

IMI notification No 318295 by Hungary (20/08/2021)

Comments and questions from the European Commission

Introduction

The Commission would like to thank the Hungarian authorities for the IMI notification No 318295 which entered into force on 1 September 2021 and concerns Government Decree No 476/2021 of 9 August 2021 amending Government Decree No 314/2018 of 27 December 2018 on the single State Application Development Environment and the State Application Catalogue and amending certain related government decrees.

According to the notification, Section 1 (7) Section 3(1) of Government Decree No 314/2018 is replaced as follows:

‘(1) The Government designates IdomSoft Informatikai Zártkörűen Működő Részvénytársaság as the central application service provider, NISZ Nemzeti Infokommunikációs Szolgáltató Zártkörűen Működő Részvénytársaság as the central infrastructure service provider and KOPINT-DATORG Informatikai és Vagyongkezelő Kft. as the central product quality assurance body.’

The Commission considers that this provision sets up a services monopoly in favour of the designated entities since 1 September 2021.

Comment

The Commission would like to underline the following Court rulings:

In its Judgment of 23 February 2016 in *Case C-179/14, Commission v Hungary* (meal vouchers), the Court of Justice of the EU ruled that:

- 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 *Lääre 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 *Lääre and Others*, C-124/97, EU:C:1999:435, paragraph 31, and OSA, C-351/12, EU:C:2014:110, paragraph 70).

In its Judgment of 7 November 2018 in *Case C-171/17, Commission v Hungary* (mobile payment system), the Court of Justice of the EU ruled that

- 88 First, it is settled case-law that national legislation, such as the mobile payment system law and the Governmental Decree, under which exclusive rights to carry on an economic activity are conferred on a single, private or public, operator, constitutes a restriction of the freedom to provide services (see, to that effect, judgment of 23 February 2016, *Commission v Hungary*, C-179/14, EU:C:2016:108, paragraph 164 and the case-law cited).
- 89 That restriction cannot be justified unless it serves overriding reasons relating to the public interest, is suitable for securing the attainment of the public interest objective which it pursues and does not go beyond what is necessary in order to attain it (see, to that effect, judgment of 23 February 2016, *Commission v Hungary*, C-179/14, EU:C:2016:108, paragraph 166 and the case-law cited).
- 90 In that regard, without it being necessary to rule on the grounds put forward by the Hungarian Government to justify the restriction on the freedom to provide services resulting from the grant of a monopoly to Nemzeti Mobilfizetési Zrt., it must be held that, for the reasons set out in paragraph 82 of this judgment, the measure concerned appears, in any event, disproportionate, since it is common ground that there were less restrictive measures, which restricted the freedom to provide services to a lesser extent than those flowing from the mobile payment system law and the Governmental Decree, enabling the objectives pursued to be achieved.

It follows from the above-mentioned settled case-law of the Court of Justice that the notified national legislation which confers exclusive rights to a single public operator to carry out a service activity constitutes a restriction on both freedom of establishment and freedom to provide services. Moreover, this restriction can be compatible with EU law only if justified by an imperative reason in the public interest, non-discriminatory, suitable, necessary and proportionate to the objective pursued.

The Hungarian authorities claim that the legislation is justified on grounds of public order, public security and protection of recipients of service. The Commission considers that the notified legislation does not concern the provision of a public service itself, but the quality assurance of the service.

Moreover, it is not clear how the legislation protects the recipient of the service when the State is responsible for providing the public service and the quality assurance of the service, i.e. the State is in the last analysis the controller and the controlled.

In view of the foregoing, the Commission services would appreciate to receive the replies of the Hungarian authorities to the following questions.

Questions

1. Which are the risks for the public order and public security that are avoided or reduced by the restriction? Please provide facts and data, if possible.
2. How the restriction is linked with service recipients' protection, taking into account that the quality assurance operator may not be independent, as the controlled and the controller are both controlled by the State?
3. Are there less restrictive measures to address the issue?
4. Would the protection of recipients of services be higher when private operators accredited by the national authorities may offer quality assurance services - as the private operator would be independent from the State bodies? Would this be considered as a less restrictive measure?