7 The Hungarian Cold Food Voucher Case

A Somewhat Rigorous Approach of the Court on the Interpretation of Free Movement Provisions

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7.1 Background to the Case

In June 2012 the European Commission sent Hungary a letter of formal notice in which it took the view that by adopting, in 2011, new national rules concerning meal vouchers, leisure vouchers and holiday vouchers, Hungary failed to fulfil its obligations under Directive 2006/123/EC (hereinafter referred to as Services Directive) and under the relevant Treaty Articles on the freedom of establishment (Art. 49 TFEU) and free movement of services (Art. 56 TFEU). The various complaints concerned more specifically the legislative framework applicable to two specific instruments, namely the so-called SZÉP card and the Erzsébet voucher. 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.[1] On the other hand, the Erzsébet voucher is a ready to eat meal voucher the issuing of which had been entrusted in 2011 to a public monopoly (Hungarian National Recreation Foundation, hereinafter referred to as HNRF). The HNRF is at the same time responsible for the operation of the Erzsébet programme. The Erzsébet programme targets socially disadvantaged 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.[2] Any revenue stemming from the issuing and marketing of Erzsébet vouchers – with the exception of operational costs – can only be used for the managing of the Erzsébet programme.[3]

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1 See para. 34 of the judgment.

2 Art. 1 of the Act CIII of 2012 on the Erzsébet Programme (hereinafter referred to as Erzsébet Law).

3 Interestingly paras. 21-25 of the judgment outlining the legal framework of the issuing of the vouchers does not cite Art. 4 of the Erzsébet Law setting statutory limits on the use of revenues stemming from the issuing

The Hungarian government contested the Commission's complaints in its answer of 20 of July 2012. The Commission – not being convinced by the Hungarian arguments – issued the 22 of November 2012 a reasoned opinion answered by Hungary the 27 of December the same year. Interestingly and against the fact that the Commission seemed to speed up the procedure in the pre-litigation phase, it was only one and a half year later, in April 2014 that the Commission lodged an application at the European Court of Justice (hereinafter referred to as: the Court) for failure to fulfil obligations under Article 258 TFEU.

Although being concerned with vouchers conferring a tax advantage on the employer and considered as a benefit in kind for the employee, the issuing of SZÉP card and that of the Erzsébet vouchers embody completely different systems and therefore completely different claims had been raised by the Commission in relation to each of the systems.

7.2 Pleas of the Commission

Concerning the issuing of SZÉP card, the Commission raised four main pleas related to the infringement of the Services Directive and one subsidiary plea on the infringement of the Treaty Article on services and establishment. In its first plea the Commission argued that by precluding branches from issuing SZÉP card Hungary is in breach of Article 14(3) of the Services Directive 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. In its second plea the Commission maintained that in failing to 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 forms of company provided for under Hungarian law with regard to the conditions which should be fulfilled in order to be entitled to issue SZÉP card, Hungary infringes Article 15(1), (2)(b) and (3) of the Services Directive. The Commission found the above rules discriminatory since they clearly placed commercial companies whose registered office was not in Hungary at a disadvantage without demonstrating that the requirements were necessary and proportionate. In its third plea the Commission contested the fact that the possibility to issue SZÉP card was in practice restricted to banks and financial institutions as these were the only entities to be able to fulfil the requirements of the relevant Government decree. The forth complaint of the applicant was based on the allegation that the requirement for the

and marketing of vouchers although this provision is crucial in understanding the close linkage between the issuing of vouchers and the social programmes run by the HNRF. Likewise, para. 23 of the judgment reformulating Art. 5 of the Erzsébet Law does not use the word exclusively when listing the activities to which the resources of the HNRF can be used.

issue of being established in Hungary breaches Article 16(2)(a) of the Services Directive which 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, is justified for reasons of public policy, public security, public health or environmental protection and is necessary and proportionate. Further, the Commission argued that in the alternative in so far the provisions of the Services Directive would not apply Articles 49 and 56 TFEU are breached.

As far as the Erzsébet voucher is concerned, the main argument of the Commission raised against Hungary was that the Hungarian Act adopted in 2011[4] establishing a monopoly in favour of public bodies for the issue of vouchers for cold meals 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. Commission submitted 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 a nature to constitute an overriding reason in the public interest that could justify the establishment of the monopoly. The Commission did not believe either that the new system of issuing cold meal vouchers is necessary in order to preserve the coherence of the Hungarian tax system. Neither thought the Commission that the Hungarian measures could anyway be proportionate and submitted 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. The Commission claimed at the same time that 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.

7.3 Arguments of the Government

As the judgment of the Court concerning the SZÉP card fits into the line of its case-law on the Services Directive and on services in general, the present review will focus exclusively on the Court's decision on the issuing of Erzsébet vouchers. Therefore only arguments put forward in the defence of this latter will be presented.

At the first place the Hungarian Government in its defence maintained that the issuing of the cold food vouchers by a state body under the circumstances defined by the Hungarian Act is not an economic activity under EU law and therefore the Treaty Articles on the freedom of establishment and freedom to provide services do not apply. The Government

4 Law No. CLVI of 21 November 2011.

submitted in the first place that the issuing of Erzsébet vouchers is not an ordinary economic activity open to free competition as it 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 terms of the law, be used by the HNRF for the performance of the public-interest tasks entrusted to it.[5] Therefore the main argument of the Government was that 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.[6]

The Government invoked the *Cisal* judgment – developed in the field of competition law – in order to sustain the non-economic nature of the activity by arguing that the system of the vouchers is governed by the principle of solidarity under the supervision of the state.[7]

At the same time, the Government referred to the fact, that vouchers which confer a right to a tax advantage are meaningful only in the context of the tax policy of a given Member State and accordingly Member States are free to decide to issue those tax policy instruments at all or to open that activity up to competition.[8] This interdependence with the tax policy excludes – in the Government's view – the mechanical comparison with gambling cases.

In the alternative, the Government maintained that if the issuing and marketing of vouchers was in the Court's view still be considered as economic activity and was found to be contrary to the free movement provisions, it could be justified by public interest such as social policy and tax policy.

7.4 Judgment of the Court

The Court in its decision of 23 February 2016 upheld all the pleas of the Commission concerning the infringement of the Services Directive such as the substantial argument of the Commission on the breach of the Treaty provisions by the establishment of a state monopoly for the issuing of cold food vouchers. Because of its particular nature and because of the lack of precedents in this respect only that part of the Court's decision will be presented which concerns the state monopoly.

5 See para. 131 of the judgment.
6 See para. 133 of the judgment.
7 See para. 132 of the judgment.
8 See para. 134 of the judgment.

In the light of the Government's defence the Court had to consider as a preliminary issue of the compatibility of Erzsébet vouchers with EU law whether it should be considered as economic activity falling under the Treaty provisions on free movement or a non-economic activity outside the scope of these provisions.

The Court found that the decisive factor which brings an activity within the ambit of the 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. It underlined referring to the judgment in the *Jundt* case that there is no need in that regard for the person providing the service to be seeking to make a profit.[9] At the same time the Court invoked its settled case-law on gambling according to which the fact that profits made from an 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.[10]

Then the Court went on to examine whether the concept of economic activity could be approached under the criteria laid down in the *Cisal* judgment raised in its defence by the Hungarian Government. The Court admitted that this jurisprudence developed in the field of competition law could in principle be applied in the area of the economic freedoms, it maintained however that the Hungarian Government failed to establish that the activity is rather of social than of economic nature.[11] In order to underline the lack of solidarity the Court referred on the one hand to the fact that the decision whether or not to provide employees with Erzsébet vouchers is a matter for the employer's discretion and does not in any way depend on the personal situation[12] and underlined on the other hand that the allocation of vouchers directly by the HNRF to socially disadvantaged persons does not alter the economic nature of the activity.[13]

Having concluded that the issuing of the food vouchers under the Hungarian system should be considered an economic activity and that conferring exclusive rights to carry on an economic activity on a single, private or public, operator, constitutes a restriction both of the freedom of establishment and of the freedom to provide services,[14] the Court went on to examine whether that restriction could be justified by any overriding reason. Here again the case-law developed in the gambling sector was invoked where state monopolies excluding all private actors being foreign or national could be upheld. The Court however refused to accept the financing of social actions as an overriding reason in itself even if the programmes in questions could not be covered by other budgetary

9 See para. 154 of the judgment.
10 See para. 157 of the judgment.
11 See para. 158 of the judgment.
12 See para. 159 of the judgment.
13 See para. 160 of the judgment.
14 See paras. 164-169 of the judgment.

resources. The arguments of the Hungarian Government which aimed to draw attention to the somewhat artificial nature (in comparison to gambling and betting) of markets of food vouchers that confer a right to tax advantage and the strict dependence – including their existence – on the Member States' tax policy had not been accepted by the Court either.

Finally at the end of the judgment the Court declared that there is no need to rule on the entering into force of the relevant provisions without appropriate transitional period as the monopoly is anyway in breach of the freedom of establishment.

7.5 Review of the Judgment

Reading the judgment the striking difference between the Court's approach and the defence put forward by the Hungarian Government is that the Court did not see the issuing of the vouchers as an integral element of the Erzsébet programme and in broader sense as part of the social protection system but scrutinized it in isolation. This approach results in a somewhat mechanical and rigorous application of the existing case-law of the Court especially when characterising the issuing as economic or non-economic activity. Here, the only filter the Court is using is whether the issuing is remunerated or not. By basing its arguments partly on the *Jundt* judgment and underlining the irrelevance of the intention of the economic operator to make profit, the Court seemed to disregard certain specificities of the voucher system. In the *Jundt* case it was a teacher who for his secondary teaching activity at a public university received remuneration that according to the Court could not be exempted from tax regardless of the fact that it was part of the teaching activity of a public body and that the activity was carried out on a quasi-honorary basis. In the present case however it was the public body which generated income against the issuing of the voucher the use of which was clearly determined by national law integrating it into the social system of the country. Therefore it is quite difficult to see how the statement of the *Jundt* judgment about the irrelevance of the person's intention to seek profit should be understood under the circumstances of the present case where there was statutory impossibility to make profit out of the issuing of the Erzsébet vouchers. Referring to the *Jundt* judgment in this special context seems to be in contradiction with the Court's own statement under Paragraph 148 of the present judgment where citing its previous case-law it defined the essence of the freedom of establishment as a right which 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.

Being able to profit from the given economic activity – at least in principle – seems thus to be an essential element of any economic activity by virtue of EU law even if the person does not actually seek to profit from it. Advocate General Jacobs in his opinion delivered in joint cases *Bundesverband AOK* in 2003 defined the distinctive feature of an economic activity the following way:

> In assessing whether an activity is economic in character, the basic test appears to me to be whether it could, at least in principle, be carried on by a private undertaking in order to make profits. If there were no possibility of a private undertaking carrying on a given activity, there would be no purpose in applying the competition rules to it.[15]

In the *Erzsébet voucher* case the Court did follow this reasoning and identified the remuneration as only criteria for an activity to fall under the scope of the economic freedoms and rejected the argument of the Hungarian Government according to which the exclusive use of the revenue excludes the income to be considered as profit under market terms as no sensible operator would commence an activity from which it is impossible to earn profits.[16] More adequate seems to be the reference to the *Schindler* case[17] adopted in the field of gambling services where the Court held that the allocation of profits does not alter the economic character of the activity even if profits may only be used for special purposes or are required to be paid into the state budget.[18] It should however be underlined that none of the cases dealt by the Court later concerned national mechanisms under which the whole profit had be transferred into the state budget by private operators.[19] On the contrary, the Court showed a very tolerant attitude in cases where providing gambling and betting services had been completely reserved to state companies or entities under state control[20] and has even confirmed in the *Läära* case as an advantage of state controlled

15 Para. 28 of the opinion of Advocate General Jacobs delivered on 22 May 2003 in Joined Cases C-264/01, C-306/01, C-354/01, C-355/01. *AOK-Bundesverband* (ECLI:EU:C:2003:304).

16 On the difference between the possibility to make profit and the making of profit see H. Smith, 'Are state-owned health care providers undertakings subject to competition law?', *European Competition Law Review*, 2011/5, p. 232.

17 Judgment of 24 March 1994 in Case C-275/92, *Her Majesty's Customs and Excise v. Gerhart Schindler and Jörg Schindler* (ECLI:EU:C:1994:119).

18 See para. 157 of the judgment.

19 In *Dickinger* 3% of the income of lotteries had to be assigned to the development of sport (judgment of 15 of September 2011 in Case C-347/09, *Criminal proceedings against Jochen Dickinger and Franz Öhmer* (ECLI:EU:C:2011:582)), while in Zenatti the Italian Minister for Finance fixed the levy to be paid from gross betting receipts to two founds which have to use these monies for investment in sporting infrastructure (judgment of 21 October 1999 in Case C-67/98, *Questore di Verona v. Diego Zenatti* (ECLI:EU:C:1999:514).

20 See judgment of 8 July 2010 in Joined Cases *Criminal proceedings against Otto Sjöberg* (C-447/08) and *Anders Gerdin* (448/08) (ECLI:EU:C:2010:415), judgment of 8 of September 2009 in Case C-42/07, *Liga Portuguesa de Futebol Profissional and Bwin International Ltd v. Departamento de Jogos da Santa Casa da*

schemes that they provide for the possibility that the entire amount of the revenues from this activity may serve public interest purposes.[21]

The only point where the Court moved away from the isolated approach in order to analyse the issuing of food voucher in a broader context as part of the social system is when it accepted the transferability of the *Cisal* criteria – delivered in the field of competition law – to the area of the economic freedoms. Under Paragraph 38 of the *Cisal* judgment the social aim is not in itself sufficient to preclude the activity in question from being classified as an economic activity, two other criteria should be fulfilled. One is that the whole scheme is based on the principle of solidarity and the other is that the activity is supervised by the state. Both the Advocate General and the Court believed that the principle of solidarity is not observed in the present case. Interestingly both of them sought to identify solidarity elements only at the level of distribution and availability of vouchers and not at the stage of the redistribution of the revenues for the specific social purposes under the Erzsébet programme financed through these incomes where solidarity is definitely the guiding principle.

Under the solidarity aspects the Court did not deal in its judgment with an additional argument raised by Hungary. Paragraph 178 of the Opinion of the Advocate General refers to one the arguments of the Hungarian Government according to which the way the issuing and marketing of Erzsébet vouchers is organised is an example of those innovative approaches of financing the social sector the Commission encourages Member States to introduce by its various recent Communications and in that regard it is similar to social investment bonds. Although the Advocate General found it as a proof for the issuing of vouchers being classified as an economic activity,[22] the argument should have been worth for scrutiny by the Court under the solidarity aspect. The arguments did however not find echo in the judgment.

Finally, as far as the justification of the monopoly is concerned the Court's answer seems to be too categorical and rigid in the light of its generous approach in the field of gambling monopolies. This, especially knowing that the case-law of the Court on state monopolies in gambling sector does not completely rule out that Member States follow a national expansion policy.[23] It is difficult to see how consumer protection, public morality could serve as a justification of gambling monopolies and social purposes could not be invoked in the case of monopolies established in rather artificial markets. In a way, while

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Misericórdia de Lisboa (ECLI:EU:C:2009:519) and judgment of 21 of September 1999 in Case C-124/97, *Markku Juhani Läärä and others v. Finnish State* (ECLI:EU:C:1999:435).

21 Para. 45 of the Opinion of Advocate General Bot delivered on 17 of December 2009 in Case C-203/08, *Sporting Exchange Ltd trading as Betfair v. Minister van Justitie* (ECLI:EU:C:2010:307).

22 See para. 208 of the opinion of Advocate General Bot delivered on 17 September 2015 (ECLI:EU:C:2015:619).

23 See D. Doukas, 'In a Bet there is a Fool and a State Monopoly: Are the Odds Stacked against Cross-border Gambling?', *European Law Review*, Vol. 36, No. 2, 2011, pp. 243-263.

the Court seems to have closed its eyes before revenue producing gambling monopolies it did not open them for innovative social solutions.[24]

24 See also case comment by A. Georgiou, 'Anti-Social? A comment on Case C-179/14 Commission v Hungary', DELI blog, Durham European Law Institut, posted on March 24 2016. Available at: https://delilawblog.wordpress.com/2016/03/24/andreas-georgiou-anti-social-a-comment-on-case-c-17914-commission-v-hungary/. Last accessed 01.07.2016.