income Tax Law and has issued more than 25 000 voucher cards according to the figures for its last complete financial year.

…’

The Law on mutual societies

15 Paragraph 2(2)(a) and (d) of the Law on mutual societies includes the following definitions :

‘(a) “voluntary mutual insurance fund (‘mutual society’)”: an association formed by natural persons (“members of a mutual society”) on the basis of the principles of

independence, mutuality, solidarity and voluntary participation, which organises and finances supplies of services which complete, supplement or replace those provided for by the Social Security system as well as services for safeguarding health ("services"). The mutual society organises, finances and provides its services by virtue of the regular contributions paid by its members, on the basis of individual account management. Provision about the rules concerning management and responsibility and the powers related to the mutual society's activity is made by the present Law;

...

(d) "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. The following, in particular, shall be regarded as a service provider: any person carrying out depositary functions on behalf of the mutual society defined above or authorised by the mutual society to carry out investments on its behalf and/or to manage its accounting and records, and any person responsible for attracting new members to the mutual society or for organising services on behalf of health insurance funds. Any person who, on the basis of a contract concluded with the service provider as referred to in this point, carries out the transactions defined above in relation to the mutual society, shall also be classified as a service provider.'

The Law on commercial companies

16 Paragraph 1(1) of the Law on commercial companies provides:

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

17 Under Paragraph 2 of that Law:

'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.'

18 As regards recognised groups of companies, Paragraph 55 of the Law on commercial companies provides:

'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.'

19 Paragraph 64(1) of the Law on commercial companies provides:

'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 controlling company and the controlled 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.'

The Law on branches

20 Paragraph 2(b) of the Law on branches states:

'For the purposes of this Law:

...

(b) "branch" means 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'.

The Erzsébet Law

21 Paragraph 1 of the Erzsébet Law provides:

'The objective of the Erzsébet programme is to reduce significantly, in the existing framework, the number of socially deprived persons, 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.'

22 In accordance with Paragraph 2 of the Erzsébet Law:

‘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 [HNRF] which may be used:

(ba) for purchasing ready-to-eat meals and hot food served in restaurants,

(bb) for purchasing particular products and services provided in consideration for the payment of taxes and duties for which the payer is liable, or tax-free,

(bc) for purchasing products and services that are necessary for children’s education and for the care of children,

(bd) for purchasing products and services prescribed by law, for social purposes.

2. The HNRF shall be responsible for implementing the Erzsébet programme.

…’

23 The HNRF is a foundation serving the public interest which is registered in Hungary. It uses the resources allocated to it for the purpose of social holidays, the provision of related services and other programmes of a social nature.

24 Paragraph 6(1) of the Erzsébet Law provides that ‘the [HNRF] may, for the purpose of carrying out tasks connected with the Erzsébet programme, conclude contracts with civil-society bodies, commercial companies and any other natural or legal person.’

25 Paragraph 7 of the Erzsébet Law concerns the entry into force of that law.

Pre-litigation procedure and proceedings before the Court

26 The Commission took the view that in adopting, in 2011, 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), 15(1), (2)(b) and (d), and (3) and 16 of Directive 2006/123, as well as under Articles 49 TFEU and 56 TFEU, and, on 21 June 2012, the Commission thus sent Hungary a letter of formal notice. Hungary replied by a letter dated 20 July 2012 in which it disputed all the allegations of infringement.

27 On 22 November 2012, the Commission issued a reasoned opinion in which it maintained that the national legislation concerned did not comply with the above-mentioned provisions of EU law, with the exception, however, of Article 10 of Directive

2006/123, infringement of which was no longer alleged. Accordingly, the Commission called on Hungary to take the measures necessary to comply with that reasoned opinion within one month of the date of receipt thereof.

28 Since the Commission was not satisfied with the explanations provided by Hungary in its response of 27 December 2012, it decided to bring the present action.

The action

29 In its action the Commission puts forward various complaints concerning the conditions which the Hungarian legislation imposes in respect of the activity of issuing certain instruments conferring a tax advantage, on presentation of which employees may obtain, from service providers, certain services relating to accommodation, leisure and food, which represent benefits in kind provided to those employees by their employer.

30 In the present case, the complaints concern, more specifically, the legislative framework applicable to two of those instruments, namely (i) the SZÉP card and (ii) the Erzsébet vouchers, each of which will be considered in turn below.

The complaints concerning the conditions for issuing the SZÉP card

31 The Commission draws attention to the fact that, under Paragraph 71(1) of the Income Tax Law, food services offered by restaurants and public catering establishments, other than work canteens, may be classified as benefits in kind within the meaning of that law only where a SZÉP card is used.

32 It submits that the conditions for issuing the SZÉP card, as they are set out in Paragraph 13 of Government Decree No 55/2011, are so restrictive that only an extremely limited number of undertakings are in a position to issue that card.

33 In its action the Commission maintains, primarily, that, because of their restrictive nature, those conditions infringe, on various accounts, Articles 14 to 16 of Directive 2006/123. In the alternative, it argues that those conditions infringe Articles 49 TFEU and 56 TFEU.

The complaints concerning infringement of Directive 2006/123

34 As a preliminary point, it should be observed that, according to the explanations provided by the parties, the SZÉP card is an instrument conferring a tax advantage, on presentation of which employees may obtain, from service providers who have entered into a contract with the issuer of the instrument, a range of particular services, namely accommodation services, certain leisure services and catering services, which are benefits in kind provided to those employees by their employer. The service providers, for their part, are subsequently paid by the issuer of the card in accordance with the contract binding the issuer to the employer.

35 Paragraph 2(2)(a) of Government Decree No 55/2011 specifies that the SZÉP card serves only to identify the employee and the service provider and is not suitable for storing electronic money or carrying out direct payment transactions.

36 As the Advocate General has noted in points 62 to 65 of his Opinion, the activity of issuing the SZÉP card thus does not constitute a 'financial service' excluded under Article 2(2)(b) of Directive 2006/123 from the latter's scope, a proposition that the Hungarian Government has not challenged before the Court.

– The first complaint, concerning infringement of Article 14, point 3, and Article 15(2)(b) of Directive 2006/123

Arguments of the parties

37 By its first complaint, as expressed in the form of order it seeks, the Commission has asked the Court to declare that, by precluding branches from issuing the SZÉP card, Paragraph 13 of Government Decree No 55/2011, 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, infringes Article 14, point 3, and Article 15(2)(b) of Directive 2006/123.

38 In response to a question from the Court, the Commission nonetheless stated, at the hearing, that it was withdrawing the second part of this complaint, concerning an infringement of Article 15(2)(b) of that directive.

39 As regards the part of the complaint concerning an infringement of Article 14, point (3), of Directive 2006/123, the Commission argues that it follows from the set of national provisions mentioned in paragraph 37 of this judgment that branches of foreign companies cannot have the status of 'service provider' as referred to in Paragraph 13 of Government Decree No 55/2011 and that they are therefore not authorised to issue SZÉP cards.

40 The Commission submits that such an exclusion is in breach of Article 14, point 3, of Directive 2006/123, which prohibits Member States, absolutely and without any possibility of justification, from making access to a service activity in their territory subject to a requirement restricting the freedom of a provider to choose between a principal or a secondary establishment, including restrictions on the freedom to choose between establishment in the form of an agency, branch or subsidiary.

41 In its defence the Hungarian Government contends, in essence, that, since the exclusion of branches of foreign companies makes it possible to ensure that issuers of SZÉP cards are properly integrated into Hungarian economic life and thus have the requisite experience and infrastructure, such a measure is justified in view of the objectives pursued in the present case of protecting consumers (that is, the employees

using the SZÉP cards) and of protecting creditors (that is, the providers which agree to the use of such cards) against the risks related to the insolvency of SZÉP card issuers.

Findings of the Court

42 It must be stated at the outset that it is common ground between the parties that, under Paragraph 13 of Government Decree No 55/2011, read in conjunction with the other provisions of national law listed in paragraph 37 of this judgment, the Hungarian branches of companies incorporated in other Member States are not authorised to operate in Hungary as issuers of SZÉP cards.

43 It should be borne in mind in that regard that Article 14 of Directive 2006/123 prohibits Member States from making access to, or the exercise of, a service activity in their territory subject to compliance with any of the requirements listed in points 1 to 8 of that provision, obliging them to ensure that those requirements be removed, systematically and as a matter of priority (judgment in *Rina Services and Others*, C-593/13, EU:C:2015:399, paragraph 26).

44 The requirements that are thus prohibited include, as is clear from Article 14, point (3), of the directive, requirements which restrict 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. That is precisely the case, as has been noted in paragraph 42 of this judgment, of the national legislation at issue.

45 As regards the grounds put forward as justification by the Hungarian Government, the Court has already held that it follows both from the wording of Article 14 of Directive 2006/123 and from the general scheme of the directive that no justification can be given for the requirements listed in that article (judgment in *Rina Services and Others*, C-593/13, EU:C:2015:399, paragraphs 28 to 35).

46 The Court has stressed in that regard that such a prohibition, with no possibility of justification, seeks to ensure the systematic and swift removal of certain restrictions on the freedom of establishment, which are regarded by the EU legislature and the case-law of the Court as adversely affecting the proper functioning of the internal market, and thus pursues an aim which is consistent with the FEU Treaty (judgment in *Rina Services and Others*, C-593/13, EU:C:2015:399, paragraph 39).

47 Accordingly, even though Article 52(1) TFEU allows the Member States to justify, on any of the grounds listed in that provision, national measures constituting a restriction on the freedom of establishment, that does not prevent the EU legislature, when adopting secondary legislation, such as Directive 2006/213, giving effect to a fundamental freedom enshrined in the Treaty, from restricting certain derogations, especially when, as in the present case, the relevant provision of secondary law merely reiterates settled case-law of the Court to the effect that a requirement such as that at issue is incompatible with the fundamental freedoms on which economic operators can rely (see, to that effect, judgment in *Rina Services and Others*, C-593/13, EU:C:2015:399, paragraph 40).

48 In those circumstances, the first complaint must be accepted in so far as it concerns an infringement of Article 14, point (3), of Directive 2006/123.

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

Arguments of the parties

49 By its second complaint, the Commission asks the Court to declare that Paragraph 13 of Government Decree No 55/2011, read in conjunction with the other national provisions listed in paragraph 37 of this judgment, in failing to recognise, with regard to the conditions contained in Paragraph 13(a) to (c) of that decree, the activity of groups whose parent company is not a company formed in accordance with Hungarian law and whose members do not operate in the forms of company provided for under Hungarian law, infringes Article 15(1), (2)(b) and (3) of Directive 2006/123.

50 In that regard, the Commission submits that Paragraph 13 of Government Decree No 55/2011 provides that, in order to be entitled to issue the SZÉP card, a service provider must fulfil the conditions set out in points (a) to (c) of Paragraph 13, if need be through the intermediary of a company group which is recognised by the Law on commercial companies or is in fact operating as such and to which the provider belongs.

51 The Commission maintains that, under Paragraphs 55(1) and (3) and 64 of that law, only a commercial company may be classified as a controlling company of such a company group, while, under Paragraphs 1(1) and 2 of that law, a commercial company must have a registered office in Hungarian territory and may be constituted only in a form provided for by that law. The Commission further submits that Paragraph 55(1) provides, with regard to groups of companies, that a controlled company may only be a public limited company or a private limited company, formed in accordance with Hungarian law and having its registered office in Hungary.

52 The Commission maintains that those requirements thus infringe Article 15(2)(b) and (3) of Directive 2006/123 under which undertakings may not be obliged to take a specific legal form, unless such an obligation is non-discriminatory and is necessary and proportionate. Those requirements are, so the Commission argues, discriminatory since they clearly place commercial companies whose registered office is not in Hungary at a disadvantage and, furthermore, the Hungarian Government has failed to demonstrate specifically that those requirements are necessary and proportionate.

53 In its defence the Hungarian Government argues, in essence, that the restrictions thus related to membership of a group of undertakings make it possible to ensure that issuers of SZÉP cards are properly integrated into Hungarian economic life and thus have the requisite infrastructure and experience, in particular with regard to the issue and management of electronic vouchers similar to the SZÉP card: as a consequence those

restrictions are, in its submission, justified in view of the objectives of protecting consumers and creditors, to which reference has already been made in paragraph 41 of this judgment.

Findings of the Court

54 It should be recalled that, in accordance with Article 15(1) of Directive 2006/123, Member States must examine whether, under their legal system, any requirements such as those listed in Article 15(2) are imposed and ensure that any such requirements are compatible with the conditions laid down in Article 15(3).

55 Article 15(2)(b) of Directive 2006/123 covers requirements which make access to a service activity, or the exercise of such an activity, subject to an obligation for the provider to take a specific legal form.

56 The cumulative conditions listed in Article 15(3) of Directive 2006/123 concern (i) the non-discriminatory nature of the requirements concerned, which cannot be directly or indirectly discriminatory according to nationality or, with regard to companies, according to the location of the registered office, (ii) the fact that the requirements are necessary, that is to say, they must be justified by an overriding reason relating to the public interest, and (iii) their proportionality, which means that they must be suitable for securing the attainment of the objective pursued and not go beyond what is necessary to attain it and that it must not be possible to replace them with other, less restrictive measures which attain the same result.

57 Article 15(6) of Directive 2006/123 provides moreover that, from 28 December 2006, the Member States are not to introduce any new requirement of the kind listed in Article 15(2), unless that requirement satisfies the conditions laid down in Article 15(3).

58 In the present case, the Commission's complaints seek to obtain a declaration that the national provisions which it designates in its application introduce requirements of the kind listed in Article 15(2)(b) of Directive 2006/123 and that, since those requirements fail to satisfy the conditions set out in Article 15(3), the national provisions in question infringe Article 15(1) to (3) of the directive.

59 It is therefore necessary to determine whether the requirements deriving from those national provisions are caught, as the Commission maintains, by Article 15(2)(b) of the directive.

60 In order to determine the full significance of Article 15(2)(b), reference should be made not only to its wording, but also to its purpose and broad logic, in the context of the scheme laid down by Directive 2006/123 (see, by analogy, judgment in *Femarbel*, C-57/12, EU:C:2013:517, paragraph 34).

61 Article 15(2)(b) of Directive 2006/123 concerns, according to the terms in which it is cast, situations in which the 'provider' is required to 'take a specific legal form'.

62 In that regard it is clear from recital 73 of Directive 2006/123 that that is the case where, for example, there is an obligation to have legal personality, to establish a single-member company or to take the form of a non-profit making organisation or a company owned exclusively by natural persons. As is suggested both by the non-exhaustive nature of that list and by its content, the concept of 'specific legal form' used in Article 15(2)(b) of Directive 2006/123 must be understood in a broad sense.

63 A broad interpretation of that kind is, moreover, in keeping with the objective of Directive 2006/123 which, as is clear from recitals 2 and 5 thereof, is intended to remove restrictions on the freedom of establishment for providers in the Member States and on the free movement of services between Member States, in order to contribute to the completion of a free and competitive internal market (see, inter alia, judgment in *Société fiduciaire nationale d'expertise comptable*, C-119/09, EU:C:2011:208, paragraph 26). Indeed, legislation of a Member State which requires a provider to have a particular legal form or status constitutes a significant restriction on the freedom of establishment of providers and on the freedom to provide services (see to that effect, inter alia, judgments in *Commission* v *Italy*, C-439/99, EU:C:2002:14, paragraph 32, and *Commission* v *Portugal*, C-171/02, EU:C:2004:270, paragraphs 41 and 42).

64 In the present case, it follows from Paragraph 13 of Government Decree No 55/2011, read in conjunction with the other provisions mentioned in paragraph 37 of this judgment, in particular those of the Law on commercial companies, that the status of SZÉP card issuer may, in cases where the provider seeks to fulfil the conditions laid down in Paragraph 13 jointly with another company in the context of a company group, be subject inter alia to the condition that the issuer be part of a group of companies in which it (i) takes the form of a commercial company and, more specifically, that of a public limited company, or a private limited company, governed by Hungarian law, and (ii) is the subsidiary of a commercial company governed by Hungarian law which, itself, fulfils the conditions set out in Paragraph 13(a) to (c) of Government Decree No 55/2011.

65 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.

66 In accordance with Article 15(3)(a) of Directive 2006/123, the requirements listed in paragraph 2 of that article are not incompatible with the provisions of the directive, provided that, amongst other things, they are neither directly nor indirectly discriminatory, with regard to companies, in terms of the location of the registered office.

67 In the present case, the obligations mentioned in paragraph 65 of this judgment 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 Hungarian law, which, by virtue of Paragraphs 1(1), 2 and 55(1) of the Law on commercial companies, presupposes that their registered offices are located in Hungary.

68 It follows that the conditions laid down in Article 15(3)(a) of Directive 2006/123 are not satisfied.

69 Whilst such a conclusion is sufficient for a finding of non-compliance with the conditions set out in Article 15(3) of Directive 2006/123, given that those conditions are cumulative, it should also be stated that the Hungarian Government — by merely asserting, in order to justify the requirements concerning the legal form of a SZÉP card issuer and of that issuer's parent company, that it is essential for the issuer and its parent company to be integrated into Hungarian economic life and for the issuer to have the requisite experience and infrastructure — has not put forward any specific matters or arguments capable of demonstrating in what respect such requirements are necessary and proportionate for the purpose of ensuring that SZÉP card issuers offer the guarantees of solvency, professionalism and accessibility that appear necessary in order to achieve that Government's stated objectives of protecting the users of such cards and creditors.

70 In the light of all the foregoing considerations, the requirements pertaining to the legal form of an issuer of SZÉP cards which follow from Paragraph 13 of Government Decree No 55/2011 and which are described in paragraph 65 of this judgment are in breach of Article 15(1), (2)(b) and (3) of Directive 2006/123, with the result that the second complaint must be upheld.

– The third complaint, concerning infringement of Article 15(1), (2)(d) and (3) of Directive 2006/123

Arguments of the parties

71 By its third complaint, the Commission asks the Court to declare that Paragraph 13 of Government Decree No 55/2011, read in conjunction with the other national provisions listed in paragraph 37 of this judgment, restricts to banks and other 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 decree and thereby infringes Article 15(1), (2)(d) and (3) of Directive 2006/123.

72 According to the Commission, the conditions prescribed by Paragraph 13(1) to (c) of Government Decree No 55/2011 — according to which the issuer of a SZÉP card must (i) have an office open to customers in each municipality of Hungary with more than 35 000 inhabitants, (ii) have, in the course of its last complete financial year, itself issued at least 100 000 payment instruments other than cash in the framework of its payment services and (iii) have at least two years' experience in the issuing of electronic voucher cards conferring a right to benefits in kind within the meaning of Paragraph 71 of the Income Tax Law and have issued more than 25 000 voucher cards in the course of its last

complete financial year — amount to requiring all issuers of SZÉP cards to carry on a principal activity corresponding to that of banking and financial institutions.

73 In that regard, it is apparent from the register managed by the Hungarian Commercial Licensing Office that only three banks, whose company seats are in Hungary, have been in a position to fulfil those conditions.

74 The Commission takes the view that the requirement for a principal activity of banking and financial business is incompatible with the conditions set out in Article 15(2)(d) and (3) of Directive 2006/123, under which, where access to a service activity is thus restricted by national rules to particular providers by virtue of the specific nature of that activity, such a restriction must be non-discriminatory, necessary and proportionate.

75 The Commission maintains that the conditions set out in Paragraph 13(a) to (c) of Government Decree No 55/2011 result in indirect discrimination since they can be met only by undertakings which are already established on the Hungarian market and thus prevent new undertakings from entering that market, as is confirmed by the finding mentioned in paragraph 73 of this judgment.

76 The Commission further submits that those conditions are neither necessary nor proportionate.

77 First, it submits that the Hungarian Government has not shown that specific problems arose under the legislation previously in force, which permitted the issue, by a much wider circle of undertakings, of vouchers that could be used to obtain benefits in kind. Second, it argues that the situation obtaining in the other Member States shows that the latter do not lay down comparable requirements to those imposed in Hungary. Third, the objectives of consumer protection and the protection of creditors can, in the Commission's submission, be achieved by less restrictive measures, such as, for example, the establishment of a system for supervising issuers or of a bank guarantee mechanism or the use of a telephone service or commercial agents. Fourth, even credit institutions, to which the issuers of SZÉP cards are likened, are not, in Hungary, subject to statutory conditions comparable to those laid down in Paragraph 13(a) to (c) of Government Decree No 55/2011.

78 In its defence the Hungarian Government advances two overriding reasons relating to the public interest which, in its submission, are such as to justify the requirements set out in Paragraph 13(a) to (c) of that decree, namely the protection of consumers and SZÉP card users, and of creditors who agree to the use of the SZÉP card, against the risks associated with the insolvency of the issuer of the SZÉP card and the inability of that issuer properly to perform the services it is to provide.

79 The Hungarian Government asserts in that regard that, at the date on which its defence was lodged, almost a million SZÉP cards had already been issued and some 55 000 contracts entered into between the issuing undertakings and service providers, whilst the figures relating to 2013 showed that, in the course of that year, the equivalent

of around EUR 227 million went into circulation following more than 20 million transactions carried out by means of SZÉP cards.

80 Given the scale of the logistical and financial management thus demanded of SZÉP card issuers, the requirements laid down by Paragraph 13(a) to (c) of Government Decree No 55/2011 are, in the Hungarian Government's submission, both necessary and proportionate with regard to the objectives mentioned in paragraph 76 of this judgment of protecting consumers and creditors, in that they ensure that those issuers have an extensive network of points of service located close to their customers allowing the latter to have personal contacts and that those issuers have a financial base that is stable and proportionate to the turnover envisaged, experience in managing large sums and in issuing electronic cards similar to the SZÉP card and a transparent and supervised way of operating in financial matters.

Findings of the Court

81 It should be recalled that Article 15(2)(d) of Directive 2006/123 covers requirements which reserve access to a service activity to particular providers by virtue of the specific nature of the activity.

82 In the present case, it must first be observed that, whilst the Commission accepts that, on a literal reading, the provisions of Paragraph 13(a) to (c) of Government Decree No 55/2011 do not expressly make the issue of SZÉP cards the preserve of banking and financial establishments, it argues that since, in practice, the conditions laid down by those provisions can be met only by such businesses, the national provisions concerned fall within the case described in Article 15(2)(d) of Directive 2006/123.

83 The Hungarian Government does not deny that that is the actual effect of the national provisions, but rather seeks to explain why it is, in its opinion, wholly justified, in view of risks associated with the issue and management of SZÉP cards and the complexity and particular sensitivity of such an activity, for that activity to be the preserve of banking or financial establishments, since they offer all the safeguards concerning financial and prudential matters, expertise and accessibility which are necessary in that area.

84 In those circumstances, the Court must determine whether the requirements laid down by Paragraph 13(a) to (c) of Government Decree No 55/2011 — which together, as is common ground between the parties, have the effect, if not the object, of restricting access to the issue of SZÉP cards to particular providers by virtue of the specific nature of the activity — satisfy the conditions set out in Article 15(3) of Directive 2006/123 (as the Hungarian Government claims to be the case and the Commission denies).

85 In that regard, the Court must, first, satisfy itself, taking account of Article 15(3)(a) of Directive 2006/123, that those requirements are neither directly nor indirectly discriminatory according to nationality nor, with regard to companies, according to the location of the registered office.

86 In view of the nature of the requirements set out in Paragraph 13(a) to (c) of Government Decree No 55/2011, which it seems, prima facie, may be met only by legal persons, it must first of all be stated that that provision, which does not include an express condition regarding the location of the registered office of SZÉP card issuers, does not in itself entail direct discrimination based on such a condition, without prejudice to the finding already made in paragraphs 67 and 68 of this judgment.

87 However, given, in particular, that Paragraph 13 of Government Decree No 55/2011, as is clear from point (a) thereof, requires an issuer of SZÉP cards to have, in each municipality of Hungary with more than 35 000 inhabitants, an office open to customers, the cumulative requirements set out in Paragraph 13(a) to (c) of that decree can be satisfied only by banking or financial establishments whose registered office is in Hungary, as is confirmed by the finding mentioned in paragraph 73 of this judgment, which was made by the Commission and has not been disputed by the Hungarian Government.

88 Although they are based on criteria other than that of the location of the registered office in the Member State concerned, those 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 and must therefore be regarded, as is apparent in particular from recital 65 of Directive 2006/123, as being such as to give rise to indirect discrimination for the purposes of Article 15(3) of the directive.

89 As has been stated in paragraph 42 of this judgment, it is, moreover, common ground between the parties that, under Paragraph 13 of Government Decree No 55/2011, read in conjunction with the other provisions of national law listed in paragraph 37 of this judgment, only companies whose registered office is in Hungary — to the exclusion of Hungarian branches of companies incorporated in another Member State — may operate in Hungary as issuers of SZÉP cards.

90 Since, as has been recalled in paragraph 69 of this judgment, the conditions in Article 15(3) of Directive 2006/123 are cumulative, that finding is sufficient to establish non-compliance with that provision.

91 Furthermore, even if, as the Hungarian Government maintains, requirements such as those laid down by Paragraph 13(a) to (c) of Government Decree No 55/2011 pursue an objective of protecting consumers and creditors by seeking to ensure that SZÉP card issuers offer adequate safeguards in terms of solvency, professionalism and accessibility, the fact remains that that Government has failed 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.

92 The Court finds in that regard that the combined effect of those requirements is to restrict the issuing of SZÉP cards exclusively to those institutions capable of showing (i) that they have experience of issuing both payment instruments other than cash and

electronic instruments conferring entitlement to benefits in kind under the national legislation concerned and (ii) that they have a large number of offices in Hungary.

93 Even if the discriminatory nature of those requirements is disregarded, it must still be noted that measures that are less restrictive of the freedom of establishment than those deriving from Paragraph 13(a) to (c) of Government Decree No 55/2011 would achieve the objectives invoked by the Hungarian Government, namely ensuring that SZÉP card issuers offer the guarantees as to solvency, professionalism and accessibility that would appear to be necessary for the purpose of protecting both the users of those cards and creditors.

94 As the Commission has argued, that would seem to be the case of measures which — provided that they comply with the requirements of EU law — are aimed, for example, at ensuring that SZÉP card issuers are subject to a system of supervision or a mechanism entailing a bank guarantee or insurance (see, by analogy, judgment in *Commission* v *Portugal*, C-171/02, EU:C:2004:270, paragraph 43) and make provision for the use by issuers of telephone services or commercial agents.

95 It follows from the foregoing considerations that the conditions listed in Paragraph 13(a) to (c) of Government Decree No 55/2011 infringe Article 15(1), (2)(d) and (3) of Directive 2006/123, with the result that the third complaint must be upheld.

– The fourth complaint, concerning infringement of Article 16 of Directive 2006/123

Arguments of the parties

96 By its fourth complaint, the Commission asks the Court to declare that Paragraph 13 of Government Decree No 55/2011 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.

97 The Commission submits that Article 16(2)(a) of the directive expressly prohibits Member States from imposing an obligation on a service provider established in another Member State to have an establishment in their territory, unless the conditions set out in Article 16(1) are met, that is to say, the measure in question must be non-discriminatory, be justified for reasons of public policy, public security, public health or environmental protection and be necessary and proportionate.

98 The Commission argues that the general grounds of consumer and creditor protection relied on by the Hungarian Government are not covered by the categories of objectives thus referred to in Article 16(1) of Directive 2006/123 and maintains that that Government has also failed to establish, with regard to the objectives on which it relies, the necessity and proportionality of the measure at issue.

99 The Commission also disputes the assertion that Article 16 of Directive 2006/123 is not applicable in the circumstances of this case. In its view, and contrary to what is maintained by the Hungarian Government in this regard, it is, in practice, entirely feasible for an undertaking established in another Member State to issue SZÉP cards on a cross-border basis, particularly from and to areas that are relatively close to the border, without, however, being established in Hungary. Moreover, such an undertaking would also be entitled to use, in Hungarian territory, the infrastructure necessary for the purpose of providing its service without being obliged to establish itself there.

100 In its defence the Hungarian Government contends, as a preliminary point, that the legislation relating to the SZÉP card must be considered solely in relation to the freedom of establishment, since the freedom to provide services is, in this case, wholly secondary in relation to the freedom of establishment and can be linked to it. According to the Hungarian Government, the issuing of SZÉP cards requires, particularly in view of the data already mentioned in paragraph 79 of this judgment, that the operator be rooted in the economic and social life of the Member State where the service is provided and that it offer its services from an establishment located in that Member State, in a permanent and continuous fashion, and that those services be offered to the whole territory of the Member State and not just to certain border areas.

101 The Hungarian Government also maintains that, even if a service provider wished to carry on an activity of that kind as part of a cross-border business, the objective features of the activity concerned and the public-interest objectives of consumer and creditor protection already alluded to would then be grounds for the national legislation at issue linking the pursuit of that activity to strict conditions which only providers established in Hungary are capable of meeting.

Findings of the Court

102 Under Article 16(2)(a) of Directive 2006/123, Member States may not restrict the freedom to provide services in the case of a provider established in another Member State by imposing an obligation on the provider to have an establishment in their territory.

103 As is made clear by Article 4, point (5), of that directive, ‘establishment’ is to mean the actual pursuit of an economic activity, as referred to in Article 49 TFEU, by the provider for an indefinite period and through a stable infrastructure from where the business of providing services is actually carried out.

104 In that regard, it should first be recalled that Paragraph 13(a) of Government Decree No 55/2011 makes the activity of issuing SZÉP cards (which, it is not disputed, constitutes an economic activity as referred to in Article 49 TFEU) subject to the condition, inter alia, that the issuer has offices open to the public in every municipality in Hungary with more than 35 000 inhabitants.

105 It is obvious that Paragraph 13(a) thus requires all providers wishing to pursue that activity to have a stable infrastructure in Hungary from where the business of providing services is actually carried out.

106 That is the case, moreover, in the various situations provided for in Paragraph 13 of Government Decree No 55/2011, that is to say, depending on whether the provider has offices available itself or through the intermediary of a group of companies to which it belongs, or jointly with a mutual society with which the provider has had a contractual relationship for at least five years. In that regard, it must be noted that, as is clear from recital 37 of Directive 2006/123, an establishment can even take the form of an office managed by a person who is independent of the provider but authorised to act for him on a permanent basis, as would be the case with an agency.

107 It follows that Paragraph 13 of Government Decree No 55/2011 imposes an obligation on the issuer of a SZÉP card to have an establishment in Hungary, as referred to in Article 16(2)(a) of Directive 2006/123.

108 The Court must, in this regard, reject the Hungarian Government's objections (i) that Article 16 of Directive 2006/123 allegedly ceases to apply where a national measure is capable of simultaneously infringing both Article 16 and the provisions of the directive relating to the freedom of establishment and (ii) that recourse to cross-border service provision is obviously purely theoretical or, in any case, much less frequent, in practice, than the exercise of the freedom to set up an establishment in the Member State concerned for the purpose of providing services there.

109 First, the Hungarian Government has not shown that it would, in practice, be impossible for, and of no interest to, a service provider established in one Member State to provide a service such as the issuing and management of SZÉP cards in another Member State without having a stable infrastructure there from where the business of providing that service is actually carried out.

110 Secondly, the Hungarian Government's argument finds no support either in Article 16 of Directive 2006/123 or in any other provision of the directive and the argument also fails to take account of the key objectives of the EU legislature.

111 In that regard, it should be borne in mind, first, that Directive 2006/123, as is clear from Article 1 in conjunction with recitals 2 and 5, lays down general provisions, intended to remove restrictions on the freedom of establishment for service providers in Member States and on the free movement of services between Member States, in order to contribute to the completion of a free and competitive internal market (see judgment in *Femarbel*, C-57/12, EU:C:2013:517, paragraph 31 and the case-law cited).

112 According to recital 5 thereof, Directive 2006/123 is thus intended, inter alia, to enable service providers to develop their service activities within the internal market, either by becoming established in a Member State or by making use of the free

movement of services, while being able to choose between those two freedoms, depending on their strategy for growth in each Member State.

113 Next, it follows from Articles 2(1) and 4 of Directive 2006/123 that the latter applies to any self-employed economic activity, normally provided for remuneration, by a provider established in a Member State, whether or not the provider is established in a stable and continuous manner in the Member State in which the services are provided, with the exception of the activities expressly excluded (see, to that effect, judgment in *Femarbel*, C-57/12, EU:C:2013:517, paragraph 32).

114 Lastly, under the first subparagraph of Article 16(1) of Directive 2006/123, Member States must respect the right of providers to provide services in a Member State other than that in which the providers are established. Article 16(2)(a) of the directive provides that Member States may not restrict the freedom to provide services in the case of a provider established in another Member State by imposing an obligation on the provider to have an establishment in their territory.

115 The Court must also reject the Hungarian Government's argument seeking, in the alternative, to justify the restriction at issue on grounds relating to consumer and creditor protection, that is to say, ensuring that SZÉP card issuers offer adequate safeguards as regards solvency, professionalism and accessibility.

116 On this point and regardless of whether it is possible, under the terms of Article 16 of Directive 2006/123, to justify a requirement such as that referred to in paragraph 2(a) of that article and of the fact that the objectives which the Hungarian Government mentions are not among the overriding reasons relating to the public interest to which paragraphs 1 and 3 of Article 16 refer, it is sufficient to point out that a requirement such as that laid down by Paragraph 13 of Government Decree No 55/2011 would not, in any event, satisfy the proportionality test set out in Article 16(1)(c) of the directive even in relation to those objectives, since the latter could be achieved by means of measures that are less restrictive of the freedom to provide services than those resulting from that requirement, such as, for example, the measures mentioned in paragraph 94 of this judgment, assuming that they comply with EU law.

117 It follows from the foregoing considerations that the fourth complaint must be upheld.

The complaints concerning infringement of Articles 49 TFEU and 56 TFEU

118 Since the Commission's principal complaints, which concern Articles 14 to 16 of Directive 2006/123 have been upheld, there is no need to consider the complaints concerning infringement of Articles 49 TFEU and 56 TFEU, which the Commission has put forward in the alternative.

The complaints concerning the conditions for issuing Erzsébet vouchers

Arguments of the parties

119 In the form of order sought in its application, the Commission asks the Court to declare that the system of Erzsébet vouchers governed by Law No CLVI of 21 November 2011 and by the Erzsébet Law establishing a monopoly in favour of public bodies for the issue of vouchers for cold meals, which entered into force without any 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 21 November 2011 and Paragraphs 2(1) and (2), 6 and 7 of the Erzsébet Law lay down disproportionate restrictions.

120 The Commission submits that, under Paragraph 71(1) of the Income Tax Law, as amended by Law No CLVI of 21 November 2011, the purchase of ready-to-eat meals is no longer classified as a benefit in kind unless it is made in exchange for Erzsébet vouchers. It also draws attention to the fact that, under the national provisions mentioned in the previous paragraph of this judgment, only the HNRF is authorised to issue those vouchers.

121 The Commission argues that the monopoly thus generated on the market for issuing vouchers conferring a right to such benefits in kind prevents all exercise, by operators established in other Member States, of their freedom to provide services and their freedom of establishment with regard to that activity and thus infringes Articles 49 TFEU and 56 TFEU. The Commission explains in this regard that its action concerns solely this aspect of the Erzsébet voucher system and is in no way concerned with the social policy measures implemented by the HNRF in the context of the Erzsébet programme, such as direct assistance targeted at socially disadvantaged persons.

122 According to the Commission, since the activity of issuing Erzsébet vouchers, with which this action is concerned, is provided for remuneration, that activity — which in the past was carried on in Hungary by commercial companies, as remains the case in a number of Member States — constitutes an economic activity falling within the scope of the Treaty. The Commission argues, referring to the judgment in *Cisal* (C-218/000, EU:C:2002:36) that such an activity cannot be regarded as a social measure because the decision whether or not to award Erzsébet vouchers to employees as benefits in kind, under advantageous tax conditions, is a matter for the employer's discretion, without any social aim being pursued which applies the principle of solidarity subject to State control.

123 The Commission also submits that the monopoly at issue is not, in this case, justified by any overriding reason relating to the public interest; nor does it satisfy the requirements deriving from the principle of proportionality.

124 First, the Commission submits that neither the fact that profits from the activity concerned must be used by the HNRF exclusively for the purposes of social goals, nor the alleged inadequacy of available budgetary resources, which is said to represent a serious threat to the financial equilibrium of the social security system, is such as to constitute an overriding reason in the public interest that may be prayed in aid. Nor, in the

present case, does the monopoly at issue address the need to preserve the coherence of the Hungarian tax system.

125 Second, it argues that other less onerous methods than the establishment of such a monopoly exist which could be used for achieving the stated objective of financing social benefits. Those methods include, for example, use of the State budget, the imposition of a solidarity levy on the benefits in kind concerned, a reduction in the tax relief pertaining thereto or the purchase by public authorities of Erzsébet vouchers with a view to distributing them to the most disadvantaged persons, or even the imposition of an obligation on the issuers to make such vouchers available to the authorities responsible for social affairs.

126 Furthermore, the monopoly at issue was introduced without any appropriate transitional period, thereby generating heavy losses for the undertakings that had hitherto been present on the market concerned.

127 In its defence the Hungarian Government raises a plea of inadmissibility against the Commission's complaints on the ground that the form of order sought in the application is imprecise and ambiguous.

128 The Hungarian Government submits in that respect that the form of order sought contains, first, a clerical error in that it refers to Paragraphs 1 and 5 of Law No CLVI of 21 November 2011 instead of to Paragraph 1(5) of that Law. Second, Paragraph 477 of that Law and Paragraph 7 of the Erzsébet Law concern only the entry into force of those laws and therefore cannot entail an infringement of EU law. Third, it is not clear why the Commission maintains that Paragraphs 2(1) and (2) and 6 of the Erzsébet Law involve an infringement of EU law.

129 The Hungarian Government further submits that the fact that the Commission targets all the decisive provisions of the national legislation relating to the Erzsébet programme belies the Commission's assertion that the present action does not concern the social policy measures implemented under that programme.

130 As regards substance, the Hungarian Government's main contention is that it is only if a Member State has chosen to treat an activity as an ordinary economic activity that such an activity is open to free competition and subject to the Treaty rules.

131 It maintains that that is not the case of the issuing of Erzsébet vouchers, which does not involve offering goods or services on a given market, that is to say, on market terms and with a view to profit, since the revenue generated by that activity must, under the Erzsébet Law, be used by the HNRF for the performance of the public-interest tasks entrusted to it.

132 As regards the line of authority beginning with the judgment in *Cisal* (C-218/00, EU:C:2002:36), the Hungarian Government maintains that the Erzsébet programme is based on the principle of solidarity, since Erzsébet vouchers are also awarded as direct

social assistance depending on the recipients' resources and since, even when employers offer the vouchers to their employees as an element of their salary, those employers are at the same time acting in the knowledge that a social programme is being financed. The State also exercises control since the HNRF carries out the public-service tasks decided upon by the State and a representative of the Minister responsible for the Erzsébet programme has the task of putting forward proposals for developing that programme and preparing the regulations necessary to implement it.

133 The Hungarian Government contends that, as a result of the new rules in force, the issuing of Erzsébet vouchers has thus been integrated in the social protection system whose resources it bolsters by giving employers a tax incentive to become contributors to that system, which is in keeping with the principle that EU law is not to undermine the competence of the Member States to organise their social security systems and to have discretion as how to finance them and ensure their financial equilibrium.

134 The Hungarian Government also argues that, inasmuch as vouchers such as Erzsébet vouchers confer a right to a tax advantage and are thus meaningful only in the context of the tax policy of a given Member State, the market for such vouchers is not a cross-border market but a strictly national market that exists only if the Member State concerned establishes it. Accordingly, the Member State is free to decide, inter alia, to issue those tax policy instruments itself or to open that activity up to competition.

135 Nor, in the Hungarian Government's view, is it appropriate to draw an analogy with activities of games of chance, since it would not be possible, in this case, for an issuer to enter the market of a given Member State with vouchers that have been issued and put into circulation under the tax legislation of another Member State and, accordingly, there is no 'analogous' activity in the first Member State.

136 In the alternative, the Hungarian Government contends that the establishment of a State monopoly is in any event justified by overriding reasons relating to the public interest which are based on considerations of social policy and tax and wages policy.

137 In this regard, the Hungarian Government submits, first, each Member State may, in the context of its social policy, choose how to finance social benefits in its territory. Unlike the activities of gambling and betting which give rise to risks of addiction and fraud and must therefore be controlled and limited, there is no legitimate reason, as regards the issuing of Erzsébet vouchers, for requiring that the financing of activities in the public interest remain only an incidental beneficial consequence.

138 Secondly, given that each Member State is free to determine how many such vouchers, which confer entitlement to a tax advantage, may be allocated to employees and the extent of that advantage, a Member State may also retain for itself the right to issue the vouchers in the context of its tax and wages policies.

139 As regards the measures mentioned by the Commission which are allegedly less harmful of competition, the Hungarian Government submits that, even if it were possible

to achieve a public interest objective pursued by a Member State by other means — such as, for example, organising the activity on the basis of the market and taxing that activity –, the Court has already accepted, in its judgment in *Läärä and Others* (C-124/97, EU:C:1999:435), that 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 sought.

140 Furthermore, as regards the alleged lack of an adequate transitional period, the Hungarian Government contends that the Commission has not substantiated its allegations relating to the practical consequences for the operators concerned of the entry into force of the national provisions establishing the monopoly at issue. In addition, as regards the conferral of tax advantages, undertakings have no grounds for expecting the legislation in force to remain unchanged.

Findings of the Court

– Admissibility

141 Under Article 120(c) of the Court's Rules of Procedure and the case-law relating thereto, an application initiating proceedings must state the subject-matter of the proceedings, the pleas in law and arguments relied on and a summary of those pleas in law. That statement must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to rule on the application. It is therefore necessary for the essential points of fact and of law on which a case is based to be indicated coherently and intelligibly in the application itself and for the form of order to be set out unambiguously so that the Court does not rule *ultra petita* or fail to rule on a complaint (see, inter alia, judgment in *Parliament* v *Council*, C-317/13 and C-679/13, EU:C:2015:223, paragraph 17 and the case-law cited).

142 In the present case, it is clear from the form of order sought and from the arguments developed in the application that, by its plea, the Commission is seeking a declaration of infringement of Articles 49 TFEU and 56 TFEU inasmuch as (i) the national legislation specified in the application grants a national public body a monopoly for issuing vouchers conferring, under advantageous tax conditions, a benefit in kind in the form of ready-to-eat meals and (ii) that monopoly has been introduced without appropriate transitional measures.

143 As regards, first, the clerical error which the Commission made in referring, in the form of order sought in the application, to Paragraphs 1 and 5 of Law No CLVI of 21 November 2011 and in respect of which it has, in the meantime, sent a corrigendum, the Court finds that that error did not mislead the Hungarian Government as to the scope of the present action, that Government having, moreover, itself immediately pointed out in the defence that the relevant point obviously had to be read as referring to Paragraph 1(5) of that Law, a provision whose purpose was to amend Paragraph 3, point 87, of the Income Tax Law.

144 Second, the Commission's reference in the form of order sought to Paragraph 477 of Law No CLVI of 21 November 2011 and Paragraph 7 of the Erzsébet Law can readily be explained by the fact that those paragraphs concern the date of entry into force of the national provisions at issue, provisions criticised by the Commission because inter alia, as has just been recalled, they do not include appropriate transitional measures.

145 Third, as is clear both from the wording of the form of order sought by the Commission and from the grounds of the application, Paragraphs 2(1) and (2) and 6 of the Erzsébet Law are, like Paragraph 1(5) of Law No CLVI of 21 November 2011, referred to only in so far as it follows from those national provisions that the HNRF is granted a monopoly for issuing vouchers allowing an employer to provide his employees, under advantageous tax conditions, with a benefit in kind in the form of vouchers for ready-to-eat meals.

146 Accordingly, the application must be found to meet the conditions referred to in paragraph 141 of this judgment and the Hungarian Government's plea of inadmissibility must be rejected.

– Substance

147 In the first place, the Court must determine whether the issuing of vouchers with which this action is concerned is within the scope of Articles 49 TFEU and 56 TFEU or whether it lies outside their scope on the ground that, as the Hungarian Government maintains, it is not an economic activity.

148 It must be borne in mind that the objective of the freedom of establishment guaranteed by Article 49 TFEU is to allow a national of a Member State to set up a secondary establishment in another Member State to carry on his activities there and thus assist economic and social interpenetration within the European Union in the sphere of activities as self-employed persons. To that end, freedom of establishment is intended to allow a national of a Member State to participate, on a stable and continuing basis, in the economic life of a Member State other than his State of origin and to profit therefrom by actually pursuing in the host Member State an economic activity through a fixed establishment for an indefinite period (see to that effect, inter alia, judgment in *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04, EU:C:2006:544, paragraphs 53 and 54 and the case-law cited).

149 As is clear from the case-law, an economic activity may consist in offering goods and services (see to that effect, inter alia, judgment in *Pavlov and Others*, C-180/98 to C-184/98, EU:C:2000:428, paragraph 75 and the case-law cited).

150 As to the freedom to provide services laid down in Article 56 TFEU, it covers all services that are not offered on a stable and continuing basis from an established professional base in the Member State of destination (see, inter alia, judgments in *Gebhard*, C-55/94, EU:C:1995:411, paragraph 22, and *Commission* v *Portugal*, C-171/02, EU:C:2004:270, paragraph 25).

151 Under Article 57 TFEU, services normally provided for remuneration, including activities of a commercial character, are considered to be ‘services’ within the meaning of the Treaties.

152 As the Court has recalled on a number of occasions, the concept of services may not be interpreted restrictively (see to that effect, inter alia, judgment in *Deliège*, C-51/96 and C-191/97, EU:C:2000:199, paragraph 52 and the case-law cited).

153 According to settled case-law of the Court, that concept means ‘services ... normally provided for remuneration’, the essential characteristic of remuneration lying in the fact that it constitutes consideration for the service in question (see, inter alia, judgment in *Jundt*, C-281/06, EU:C:2007:816, paragraphs 28 and 29 and the case-law cited).

154 The decisive factor which brings an activity within the ambit of the FEU Treaty provisions on the freedom to provide services and, accordingly, of those relating to the freedom of establishment, is its economic character, that is to say, the activity must not be provided for nothing. By contrast, contrary to what is maintained by the Hungarian Government, there is no need in that regard for the person providing the service to be seeking to make a profit (see, to that effect, judgment in *Jundt*, C-281/06, EU:C:2007:816, paragraphs 32 and 33 and the case-law cited).

155 Moreover, it is immaterial who pays the provider for the service. Article 57 TFEU does not require that the service provided be paid for by those who benefit from it (see, inter alia, judgment in *OSA*, C-351/12, EU:C:2014:110, paragraph 62 and the case-law cited).

156 As regards the activity of issuing and managing Erzsébet vouchers which is at issue in the present case, it is undisputed that the service provided by the HNRF for the combined benefit of employers, their employees and the suppliers who accept those vouchers gives rise to the payment of consideration to the HNRF which represents remuneration for the latter (see, by analogy, judgment in *Danner*, C-136/00, EU:C:2002:558, paragraph 27).

157 The fact that the national legislation provides that the profits made by the HNRF 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 (see to that effect, inter alia, judgment in *Schindler*, C-275/92, EU:C:1994:119, paragraph 35).

158 As regards the judgment in *Cisal* (C-218/00, EU:C:2002:36) and the case-law developed in the sphere of competition law, it is sufficient to point out that, even if that case-law could be applied in the area of the freedom to provide services and the freedom of establishment, the Hungarian Government has failed to establish that the activity of issuing Erzsébet vouchers with which this action is concerned applies the principle of

solidarity as required by that case-law if the activity is to be found to be social rather than economic.

159 As the Commission has maintained and the Advocate General has stated in point 207 of his Opinion, the decision whether or not to provide employees with Erzsébet vouchers enabling them to obtain benefits in kind in the form of ready-to-eat meals and the determination as to the amount of those vouchers are a matter for the employer's discretion and do not in any way depend on the personal situation, in particular the means, of the employees concerned.

160 Moreover, as regards the fact, relied on by the Hungarian Government, that vouchers, also known by the name 'Erzsébet', may be allocated directly by the HNRF, by way of social assistance, to certain underprivileged persons, in particular to finance holidays, it must be stated that that fact, even if proven, would have no impact on the economic classification of the activity of issuing Erzsébet vouchers to which the Commission's action specifically relates, namely, as recalled above, the activity of issuing vouchers that may be used to purchase ready-to-eat meals and which may be awarded, under advantageous tax conditions, by employers to their employees as benefits in kind.

161 So far as the tax aspect is concerned, the fact that the recipients of the service concerned obtain a tax advantage does not affect the fact that the service is provided by the issuer for remuneration, so that the activity concerned, which thus corresponds to the definition of a service contained in the provisions of the Treaty relating to the freedom to provide services, comes within the scope of those provisions (see, to that effect, judgments in *Skandia and Ramstedt*, C-422/01, EU:C:2003:380, paragraphs 22 to 28, and *Commission* v *Germany*, C-318/05, EU:C:2007:495, paragraphs 65 to 82).

162 Accordingly, an activity such as the issuing of Erzsébet vouchers to which the action relates must be regarded as a 'service' within the meaning of Article 57 TFEU and, more generally, as an economic activity falling within the scope of the provisions of the Treaty relating to the freedom to provide services and the freedom of establishment.

163 In the second place, as regards the Hungarian Government's argument that the issuing of vouchers giving rise to a benefit in kind solely under the tax legislation of the host Member State is not comparable to the activity which is carried on in other Member States by issuers established there and that those issuers thus cannot rely on the freedom to provide services, it is sufficient to recall that the right of an economic operator, established in a Member State, to provide services in another Member State, which Article 56 TFEU lays down, is not subject to the condition that the operator concerned also provides such services in the Member State in which he is established. In that regard, Article 56 TFEU requires only that the provider be established in a Member State other than that of the recipient (see, inter alia, judgment in *Carmen Media Group*, C-46/08, EU:C:2010:505, paragraph 43 and the case-law cited).

164 In the third place, it is accepted that national legislation such as that at issue, under which exclusive rights to carry on an economic activity are conferred on a single, private or public, operator, constitutes a restriction both of the freedom of establishment and of the freedom to provide services (see to that effect, inter alia, judgments in *Läärä and Others*, C-124/97, EU:C:1999:435, paragraph 29; *Servizi Ausiliari Dottori Commercialisti* C-451/03, EU:C:2006:208, paragraphs 33 and 34; and *Stoß and Others*, C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07, EU:C:2010:504, paragraphs 68 and 107).

165 In the fourth place, it nonetheless remains necessary to determine whether, as the Hungarian Government maintains, that obstacle to the freedom of establishment and the freedom to provide services, may, in the circumstances of this case, be justified, in accordance with the case-law of the Court, by overriding reasons relating to the public interest (see to that effect, inter alia, judgment in *Stoß and Others*, C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07, EU:C:2010:504, paragraph 69 and the case-law cited).

166 The Court has consistently held that such restrictions cannot be justified unless they serve overriding reasons relating to the public interest, are suitable for securing the attainment of the public interest objective which they pursue and do not go beyond what is necessary in order to attain it (see, inter alia, judgments in *Läärä and Others*, C-124/97, EU:C:1999:435, paragraph 31, and *OSA*, C-351/12, EU:C:2014:110, paragraph 70).

167 As regards the justification based on grounds of social policy which the Hungarian Government advances, it should be recalled, first, that, according to settled case-law of the Court, developed in relation to the betting and gaming sector, the mere fact that the profits which arise from an economic activity carried out in the context of special or exclusive rights are used for financing social actions or welfare is not a ground that may be regarded as an objective justification for restrictions of the freedom to provide services (see to that effect, see, inter alia, judgments in *Läärä and Others*, C-124/97, EU:C:1999:435, paragraph 13 and the case-law cited; *Zenatti*, C-67/98, EU:C:1999:514, paragraph 36; and *Stoß and Others*, C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07, EU:C:2010:504, paragraph 104).

168 Thus, although the Court has accepted, in the context particular to betting and gaming, that there may be justification for a restriction such as the granting of a monopoly to a public body entrusted, inter alia, with the task of financing social actions or welfare, it is apparent from the Court's decisions that that has been the case only with regard to a certain number of overriding reasons relating to the public interest, such as, for example, the objectives of consumer protection and the prevention of both fraud and incitement to squander money on gambling as well as the general need to preserve public order, and in the light of certain moral, religious or cultural factors associated with betting and gaming (see to that effect, inter alia, judgments in *Läärä and Others*, C-124/97, EU:C:1999:435, paragraphs 41 and 42; *Liga Portuguesa de Futebol Profissional and Bwin International*, C-42/07, EU:C:2009:519, paragraphs 66, 67 and 72;

and *Stoß and Others*, C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07, EU:C:2010:504, paragraphs 79 and 81 to 83).

169 It must be stated that, in the case of an activity such as that with which the present action is concerned, there are no comparable objectives or particular factors.

170 Secondly, as regards the argument, also relied on by the Hungarian Government, that the grant of the monopoly at issue represents the sole means possible, in the absence of available budgetary resources, of successfully carrying out the welfare tasks with which the HNRF is entrusted, the Court notes that the fact that the revenue generated by the holder of a monopoly is the source of funding for social programmes does not justify a restriction of the freedom of establishment and the freedom to provide services.

171 Moreover, as regards the Hungarian Government's assertion that a Member State is free to establish a monopoly such as that at issue in the context of its tax and wages policies, it should first of all be recalled that the Member States must exercise their competence in the area of direct taxation consistently with EU law and, in particular, with the fundamental freedoms guaranteed by the Treaty (see to that effect, inter alia, judgments in *Skandia and Ramstedt*, C-422/01, EU:C:2003:380, paragraph 25 and the case-law cited, and *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraph 34 and the case-law cited). The same is true with regard to the employment policies of the Member States, in particular in the sphere of wages (see, to that effect, judgments in *Portugaia Construções*, C-164/99, EU:C:2002:40, paragraph 24; *Commission* v *Germany*, C-341/02, EU:C:2005:220, paragraph 24; and *ITC*, C-208/05, EU:C:2007:16, paragraphs 39 to 41).

172 In the present case, the Hungarian Government, relying on its competence in the areas of tax and wages, fails to explain either (i) how the establishment of a public monopoly for issuing vouchers which confer an entitlement to a tax advantage and may be provided to employees as benefits in kind meets, in the circumstances of the present case, legitimate objectives that might be capable of justifying the restrictions of the freedom of establishment and the freedom to provide services guaranteed by EU law, to which such a measure gives rise, or (ii) how such restrictions comply with the requirements of the principle of proportionality.

173 It follows from the foregoing considerations that the Court must uphold the complaint alleging an infringement of Articles 49 TFEU and 56 TFEU as the result of the establishment of a monopoly in respect of the activity of issuing vouchers which may be used to obtain ready-to-eat meals and may be provided, under advantageous tax conditions, to employees as benefits in kind.

174 Since the actual establishment of that monopoly must thus be held contrary to Articles 49 TFEU and 56 TFEU, there is no need to adjudicate on the Commission's second complaint, which alleges, in essence, that, even if the monopoly is permissible in principle, it entered into force without appropriate transitional measures, in breach of those provisions of the Treaty and of the principle of proportionality.

Costs

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

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

1. **Declares that by introducing and retaining the Széchenyi leisure card scheme provided for by Government Decree No 55/2011 of 12 April 2011 regulating the issue and use of the Széchenyi leisure card, and amended by Law No CLVI of 21 November 2011 amending certain tax laws and other related measures, Hungary has infringed Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, in so far as:**

– **Paragraph 13 of Government Decree No 55/2011, read in conjunction with Paragraph 2(2)(d) of Law No XCVI of 1993 on voluntary mutual insurance funds, Paragraph 2(b) of Law No CXXXII of 1997 on branches and commercial agencies of undertakings which have their registered office abroad and Paragraphs 1, 2(1) and (2), 55(1) and (3) and 64(1) of Law No IV of 2006 on companies and firms governed by commercial law, precludes the issue of the Széchenyi leisure card by branches and thereby infringes Article 14, point (3), of Directive 2006/123;**

– **Paragraph 13 of Government Decree No 55/2011, read in conjunction with the above-mentioned national provisions, which does not recognise, for the purposes of the conditions laid down in Paragraph 13(a) to (c) of that decree, the activity of groups whose parent company is not a company formed in accordance with Hungarian law and whose members do not operate in the forms of company provided for by Hungarian law, infringes Article 15(1), (2)(b) and (3) of Directive 2006/123;**

– **Paragraph 13 of Government Decree No 55/2011, read in conjunction with the above-mentioned national provisions, which restricts to banks and financial institutions the possibility of issuing the Széchenyi leisure card as they are the only entities able to meet the conditions laid down by Paragraph 13 of the decree, infringes Article 15(1), (2)(d) and (3) of Directive 2006/123;**

– **Paragraph 13 of Government Decree No 55/2011 infringes Article 16 of Directive 2006/123 inasmuch as it requires, for the issue of the Széchenyi leisure card, the existence of an establishment in Hungary;**

2. **Declares that the system of Erzsébet vouchers governed by Law No CLVI of 21 November 2011 and Law No CIII of 6 July 2012 on the Erzsébet programme infringes Articles 49 TFEU and 56 TFEU inasmuch as that 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;

3. **Orders Hungary to pay the costs.**

[Signatures]

---

* Language of the case: Hungarian.