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6 National Interests in the Common Market

SZÉP Card and Erzsébet Voucher before the European Court of Justice

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6.1 Introduction

Shortly after assuming power the new center-right government in Hungary started to reorganize the country's economy. Amongst the priorities of the Orbán government in the realm of economic policy one can identify firm budgetary discipline (keeping the annual deficit under 3 percent of the GDP required by the EU), the "reindustrialization" of the country, and the increasing Hungarian state ownership in the banking sector and in the retail-business, all with the general objective of the promotion of the national interest. This orientation manifested in the use of regulation to restructure competitive conditions in individual markets, close or open markets, introduce new regulatory and tax burdens and barriers to entry.[1]

We suggest that the case under scrutiny fits the pattern of this economic policy.

6.2 Factual and Legal Background

In 2011 the Hungarian government adopted the Government Decree on the Széchenyi leisure card (SZÉP card), and the Hungarian Parliament adopted the Law on the Erzsébet Programme.[2] These laws provided for the issuing and management of the said card and the Erzsébet vouchers.

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1 The Legal and Regulatory Environment for Economic Activity in Hungary: Market Access and level Playing-Field in the Single Market. A legal expert review report Hungarian Academy of Sciences, Centre for Social Sciences, Lendület-HPOP's Research Group, Budapest, 2016, p. 2, http://hpops.mta.tk.hu.

2 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, Law No. CLVI of 21 November 2011 and by Law No. CIII of 6 July 2012 on the Erzsébet programme ('the Erzsébet Law').

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> The Széchenyi Pihenő Kártya (hereinafter 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.[3]

Paragraph 13 of the SZÉP Decree states that: any service provider shall be authorised to issue the card 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 as a group of companies or in fact operating as such, or jointly with a mutual society, with which the service provider has maintained a contractual relationship for not less than five years fulfils all the following conditions:

a. has an office open to customers in each municipality of Hungary with a population of more than 35 000 inhabitants;
b. has itself, in the course of its last complete financial year, issued at least 100 000 payment instruments other than cash in the framework of its payment services;
c. has at least two years' experience in the issue of electronic voucher cards conferring a right to benefits in kind within the meaning of Paragraph 71 of the Law on income tax and has issued more than 25 000 voucher cards according to the figures for its last complete financial year.

The factual effect of the regulatory regime is that only banking and financial institutions can satisfy the conditions.[4]

Under the Erzsébet programme Erzsébet vouchers are issued only by the Hungarian National Recreation Foundation (HNRF), which may be used to purchase ready-to-eat meals. 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. It 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. The employers may decide to award Erzsébet cards to their employees as benefits in kind under advantageous tax conditions. The employers have to pay a fee to the issuer.

3 Para. 34 of the judgment.
4 According to the Hungarian Trade Licence Office's register the three companies licenced to issue the SZÉP card are subsisdiaries of three large Hungarian banks: OTP Bank, K&H and MKB.

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The activity of issuing such vouchers in the past was carried on in Hungary by commercial companies.[5]

In the framework of an infringement procedure under Article 258 Treaty on the Functioning of the European Union (TFEU) the Commission questioned the conformity with EU law of the Hungarian regulations introduced in 2011 affecting the SZÉP card system and the monopoly of issuing of Erzsébet vouchers under the Erzsébet programme.

Although the two systems have several different characteristics, the Commission decided to put them before the Court in the same procedure.

We will present the legal disputes in the order chosen by the Court (as did its Advocate General), first the problems related to the issuing the SZÉP card, then the state monopoly of issuing and managing the Erzsébet vouchers.

6.3 The Pre-Litigation Procedure

The Commission took the view that in adopting in 2011 new national rules concerning meal vouchers, leisure vouchers and holiday vouchers Hungary infringed a number of provisions of the Service Directive (hereinafter the Directive)[6] and their obligations under Articles 49 and 56 TFEU, and on 21 June 2012 sent Hungary a letter of formal notice. Hungary replied with a letter dated 20 July 2012 in which it disputed all the allegations of infringement. 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 provision of EU law. 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. Since the Commission was not satisfied with the explanations provided by Hungary in its response of 27 December 2012, it decided to bring an action before the Court of Justice. The action was actually brought on 10 April 2014.

We note that more than one year elapsed between the deadline for compliance given to Hungary and the date on which the action was brought. Normally in similar cases in this period there are negotiations between the Commission and the Governement of the Member State in question in order to achieve an amicable solution. In the present case these negotiations were obviously without any substantial result.

5 Until 2010 the market share of three subsidiaries of French companies (Edenred kft, Sodexo kft and Le Chèque Déjeuner kft) was around 90%.

6 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).

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6.4 The Commission's Complaint Concerning the Issuing of SZÉP Card

The regulatory framework and the consequences may have at least four different approaches from EU law perspective. These are the basis of the four different claims of the Commission:

- The national legislation – especially Paragraph 13 of the Government Decree No. 55/2011 read in conjunction with other provisions of national law[7] excludes branches from issuing the SZÉP card – infringes Article 14, point (3).[8] of Directive 2006/123. This point prohibits the requirement on the service provider subject to 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.
- The national legislation does not recognise 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 form of a company provided for by Hungarian law, consequently it infringes Article 15(1), (2)(b) and (3) of the Directive 2006/123. According to these provisions Member States are allowed to introduce or maintain an obligation on a service provider to take a specific legal form only in a non-discriminatory manner and satisfying the requirements of necessity and proportionality.
- The Hungarian legislation restricting to banks and other financial institutions the possibility of issuing the SZÉP card infringes Article 15(1), (2)(d), (3) of the Directive. The Directive allows Member States to reserve access to the service activity in question to particular providers by virtue of the specific nature of the activity, but such a restriction must be non-discriminatory, necessary and proportionate.
- The Hungarian legislation inasmuch as it requires, for the issuing of the SZÉP card, the existence of an establishment in Hungary, infringes Article 16 of the Directive.
- Article 16 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 measure in question is non-discriminatory, can be justified for reasons of public policy, public security, public health or environmental protection and is necessary and proportionate. In other words, Member States are not allowed to restrict the cross-border provision of services only pursuing well defined public interests.

7 Para. 2(2)(d) of Law No. XCVI of 1993 on voluntary mutual insurance funds ('the Law on mutual societies'), para. 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 paras. 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 Art. 14, point (3), and Art. 15(2)(b) of Directive 2006/123.

8 In its original action the Commission also claimed the infringement of Art. 15(2)(b) of the Directive, but in the hearing it withdrew this part of its action.

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6.5 Defence of the Hungarian Government

The Hungarian government did not deny the *prima facie* unlawful legislation, or its restrictive effect, but relied on public interests which might justify them.

The defence strategy of the Hungarian government has essentially been based – against all the allegations mentioned above – on the following reasoning:[9]

The issuing of the SZÉP card is a special service the regulation of which requires all the restrictions which the legislation in force contains. This special nature justifies that the issuers of SZÉP cards are properly integrated into Hungarian economic life and thus have the requisite experience and infrastructure, 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.

In order to convince the Court of the special nature of the service of issuing the SZÉP card the Hungarian government relied on the facts 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. 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 both necessary and proportionate with regard to the objectives 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.[10]

6.6 The Assessment of the Court

As far as the first complaint is concerned, the crucial question was if the defendant could rely on Article 51 TFEU which provides the possibility for justifying restrictions to freedom

9 Para. 41 of the judgment concerning the first complaint, para. 53 of the judgment concerning the second complaint, paras. 78-80 of the judgement concerning the third complaint, paras. 100-101 concerning the fourth complaint.

10 Paras. 79-80 of the judgment.

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of establishment. The Court – following its Advocate General – referring to its recent judgment in Rina declared:

> …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.[11]

It follows both from the wording of Article 14 of the Directive and from the general scheme of the directive that no justification can be given for the requirements listed in that article.[12] Consequently the Court accepted the first complaint of the Commission, the exclusion of branches from issuing the SZÉP card infringes Article 14(3) of the Directive. Given that the judgment in Rina has been delivered on 16 June 2015 and the hearing in the present case has been held on 12 May 2015, the Hungarian government cannot be blamed for not considering this in its defence.

As far as the second complaint is concerned, the Court – following once again the AG – found that the requirement of specific legal form of the service provider and the obligation that the company has to have its registered office in Hungary are not in conformity with the Directive. It is clear from Article 15(3)(a) that the Member States are allowed to prescribe certain restriction concerning the legal form of the service provider. The Hungarian defence may rely on this, but these restrictions must be non-discriminatory and proportionate. The Court found that the Hungarian legislation, because it contains the requirement of the location of the registered office, is discriminatory. This is sufficient for a finding of non-compliance, and concluding that the second complaint is well established. While it was not necessary, the Court stated that the Hungarian defence concerning the public interests were not strong enough:

> …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

11 C-593/13, *Rina Services and Others* (ECLI:EU:C:2015:399) point 40.

12 Points 71-74 of the Opinion of the AG, point 45 of the Judgement.

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> 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.[13]

As far as the third complaint is concerned one has to note that this allegation is not based on the wording of the Hungarian legislation as the two former claims, but the practical effects of it.

Once again, as a general rule the Directive makes it possible for the Member States to reserve access to a service activity to particular providers by virtue of the specific nature of the activity. This was the starting point of the Hungarian defence.

The Court's reasoning begins with admitting that the government decree on a literal reading does not expressly make the issue of SZÉP cards the preserve of banking and financial establishments, nor does it include an express condition regarding the location of the registered office of SZÉP card issuers. Accordingly, the Court admits that the national legislation does not in itself entail direct discrimination based on such a condition. It continues with examining if the actual effects of the national provisions – only those entities can fulfil the criteria laid down in the government decree – satisfy the conditions set out in Article 15(3) of the Directive. The result must be disappointing for the Hungarian government's supporters.

According to Court's reasoning the actual effect of the national legislation only companies whose registered office is in Hungary may operate in Hungary as issuers of SZÉP cards. This requirement qualifies as indirect discrimination against banks and financial institutions not having their registered office in Hungary. As Article 15(3) prohibits any discriminative measure restricting provision of services, that finding is sufficient to establish non-compliance with the Directive, in other words, the third complaint of the Commission is upheld by the Court.

In spite of the fact that it has established the infringement, the Court turns to the next phase and examines if the requirements fulfil the criteria of the proportionality test (also included in Art. 16 of the Directive). The Court, following the arguments of the Commission in this regard, concludes that there are less restrictive measures which would achieve the objectives invoked by the Hungarian government (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). Amongst the possible less restrictive measures mentioned are ensuring that SZÉP card

13 Point 69 of the judgement.

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issuers are subject to a system of supervision or a mechanism entailing a bank guarantee or insurance and make provision for the use by issuers of telephone services or commercial agents.

All this is enough for the Court to establish that the defence of the Hungarian government would also fail the proportionality test. The final result remains the same, the restriction to banks and financial institutions (whose registered office is in Hungary) breaches Article 16(1), (2)(d) and (3) of the Directive.

The national legislation prescribes not only the special nature of the service provider (it has to be a banking or other financial institution), but also that it has to have its registered office in Hungary. This criterion – according to the Court – is contrary to the condition set in Article 15(3)(a) which also prohibits indirect discriminatory measures with regard to companies, according to the location of the registered office.

We note that at this point the Court did not follow its AG. He argued that because of the fact that only finance companies with their registered office in Hungary would be capable de facto of fulfilling the conditions laid down by the Hungarian legislation, this constitutes an indirectly discriminatory condition. For the AG these conditions do not fall within the scope of Article 15(2)(d) of the Directive because it covers only non-discriminatory requirements. The restrictive conditions fall rather under Article 14, point 1 of the Directive. Therefore – according to the AG – the Commission has misinterpreted Article 15(2)(d) of the Directive.[14]

As far as the fourth complaint is concerned, the Hungarian government's first argument in defence of the national legislation which excludes the possibility of offering the service of SZÉP card issuing from other Member States is that this complaint must to be treated exclusively in relation to 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.

In support of its argument the Hungarian government maintained that recourse to cross-border service provision is obviously purely theoretical or, in any case, much less frequent in practice, than exercise of the freedom to set up an establishment in the Member State concerned for the purpose of providing services there.

The Court did not accept this argument. It pointed out that the Hungarian government has not shown that it would, in practice, be impossible for, and of no interest to, a service provider established in another Member State to provide a service such as the issuing and management of SZÉP cards in another Member State without having a stable infrastructure from where the business of providing that service is actually carried out.[15] It also argued that the objective of the Directive intends not only to remove the obstacles to the freedom

14 Paras. 137-140 of the Opinion.

15 Para. 109 of the judgment.

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of establishment but also to the freedom to provide services. Under the first subparagraph of Article 16(1) of Directive Member State must respect the right of providers to provide services in a Member State other than in which the providers are established.[16]

The Court also rejected the alternative defence of the Hungarian government maintaining that the restriction is justified by the public interests of consumers and creditors. The Court based its reasoning on Article 16 of the Directive and rightly pointed out that these objectives are not among the overriding reasons relating to the public interest to which paragraphs 1 and 3 of Article 16 refer. The Court also added that in any event, the requirements would not satisfy the proportionality test set out in Article (1)(c) of the Directive, since the said objectives could be achieved by means of less restrictive measures, like those mentioned in relation to the third complaint (point 94).

6.7 Commission's Complaints Concerning the Conditions for Issuing Erzsébet Vouchers

The Erzsébet Law established a monopoly in favour of a public body – the Hungarian National Recreational Foundation (HNRF) – which is only authorized to issue of vouchers for cold meals.

According the Commission

> … 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.[17]

6.8 The Defence of the Hungarian Government

Against the Commission's complaint the Hungarian government built up a complex defence.

16 We note that the Advocate General chose a somewhat different line of reasoning for arriving to the same conclusion. In his view Art. 16(2), like Art. 14 constitutes a 'black list' and therefore contains certain requirements which are prohibited per se. As the case-law already held those requirements to be incompatible with Art. 56 TFEU, there is a strong presumption that they cannot be justified by one of the four public interest objectives referred to in Art. 16(3) of the Directive as they will not normally be proportionate. Paras. 152-157 of the Opinion.

17 Para. 121 of the judgment.

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Its first argument was that the claim is inadmissible because the form of order in the application is imprecise and ambiguous. The Court rejected this argument and declared the application admissible.[18]

As far as the defence of the Hungarian government in substance, the main argument was that the issuing of the Erzsébet vouchers is not an 'ordinary' economic activity. In support of this argument the Hungarian government raised several points.

In the Hungarian government's view a state is free to choose not to open for free competition an activity – so it is its decision to offer a particular service for the society through state organisations or other non-profit organisations.

In order to strengthen the non-economic nature of the new system of issuing and managing the Erzsébet vouchers, the Hungarian government maintained that 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.[19]

It also maintained 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 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.[20]

In the third line of defence the Hungarian government contended 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, tax and wages policy. Each Member State may, in the context of its social policy, choose how to finance social benefits in its territory. 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, and a Member State may also retain for itself the right to issue the vouchers in the context of its tax and wages policies.

Finally, in the fourth line of defence the Hungarian government tried to oppose the disproportionality claim of the Commission (there are possible measures less harmful to competition to achieve the objectives pursued by Hungary such as for example organising the activity on the basis of the market and taxing that activity). It relied on Läärä and

18 Paras. 141-146 of the judgment.
19 Para. 131 of the judgment.
20 Paras. 132-133 of the judgment.

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Others[21] in which the Court accepted 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.[22]

6.9 The Court

The Court of Justice rejected all of the arguments of the Hungarian government.

It qualified the issuing and managing of the Erzsébet vouchers for the employers as an economic activity, consequently an activity which comes under the scope of EU law.

Maybe the decisive counter-argument was 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.[23] Only the fact that a service is provided for remuneration is enough to qualify the activity as a service in terms of the freedom to provide services under EU law.[24] There is no need in that regard for the person providing the service to be seeking to make a profit.[25] 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.[26]

The Court also denied the solidarity argument of the Hungarian government. Following the Commission and the Advocate General in that regard, it pointed out that

> …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.[27]

The Court also declared that 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 remu-

21 C-124/97, EU:C:1999:435.
22 Para. 139 of the judgement.
23 Para. 156 of the judgment.
24 "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, paras. 28 and 29 and the case-law cited)." This qualification has been repeated in para. 161.
25 Para. 154.
26 Para. 157.
27 Para. 159.

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neration, so that the activity concerned, which thus corresponds to the definition of a service.[28]

As regards the argument 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.[29]

As regards the assertion that a Member State is free to establish a monopoly such as at issue in the context of its tax and wages policies, the Court recalled that the Member States must exercise their competence in the area of direct taxation and employment polices consistent with EU law, in particular with the fundamental freedoms guaranteed by the Treaty.[30] In the Court's view the Hungarian governement failed to explain either (i) how the Erzsébet system 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, (ii) how such restrictions comply with the requirements of the principle of proportionality.[31]

So the final assessment of the Court was: the establishment of that monopoly must thus be held contrary to Articles 49 TFEU and 56 TFEU.

6.10 Comments

The common feature of the SZÉP card and the Erzsébet voucher issuing and managing systems is that both of them – other than giving employees and their family members different advantages for the purchase of different goods and services – exclude from the market of these services the companies having their registered office in other Member States. Nevertheless the two systems have several differences.

The SZÉP card is a newly introduced card system the regulation of which has been so created that only Hungarian based banks and other financial institutions could fulfil the requirements of issuing and managing it: consequently the entry for foreign companies (companies from other Member States) is not possible in any way, nor by the way of their Hungarian branches, or by provision of the services as a transborder service.

For the issuing of Erzsébet voucher for employers and the management of the system Hungary established a public foundation – Hungarian National Recreational Foundation

28 Para. 161.
29 Para. 170.
30 Para. 171.
31 Para. 172.

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(HNRF) –, which under the new regulation became the monopoly of this kind of activity. The entry into force of the new system excluded companies from other Member States pursuing this kind of activity in the Hungarian market.

Because of these differences the defence of the Hungarian government has been built on different argumentative strategies. We think that the Hungarian regulation of the SZÉP card system was obviously contrary to the wording and spirit of the Service Directive the clear objective of which is to facilitate the establishment of service providers in other Member States and the cross-border provision of services. The only reasonable justification seemed to be the public interests of the consumers and the creditors.

This argumentation tried to defend what is almost indefensible. The Service Directive clearly, without the possibility of justification, prohibited some kind of national restrictions for the Member States (the exclusion of foreign branches from the provision of services is amongst these), other types of restrictions were lawful only if they are non-discriminatory and proportional at the same time, and in some cases the objectives followed by the national legislation have been enumerated in the Directive.

These criteria could not be fulfilled by the Hungarian legislation. Some provisions proved to be directly or indirectly discriminatory, some restrictions failed the proportionality test. (It is interesting to note how creative the Commission was in proposing less onerous measures in order to attain the national public interest objectives.)

The defence in the case of the Erzsébet vouchers was much more robust (on the other side of the coin, the new regime excluded other Member States' companies from the market). The first – unsuccessful – radical procedural step was the contention of inadmissibility. The Hungarian government relatively often raises the admissibility question before the Court of Justice. Given that the Court systematically refuses this observation (in preliminary ruling procedures) or plea, we do not see clearly the reason for this litigation policy.[32]

The main emphasis of the defence was that the issuing and managing of the Erzsébet vouchers is not an economic activity, consequently it does not come under EU law. In the eyes of the Hungarian government the issuing of the Erzsébet vouchers for employers is embedded in the Erzsébet programme which is a state programme with clear social policy objectives. The programme wishes to incite with tax exemptions the employers to give part of the wages in the form of vouchers the use of which serves social policy objectives. In the framework of the programme the HNRF itself issues Erzsébet vouchers for persons in need. We think that the argument that the counterpart paid by the employers for the issuer (HNRF) has to be used exclusively for the social objectives is an important element.

32 Ernő Várnay, The Hungarian Government before the courts of the European Union. Rationales and results. In Márton Varju and Ernő Várnay (Eds.), *The Law of the European Union in Hungary: Institutions, Processes and the Law*. HVG-ORAC, Budapest, 2014, pp. 151-182, 173-174.

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It is also indisputable that the tax exemption offered to the employers forms part of the Member State (direct) taxation policy.

We consider that all these arguments concern the very sensitive issues of the share of competences between the European Union and its Member States. The case also raised the very interesting question of the limits to renationalization of activities formerly carried out by the market. Maybe that is why the case was assigned to the Grand Chamber.

The Court (and for good reasons the Commission and the Advocate General Yves Bot) obviously was not susceptible to this reasoning. It limited itself to the denial of the arguments of the Hungarian government. In order to attain this, it denied the fact that the activity in case is part of the Erzsébet programme, which itself is executed by the HNRF, an emanation of the state. It deconstructed the system and this way it became relatively easy to prove that the elements (remuneration, tax exemption, social policy objectives) – now standing alone – are in breach of EU law.

The one sided approach of the Court become clear from the extremely concise arguments concerning the tax and wage policies where the Court simply declared relying on its long standing case law, that the Member States have to exercise their competences in these areas consistently with EU law and, in particular, with the fundamental freedoms guaranteed by the Treaty.

The Court's reasoning concerning its former case-law on the granting of monopoly to a public body entrusted with the task of financing social actions and welfare seems to be somewhat one-sided. While admitting that this kind of restriction may be acceptable, it emphasises that this acceptance has been only with regard to certain overriding reasons relating to public interest such as consumer protection and the prevention of fraud and incitement to squander money on gambling, etc. The Court concludes 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.[33] We think that this statement was possible only if one disregards the whole range of activity of the HNRF.

Hungary – and maybe all of the Member States – have received some guidance concerning the freedom to choose among different methods of offering public services, and also how to use the freedom to cut back the realm of the market in the Common Market.

33 Paras. 167-169 of the judgment.