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ECLI:EU:C:2019:1125

Provisional text

JUDGMENT OF THE COURT (Fourth Chamber)

19 December 2019 (\*)

(Reference for a preliminary ruling — Freedom of establishment — Sale of a pharmacy under a tendering procedure — National legislation — Right of pre-emption granted to employees of the pharmacy being sold)

In Case C-465/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 31 May 2018, received at the Court on 16 July 2018, in the proceedings

**AV,**

**BU**

v

**Comune di Bernareggio,**

intervener:

**CT,**

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, S. Rodin, D. Šváby, K. Jürimäe and N. Piçarra (Rapporteur), Judges,

Advocate General: G. Hogan,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 3 July 2019,

after considering the observations submitted on behalf of:

- AV and BU, by E. Beacco and A. Barletta, avvocati,
- the Comune di Bernareggio, by F. Pintucci, avvocato,
- CT, by G. Pini, avvocato,
- the European Commission, by L. Malferrari, H. Støvlbæk and L. Armati, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 October 2019,

gives the following

### **Judgment**

1 This request for a preliminary ruling concerns the interpretation of Articles 45, 49 to 56 and 106 TFEU and of Articles 15 and 16 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between AV and BU, of the one part, and the Comune di Bernareggio (Municipality of Bernareggio, Italy), of the other, concerning the decision to award the ownership of a municipal pharmacy to a pharmacist employed by that pharmacy, who had exercised her right of pre-emption under national law.

### **Legal context**

3 Article 9 of legge n. 475 — Norme concernenti il servizio farmaceutico (Law No 475 laying down provisions applicable to the provision of pharmaceutical services) of 2 April 1968 (GURI No 107, 27 April 1968, p. 2638), as amended, provides:

'The ownership of up to 50% of pharmacies that become vacant and of new pharmacies established following the review of the *pianta organica* (territorial grid) may be taken up by the municipality. Pharmacies that are owned by the municipalities may be managed, in accordance with Law No 142 of 8 June 1990 ...'

4 Article 12 of Law No 475 of 2 April 1968, laying down provisions applicable to the provision of pharmaceutical services, provides:

'1. Ownership of the pharmacy may be transferred after a period of three years following the date of its acquisition.

2. A transfer may be made only to a pharmacist who has previously owned a pharmacy or to a pharmacist who has been found to have the requisite qualifications in a previous competition;

...

11. The transfer of ownership of a pharmacy shall not be regarded as legally valid, for all intents and purposes, unless the transfer of the right to operate the pharmacy is accompanied by a transfer of the business, on pain of revocation.’

5 Legge n. 362 — Norme di riordino del settore farmaceutico (Law No 362 laying down provisions restructuring the pharmaceutical sector) of 8 November 1991 (GURI No 269, 16 November 1991, p. 3, ‘Law No 362/1991’), as amended, provides, in Article 4, entitled ‘Competition procedures’:

‘1. Vacant pharmacies and newly established pharmacies, which are available for operation by individuals, shall be allocated on the basis of a provincial competition, based on qualifications and examinations, organised by the regions and by the autonomous provinces of Trento and Bolzano before the month of March of every odd-numbered year.

2. Nationals of Member States of the European [Union] who have reached the age of majority, are in possession of their civic and political rights, are listed in the register of pharmacists and have not yet reached the age of 60 on the date on which the period for lodging a request expires shall be eligible to enter the competition referred to in paragraph 1.’

6 Article 7 of that law, entitled ‘Ownership and operation of the pharmacy’, provides:

‘1. The operation of private pharmacies shall be restricted to natural persons, in accordance with the provisions in force, and to partnerships and cooperatives with limited liability.

...

8. Ownership of a private pharmacy may be transferred three years after the delivery of the corresponding licence by the competent authority, save in the cases provided for paragraphs 9 and 10.

...’

7 Article 12(2) of Law No 362/1991, entitled ‘Transfer of ownership of pharmacies managed by municipalities’, provides that ‘in the event of a transfer of ownership of a municipal pharmacy, the employees thereof shall have a right of pre-emption and the provisions of Article 7 shall apply to them’.

8 Pursuant to the first paragraph of Article 2112 of the Codice civile (Civil Code), ‘upon the transfer of an undertaking, the employment relationship shall continue with the transferee and employees shall retain all rights under that relationship’.

### **The dispute in the main proceedings and the question referred for a preliminary ruling**

9 By notice published on 31 January 2014, the Municipality of Bernareggio launched a tendering procedure with a view to the sale of a municipal pharmacy.

10 The call for tenders specified, inter alia, that the transfer of the licence for that pharmacy would be awarded to the offer comprising the highest bid, starting from a basic contract value of EUR 580 000.

11 It was also specified that, pursuant to Article 12 of Law No 362/1991, the transfer of the ownership of the pharmacy to the tenderer provisionally awarded the contract would be conditional on the right of pre-emption not having been exercised by the municipal undertaking operating the pharmacies in Vimercate (Italy) or by the pharmacists employed under contracts of indefinite duration by that undertaking who satisfy the legal requirements.

12 The tender submitted by AV and BU was the most economically advantageous bid and, accordingly, they were provisionally awarded the contract.

13 However, by decision of 12 May 2014, the contract was definitively awarded to CT, a pharmacist employed by the municipal undertaking operating the pharmacies in Vimercate. Despite the fact that she had not participated in the call for tenders, CT was accorded precedence under Article 12(2) of Law No 362/1991.

14 AV and BU brought an action for annulment of that decision before the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy, Italy), contending that Article 12(2) of Law No 362/1991 was contrary to the principles of free competition and equal treatment laid down in EU law. They argued, inter alia, that the right of pre-emption, laid down in Article 12(2), in favour of pharmacists employed by the municipal pharmacy, is not justified, since the rights of those pharmacists are protected, in the event that the pharmacy is sold to a private buyer, under Article 2112 of the Civil Code, which transposes Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 2001 L 82, p. 16).

15 Following dismissal of their action for annulment, AV and BU appealed against the rejection decision before the referring court. The referring court indicates that it concurs with the observations submitted by the applicants as regards the incompatibility of the right of pre-emption at issue with EU law.

16 Relying on the case-law of the Court of Justice, the referring court notes, in the first place, that the principle of open competition, which applies to the allocation of newly established pharmacies, and to the transfer of ownership, or of the mere operation, of a municipal pharmacy, may be subject to limitations justified by higher-ranking requirements relating to the protection of the general interest, provided that the national legislation at issue is not, in fact, intended to protect sectoral economic interests (see, to that effect, judgments of 19 May 2009, *Commission v Italy*, C-531/06, EU:C:2009:315, and of 16 February 2012, *Costa and Cifone*, C-72/10 and C-77/10, EU:C:2012:80).

17 In the second place, the referring court points out that a right of pre-emption is a preferential right on conclusion of a given agreement, which is granted to certain classes of person and is intended, while furthering the private interests of those persons, also to pursue interests of a more general nature. According to the referring court, it follows from its own case-law that, as regards the right of pre-emption laid down in Article 12(2) of Law No 362/1991, the preference granted to employees arises from the need to ensure that pharmacies are run more effectively (judgment of the Consiglio di Stato (Council of State, Italy), Fifth Chamber, No 5329, 5 October 2005). The referring court states that Article 12(2) is based on the idea that a pharmacist who was already employed by the pharmacy sold will be able to ensure continuity and draw on the experience gained in running that pharmacy.

18 However, the referring court considers, first, that the continuity offered by the continuation of the employment relationships with the pharmacist staff is already effectively safeguarded by Article 2112 of the Civil Code, which transposes Directive 2001/23, with the result that the right of pre-emption laid down in Article 12(2) of Law No 362/1991 is superfluous.

19 The referring court considers, secondly, that the professional experience gained could be recognised in other ways, such as a mechanism, under the tendering procedure, for awarding additional points to pharmacists employed by the pharmacy. Moreover, that court is uncertain whether professional experience gained with the municipal pharmacy should be given such recognition. In that regard, the referring court points out that pharmacy is a regulated profession, that pharmacies may be transferred only to pharmacists whose names appear in the register of pharmacists and who either have the requisite qualifications to acquire a pharmacy or at least two years' professional experience. Similarly, experience as a pharmacist employed by the municipal pharmacy offers no indication of that employee's ability to manage a pharmacy.

20 The referring court considers, therefore, that the right of pre-emption laid down in Article 12(2) of Law No 362/1991 amounts to an unconditional right of precedence, which is not justified, particularly as it takes no account of genuine evidence that the pharmacy in question has in fact been well run or of the actual experience gained by the employees of the municipal pharmacy.

21 Accordingly, the referring court regards that right of pre-emption as disproportionate inasmuch as it is not based on any merit criterion. In that regard, it relies on the case-law of the Court of Justice, according to which assessing the professional experience acquired by EU citizens differently, for the purposes of participation in a competition, amounts to infringement of Article 45 TFEU (see, to that effect, judgment of 12 May 2005, *Commission v Italy*, C-278/03, EU:C:2005:281, paragraph 22).

22 Similarly, according to the referring court, the Court of Justice has held that regulation and governance of the pharmaceutical sector may be justified in the interest of the protection of health, provided that the effects of the national legislation do not go beyond what is necessary for securing attainment of that objective (see, to that effect, judgments of 10 March 2009, *Hartlauer*, C-169/07, EU:C:2009:141, paragraphs 44, 46 and 47, and of 19 May 2009, *Apothekerkammer des Saarlandes and Others*, C-171/07 and C-172/07, EU:C:2009:316, paragraphs 25, 27 and 28).

23 In the third place, the referring court states that the case before it has cross-border implications inasmuch as any EU citizen who meets the professional requirements laid down in Article 4(2) of Law No 362/1991 may submit a bid in response to the call for tenders. The referring court points out, furthermore, that Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22), as amended by Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 (OJ 2013 L 354, p. 132), enables the principle of mutual recognition of professional qualifications to be applied to the pharmacy profession.

24 The referring court draws attention, in that regard, to the case-law of the Court of Justice from which it is apparent that even if all the facts of a case are confined to a Member State, the legislation at issue may have effects that are not limited to that Member State in that it is not inconceivable that nationals established in other Member States have been or are interested in opening or taking over pharmacies in that Member State (see, to that effect, judgment of 1 June 2010, *Blanco Pérez and Chao Gómez*, C-570/07 and C-571/07, EU:C:2010:300, paragraph 40).

25 In those circumstances the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Do the principles of freedom of establishment, non-discrimination, equal treatment, the protection of competition and freedom of movement for workers, referred to in Articles 45, 49 to 56 and 106 TFEU and in Articles 15 and 16 of the Charter, and the requirements of proportionality and reasonableness inherent in those principles, preclude a provision of national law, such as Article 12(2) of Law No 362/1991, which, in the event of the transfer of ownership of a municipal pharmacy, confers a right of pre-emption on the employees of the pharmacy in question?’

### **Preliminary observations**

#### ***The relevant provision of EU law***

26 As a preliminary point, it should be specified which of the provisions of EU law cited by the referring court in the question referred might be of relevance in deciding the dispute in the main proceedings.

27 In that regard, it must be noted, first, that the acquisition of a pharmacy for an indefinite period falls within the scope of Article 49 TFEU, in that it enables an economic activity to be pursued by means of a stable arrangement (see, to that effect, judgments of 30 November 1995, *Gebhard*, C-55/94, EU:C:1995:411, paragraph 39, and of 19 May 2009, *Apothekerkammer des Saarlandes and Others*, C-171/07 and C-172/07, EU:C:2009:316, paragraphs 23 and 24).

28 It follows that neither Article 45 TFEU, which guarantees the free movement of workers nor Article 56 TFEU, relating to the freedom to provide services, applies to the case in the main proceedings.

29 Next, as regards the application of Articles 15 and 16 of the Charter, since those articles recognise rights that are the subject of provisions in the EU Treaties — that is to say, in the case in the main proceedings, Article 49 TFEU — those rights must be exercised, in accordance with Article 52(2) of the Charter, ‘under the conditions and within the limits defined by those Treaties’.

30 Lastly, as regards Article 106 TFEU, as the Advocate General observes in point 33 of his Opinion, it cannot be inferred from the material in the file before the Court that the dispute in the main proceedings centres on or indeed relates in any manner to the operation of public or, indeed, private undertakings, to which a Member State has granted special or exclusive rights, or indeed undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly in accordance with Article 106 TFEU.

31 Accordingly, it must be concluded that, with respect to the referring court’s question, Article 49 TFEU is the only provision that may be of relevance in deciding the dispute in the main proceedings.

#### ***Admissibility***

32 Since the facts of the case in the main proceedings are confined to a single Member State in all respects, whereas, in principle, the provisions of the FEU Treaty on free movement do not apply to purely internal situations (see, to that effect, judgment of 15 November 2016, *Ullens de Schooten*, C-268/15, EU:C:2016:874, paragraph 47), the Court must examine whether the request for a preliminary ruling is admissible.

33 In that regard, it must be borne in mind that even if a dispute is confined in all respects to a single Member State, a request for a preliminary ruling concerning the interpretation of the provisions of the Treaty relating to the fundamental freedoms may be declared admissible, on the ground that it is not inconceivable that nationals established in other Member States have been or are interested in making use of those freedoms for carrying on activities in the territory of the Member State that had enacted the national legislation in question and, consequently, that the legislation, applicable without distinction to nationals of that State and those of other Member States, is capable of producing effects which are not confined to that Member State (judgments of 1 June 2010, *Blanco Pérez and Chao Gómez*, C-570/07 and C-571/07, EU:C:2010:300, paragraph 40; of 5 December 2013, *Venturini and Others*, C-159/12 to C-161/12, EU:C:2013:791, paragraphs 25 and 26; and of 15 November 2016, *Ullens de Schooten*, C-268/15, EU:C:2016:874, paragraph 50).

34 As the referring court noted, it must also be stated that in such a case the Court, adjudicating on a question from a national court in connection with a purely internal situation, cannot, where the national court does not indicate anything other than that the national legislation at issue in the main proceedings applies without distinction to nationals of the Member State concerned and those of other Member States, consider that the request for a preliminary ruling on the interpretation of the fundamental freedoms is necessary to the outcome of the case pending before the referring court. The specific facts that allow a link to be established between the subject or circumstances of a dispute concerning a purely internal situation, on the one hand, and the provisions of the Treaty, on the other, must be apparent from the order for reference (judgment of 15 November 2016, *Ullens de Schooten*, C-268/15, EU:C:2016:874, paragraph 54).

35 In the case in the main proceedings, the referring court states that the value of the municipal pharmacy, which is the subject of the tendering procedure, is EUR 580 000. The referring court also states that the case has cross-border implications inasmuch as, under Article 4(2) of Law No 362/1991, the acquisition of a pharmacy is open to any EU citizen with the requisite professional qualifications. The referring court further adds that Directive 2005/36, as amended by Directive 2013/53, makes provision for the mutual recognition of professional qualifications of pharmacists.

36 Consequently, the question referred by the Consiglio di Stato (Council of State) is admissible.

### **Consideration of the question referred**

37 By its question, the referring court asks, in essence, whether Article 49 TFEU must be interpreted as precluding a national measure that grants an unconditional right of pre-emption to pharmacists employed by a municipal pharmacy, in the event of the sale of that pharmacy by tender.

38 In order to answer that question, it is necessary to examine whether the right of pre-emption, laid down in Article 12(2) of Law No 362/1991, constitutes a restriction of freedom of establishment and, if so, whether such a restriction may be justified by overriding reasons in the general interest (see, to that effect, judgment of 19 May 2009, *Apothekerkammer des Saarlandes and Others*, C-171/07 and C-172/07, EU:C:2009:316, paragraphs 22 and 25).

39 As regards, first of all, whether there has been a restriction of freedom of establishment, it must be recalled that Article 49 TFEU precludes any national measure which, even though it is applicable without discrimination on grounds of nationality, is liable to hinder or render less attractive the exercise by EU nationals of freedom of establishment (judgment of 19 May 2009,

*Apothekerkammer des Saarlandes and Others*, C-171/07 and C-172/07, EU:C:2009:316, paragraph 22).

40 In that regard, as the Advocate General stated in point 47 of his Opinion, given the time and money needed to participate in a call for tenders, the unconditional right of pre-emption, which is granted, in the event of the sale of a municipal pharmacy, to the pharmacists employed by that pharmacy, is likely to discourage pharmacists from other Member States from participating in such a tendering procedure.

41 Such a conclusion is all the more compelling considering that submission of the most economically advantageous bid is no guarantee of being awarded the contract. Without even participating in the call for tenders, a pharmacist who is employed by the municipal pharmacy may exercise his or her right of pre-emption by matching the most economically advantageous bid and thus obtain the transfer of that pharmacy.

42 It follows that the unconditional right of pre-emption granted to the pharmacists employed by a municipal pharmacy, in the event of the sale of that pharmacy by tender, by conferring an advantage on the pharmacists employed by the municipal pharmacy, tends to discourage or even prevent pharmacists from other Member States from acquiring a fixed place of business for the practice of their profession in Italy.

43 Consequently, such a right of pre-emption constitutes a restriction of the freedom of establishment guaranteed by Article 49 TFEU.

44 As regards, in the second place, whether that restriction may be justified, it must be determined, first, whether the national measure pursues a legitimate objective (see, to that effect, judgment of 19 May 2009, *Apothekerkammer des Saarlandes and Others*, C-171/07 and C-172/07, EU:C:2009:316, paragraph 25).

45 It is apparent from the order for reference that the right of pre-emption, which is granted, where the municipal pharmacy is sold by tender, to the pharmacists employed by that pharmacy, is aimed at ensuring that pharmacies are run more effectively, first, by ensuring continuity in the employment relationship of pharmacists employed by that pharmacy, and secondly, by capitalising on the experience gained by those pharmacists in running the pharmacy.

46 Such an objective, inasmuch as it is akin to the objective of protecting public health, expressly referred to in Article 52(1) TFEU, may justify a restriction of freedom of establishment. It has also been held that restrictions of freedom of establishment may be justified by the objective of ensuring that the public has a supply of medicinal products which is reliable and of good quality, which constitutes an overriding reason in the general interest (see, to that effect, judgment of 5 December 2013, *Venturini and Others*, C-159/12 to C-161/12, EU:C:2013:791, paragraphs 40 and 41).

47 Consequently, it must be examined, secondly, whether the restriction of freedom of establishment entailed by the unconditional right of pre-emption granted to the pharmacists employed by a municipal pharmacy, where that pharmacy is sold by tender, is appropriate for ensuring attainment of the objective pursued and, if so, whether that restriction goes beyond what is necessary to attain that objective, that is to say whether there are measures less restrictive of the freedom enshrined in Article 49 TFEU which would enable the objective to be attained just as effectively (see, to that effect, judgment of 19 May 2009, *Apothekerkammer des Saarlandes and Others*, C-171/07 and C-172/07, EU:C:2009:316, paragraphs 25 and 52).

48 As regards the continuity in the employment relationship, which seeks to ensure that pharmacies are run more effectively, that continuity cannot be regarded as appropriate for attaining the objective of protecting public health.

49 The referring court notes that the objective of retaining the rights of the employees of a municipal pharmacy, in the event of that pharmacy's sale, is in principle ensured by the application of Article 2112 of the Civil Code, which transposes Directive 2001/23.

50 As regards capitalising on the professional experience gained in order to ensure that pharmacies are run more effectively, it is apparent from the file before the Court that the unconditional right of pre-emption granted to the pharmacists employed by a municipal pharmacy, where that pharmacy is sold by tender, gives rise to a non-rebuttable presumption that those employees are best placed to manage that pharmacy as owners. Such a right of pre-emption is not based on any real assessment of the experience actually gained, the quality of service provided or the duties actually performed within the municipal pharmacy. Consequently, it cannot be regarded as being appropriate for attaining the objective of protecting public health.

51 In any event, it must be pointed out that under national law pharmacies may be sold only to pharmacists whose names appear in the register of pharmacists and who either have the requisite qualifications to acquire a pharmacy or at least two years' professional experience. Notwithstanding the fact that pharmacy is a regulated profession, those conditions offer, in and of themselves, certain safeguards concerning the professional ability of potential purchasers of municipal pharmacies. Furthermore, as the referring court noted, such an objective of capitalising on the professional experience gained may be attained through less restrictive measures such as the award of additional points under the tendering procedure to tenderers who provide proof of experience in managing a pharmacy.

52 It must, therefore, be held that, inasmuch as it aims to ensure that pharmacies are run more effectively and assuming that it does in fact pursue an objective related to the protection of public health, the unconditional right of pre-emption, granted to the pharmacists employed by a municipal pharmacy, where that pharmacy is sold by tender, is not appropriate for securing attainment of that objective and, in any event, goes beyond what is necessary in order to attain it.

53 Having regard to all the foregoing considerations, the answer to the question referred is that Article 49 TFEU must be interpreted as precluding a national measure that grants an unconditional right of pre-emption to pharmacists employed by a municipal pharmacy, in the event of the sale of that pharmacy by tender.

### **Costs**

54 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

**Article 49 TFEU must be interpreted as precluding a national measure that grants an unconditional right of pre-emption to pharmacists employed by a municipal pharmacy, in the event of the sale of that pharmacy by tender.**

[Signatures]

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\* Language of the case: Italian.

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