Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 14 March 2024[1]

Case C-16/23

FA.RO. di YK & C. Sas
v
Agenzia delle Dogane e dei Monopoli,
intervener:
JS

(Request for a preliminary ruling from the Tribunale Amministrativo Regionale per la Liguria (Regional Administrative Court, Liguria, Italy))

(Reference for a preliminary ruling – Services in the internal market – Directive 2006/123/EC – Sale of tobacco products – Monopolies over the provision of services – Authorisation scheme – Requirements applied to the establishment of service providers – National legislation restricting the authorisation of resale outlets for monopoly goods – Distance and population density criteria – Protection of public health against smoking)

1. This request for a preliminary ruling concerns the compatibility with Directive 2006/123/EC[2] of Italian legislation applicable to the retail sale of tobacco products.

2. The legislation at issue uses restrictive criteria, based on geographical distance and population density, to authorise the establishment of points of sale for those products. The referring court is unsure whether those criteria are compatible with Directive 2006/123.

I. Legal framework

A. European Union law. Directive 2006/123

3. Article 1 ('Subject matter') provides:

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

[1] Original language: Spanish.

[2] Directive of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

2. This Directive does not deal with the liberalisation of services of general economic interest, reserved to public or private entities, nor with the privatisation of public entities providing services.

3. This Directive does not deal with the abolition of monopolies providing services nor with aids granted by Member States which are covered by Community rules on competition.

This Directive does not affect the freedom of Member States to define, in conformity with Community law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to.

…'

4. Article 2 ('Scope') states:

'…

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

(a) non-economic services of general interest;

…'

5. Article 4 ('Definitions') provides:

'For the purposes of this Directive, the following definitions shall apply:

…

(6) "authorisation scheme" means any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof;

(7) "requirement" means any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States or in consequence of case-law, administrative practice, the rules of professional bodies, or the collective rules of professional associations or other professional organisations, adopted in the exercise of their legal autonomy; rules laid down in collective agreements negotiated by the social partners shall not as such be seen as requirements within the meaning of this Directive;

…'

6. Article 9 ('Authorisation schemes') reads:

'1. Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following conditions are satisfied:

(a) the authorisation scheme does not discriminate against the provider in question;

(b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest;

(c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective.

…'

7. In accordance with Article 10 ('Conditions for the granting of authorisation'):

'1. Authorisation schemes shall be based on criteria which preclude the competent authorities from exercising their power of assessment in an arbitrary manner.

2. The criteria referred to in paragraph 1 shall be:

(a) non-discriminatory;

(b) justified by an overriding reason relating to the public interest;

(c) proportionate to that public interest objective;

(d) clear and unambiguous;

(e) objective;

(f) made public in advance;

(g) transparent and accessible.

…'

8. Article 14 ('Prohibited requirements') states:

'Member States shall not make access to, or the exercise of, a service activity in their territory subject to compliance with any of the following:

…

(5) the case-by-case application of an economic test making the granting of authorisation subject to proof of the existence of an economic need or market demand, an assessment of the potential or current economic effects of the activity or an assessment of the appropriateness of the activity in relation to the economic planning objectives set by the competent authority; this prohibition shall not concern planning requirements which do not pursue economic aims but serve overriding reasons relating to the public interest;

…'

9. Article 15 ('Requirements to be evaluated') reads:

'1. Member States shall examine whether, under their legal system, any of the requirements listed in paragraph 2 are imposed and shall ensure that any such requirements are compatible with the conditions laid down in paragraph 3. Member States shall adapt their laws, regulations or administrative provisions so as to make them compatible with those conditions.

2. Member States shall examine whether their legal system makes access to a service activity or the exercise of it subject to compliance with any of the following non-discriminatory requirements:

(a) quantitative or territorial restrictions, in particular in the form of limits fixed according to population or of a minimum geographical distance between providers;

…

3. Member States shall verify that the requirements referred to in paragraph 2 satisfy the following conditions:

(a) non-discrimination: requirements must be neither directly nor indirectly discriminatory according to nationality nor, with regard to companies, according to the location of the registered office;

(b) necessity: requirements must be justified by an overriding reason relating to the public interest;

(c) proportionality: requirements must be suitable for securing the attainment of the objective pursued; they must not go beyond what is necessary to attain that objective and it must not be possible to replace those requirements with other, less restrictive measures which attain the same result.

…'

B. Italian law

1. Law 1293/1957[3]

10. Under Article 16 et seq. of Law 1293/1957, monopoly goods, including manufactured tobacco products, are sold through ordinary and special 'outlets' and by means of 'secondary licences'.

11. *Ordinary outlets* are establishments, located on the public highway, which are specifically dedicated to the sale of tobacco and other monopoly goods. They are licensed to individuals for a period not exceeding nine years.[4]

[3] Legge n. 1293 – Organizzazione dei servizi di distribuzione e vendita dei generi di monopolio (Law 1293/1957 on the organisation of services for the distribution and sale of monopoly goods) of 22 December 1957 (GURI No 9 of 13 January 1958) ('Law 1293/1957').

[4] The decision to establish an ordinary outlet is a matter for the Agenzia delle Dogane e dei Monopoli (Customs and Monopolies Agency) ('the ADM') which, pursuant to Article 21(1) of Law 1293/1957, must exercise that power in accordance with the '*interest of the service*' criterion.

12. *Special outlets* are established to meet demand needs in specific places (railway stations, sea ports, airports, motorway services, shopping centres, and so forth). They are licensed, usually to individuals, for a period not exceeding nine years.

13. The ADM may also authorise the sale of monopoly goods in public establishments by means of a *secondary licence*. Holders of such licences obtain their supplies from the nearest ordinary outlet.

14. Secondary licences must be justified by the need to provide the service in places where and at times when outlets are unable to do so. A secondary licence cannot be issued where a vending machine selling manufactured tobacco products has been installed in the nearest outlet located within a predetermined distance.

2. Decree-law 98/2011 [5]

15. Pursuant to Article 24(42) of Decree-law 98/2011, the legislature delegated to the Minister for Economic Affairs and Finance the power to regulate, by decree, the establishment of points of sale for monopoly goods 'in order to balance, while also protecting competition, the requirement to ensure that users have access to a sales network spread out across the territory against the fundamental public interest in health protection, consisting in preventing and controlling any supply of tobacco to the public that is not justified by the actual demand for tobacco'.

16. In particular, Article 24(42)(b) of Decree-law 98/2011, as amended by Article 4 of Law 37/2019, provides that ordinary outlets may be established 'only if certain requirements are met as to distance, namely a distance of not less than 200 metres, and as to population, namely a ratio of one outlet for every 1 500 residents'.

3. Decree 38/2013 [6]

17. Following the amendments introduced in 2021, Article 2 of Decree 38/2013 lays down the following criteria for the establishment of ordinary outlets:

(a) Minimum distance from the nearest operational outlet:

- 300 metres in municipalities with a population of 30 000 residents or fewer;
- 250 metres in municipalities with a population of between 30 001 and 100 000 residents;
- 200 metres in municipalities with a population of more than 100 000 residents;

(b) Ratio of one outlet for every 1 500 residents in the municipality; it is possible to derogate from this ratio only for municipalities with fewer than 1 500 residents.

[5] Decreto legge n. 98 – Disposizioni urgenti per la stabilizzazione finanziaria (Decree-law 98/2011 – Urgent measures for financial stability) of 6 July 2011 (GURI No 155 of 6 July 2011), converted into law, with amendments, by Law 111/2011 of 15 July 2011 (GURI No 164 of 16 July 2011), as amended by Law 37/2019 of 3 May 2019 (GURI No 109 of 11 May 2019) ('Decree-law 98/2011').

[6] Decreto ministeriale n. 38 – Regolamento recante disciplina della distribuzione e vendita dei prodotti da fumo (Decree No 38 of the Minister for Economic Affairs and Finance laying down rules governing the distribution and sale of smoking products) of 21 February 2013 (GURI No 89 of 16 April 2013), as amended by Decree No 51 of the Minister for Economic Affairs and Finance of 12 February 2021 ('Decree 38/2013').

18. The criterion relating to the ratio between outlets and resident population was introduced by Law 37/2019 and by Ministerial Decree No 51 of 2021, replacing the minimum productivity requirement laid down by the original texts of Decree-Law 98/2011 and Ministerial Decree No 38 of 2013. [7]

19. In accordance with Article 3:

– The ADM must take particular account of areas where there is new housing and commercial development, the specific importance of road junctions and the main urban meeting places, the resident population, and the presence of offices or production structures that are particularly important and well-used, which might demonstrate an interest of the service.

– The sales network for manufactured tobacco products must be in line with the interest of the service and be organised in such a way as to ensure the efficiency and effectiveness of checks by the authorities in connection with the protection of minors, public order and public safety, public health, and the revenue from tax on monopoly goods.

20. Ordinary outlets are established in accordance with a plan drawn up for that purpose by the competent regional office of the ADM, approved every six months, following the conduct of a procedure providing, inter alia, for prior publication of a draft provisional plan and for the submission of observations by interested parties.

21. For the allocation of new ordinary outlets, the following arrangements are used: in municipalities with a population of 30 000 residents or fewer, the authorities launch a competition solely for particular categories of persons; in municipalities with a population of more than 30 000 residents and in provincial capitals, licences are awarded by means of a public tendering procedure open to all candidates.

II. Facts, dispute and questions referred for a preliminary ruling

22. The company FA.RO. di YK & C. s.a.s. ('FA.RO.') was, for many years, the holder of a secondary licence for the sale of tobacco at the 'Bar Rino' commercial establishment, situated in Finale Ligure (Italy).

23. On 19 November 2021, the ADM initiated the procedure for revocation of the licence, since the ordinary tobacco outlet, which supplies the outlet operated by FA.RO. and is located less than 300 metres away, had installed a cigarette vending machine in May 2021. Under the legislation in force (Article 7 of Decree 38/2013), that situation prevents the secondary licence from being maintained.

24. FA.RO. notified the ADM of the need to establish a new ordinary outlet at the 'Bar Rino', setting out a series of facts indicating high consumer footfall.

[7] The previous requirement had been criticised by the European Commission in procedure EU-Pilot 8002/15/GROW, on the ground that it was contrary to point 5 of the first paragraph of Article 14 of Directive 2006/123.

25. The ADM did not grant the application submitted by FA.RO., on the ground that it did not meet the requirements relating to distance and the outlet-to-resident ratio laid down in Article 2 of Decree 38/2013. [8]

26. FA.RO. appealed against the decision of the ADM to the Tribunale Amministrativo Regionale per la Liguria (Regional Administrative Court, Liguria, Italy), seeking the annulment:

– First, of memorandum No 6401/RU of 31 March 2022 of the ADM concerning the six-month plan (second half of 2022) for the opening of new ordinary tobacco outlets in Liguria, in so far as it did not provide for the opening of such an outlet in the municipality of Finale Ligure, via Mazzini, No 2, where 'Bar Rino' is situated.

– Secondly, of any other associated act.

27. FA.RO. argued that the national provision conflicts with Article 15 of Directive 2006/123. As a result, Article 2 of Decree 38/2013 should be annulled or, at least, its application should be excluded, and Article 24(42) of Decree-law 98/2011 should be disapplied.

28. FA.RO submitted that a new outlet in 'Bar Rino' would not result in over-supply in relation to demand because it is a location where there are many more actual users of the service than there are residents, owing to the influx of visitors at weekends and during the tourist season.

29. The ADM claimed that the appeal should be dismissed.

30. Against that background, the Tribunale Amministrativo Regionale per la Liguria (Regional Administrative Court, Liguria) has referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 15 of Directive 2006/123 … and Articles 49, 56 and 106(2) TFEU be interpreted as precluding national legislation, such as that at issue in the main proceedings, which imposes restrictions on the authorisation of tobacco product outlets according to a minimum geographical distance between providers and according to the resident population?

(2) Must Article 15 of Directive 2006/123 … and Articles 49, 56 and 106(2) TFEU be interpreted as precluding national legislation, such as that at issue in the main proceedings, which makes the authorisation of tobacco product outlets subject to compliance with pre-established criteria relating to the minimum geographical distance between suppliers and to the resident population, without allowing the competent public authority to assess other objective factual circumstances that demonstrate, even where the abovementioned conditions are not satisfied[,] a need for a service in the case at issue?'

III. Procedure before the Court of Justice

31. The request for a preliminary ruling was received at the Court on 16 January 2023.

[8] According to the ADM: (a) the proposed premises were situated 176 metres from point of sale No 6 and 220 metres from point of sale No 7; and (b) there were already 13 active ordinary and special points of sale in Finale Ligure for a population of 11 358 residents.

32. Written observations were submitted by FA.RO., JS,[9] the Spanish and Italian governments, and the European Commission. Those parties all attended the hearing held on 24 January 2024.

IV. Assessment

A. Admissibility

33. The Spanish Government contends that the two questions referred for a preliminary ruling are inadmissible on the ground that they are hypothetical. The Italian Government, for its part, argues that Directive 2006/123 is not applicable to the dispute.

1. Admissibility of the questions in so far as they concern Articles 49, 56 and Article 106(2) TFEU

34. The provisions of the FEU Treaty on the freedom of establishment (Article 49) and the freedom to provide services (Article 56) do not apply, in principle, to a situation which is confined in all respects within a single Member State.[10]

35. It can be inferred from the order for reference that the dispute is confined in all respects within the Italian Republic: an Italian undertaking applied to the Italian authorities for authorisation to operate a tobacco outlet in Italy.

36. Where a situation is confined in all respects within a single Member State, a request for a preliminary ruling is admissible only if it indicates facts or factors which allow a link to be established between the subject matter or circumstances of the dispute and Articles 49 or 56 TFEU.

37. It is for the referring court to indicate to the Court 'in what way the dispute pending before it, despite its purely domestic character, has a connecting factor with the provisions of EU law relating to the fundamental freedoms that makes the requested preliminary ruling concerning the interpretation of those provisions necessary for the purpose of resolving that dispute.'[11]

38. Since the request for a preliminary ruling from the Italian court contains no indication to that effect, its questions must be regarded as inadmissible in so far as they concern the interpretation of Articles 49 and 56 TFEU.[12]

[9] JS is the licensed operator of one of the points of sale near the establishment of FA.RO. and disputes FA.RO.'s claims.

[10] Judgments of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874, paragraph 47), and of 18 January 2022, *Thelen Technopark Berlin* (C-261/20, EU:C:2022:33, paragraph 50).

[11] Judgments of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874, paragraphs 54 and 55), and of 18 January 2022, *Thelen Technopark Berlin* (C-261/20, EU:C:2022:33, paragraphs 52 and 53).

[12] Judgments of 20 September 2018, *Fremoluc* (C-343/17, EU:C:2018:754, paragraph 33); of 14 November 2018, *Memoria and Dall'Antonia* (C-342/17, EU:C:2018:906, paragraph 21); of 24 October 2019, *Belgische Staat* (C-469/18 and C-470/18, EU:C:2019:895, paragraph 26); and of 18 January 2022, *Thelen Technopark Berlin* (C-261/20, EU:C:2022:33, paragraph 54).

39. The same applies with regard to Article 106(2) TFEU. The referring court does not set out the reasons which led it, specifically, to ask about the interpretation of that provision or the link which, in its view, may exist between that provision and the national rules. It follows that the Court of Justice is unable to provide the referring court with an interpretation of that article which would be useful for resolving the dispute. [13]

40. The two questions referred for a preliminary ruling are, therefore, inadmissible as regards the interpretation of Articles 49, 56 and Article 106(2) TFEU.

41. The finding that the situation at issue is purely internal does not, however, affect the applicability of the provisions of Directive 2006/123 concerning freedom of establishment for providers. The Court has previously held that those provisions apply to a situation which is confined in all respects within a single Member State. [14]

2. Admissibility of the questions in so far as they concern the interpretation of Directive 2006/123

42. The Spanish Government argues that the questions should also be ruled inadmissible in relation to the interpretation of Directive 2006/123, pursuant to Article 1(3) thereof.

43. Article 1(3) of Directive 2006/123 states that the directive 'does not deal with the abolition of monopolies providing services'.

44. That exclusion, read in the light of recital 8 of the directive, supports the inference that Directive 2006/123 does not apply where the provision of commercial distribution services is subject to a sales monopoly system [15] which completely excludes competition and leaves such sales in the hands of a single supplier. [16]

45. The Italian rules on the sale of manufactured tobacco products do not appear to be framed as a monopoly on the sale of goods or as a monopoly on the supply of services. [17] Tobacco products are sold by a large number of ordinary and special outlets and by other undertakings holding secondary licences.

[13] Judgments of 19 April 2018, *Consorzio Italian Management and Catania Multiservizi* (C-152/17, EU:C:2018:264, paragraph 22), and of 2 September 2021, *Irish Ferries* (C-570/19, EU:C:2021:664, paragraph 133).

[14] As regards the provisions of Chapter III of Directive 2006/123 on freedom of establishment for providers, see judgments of 30 January 2018, *X and Visser* (C-360/15 and C-31/16, EU:C:2018:44; 'judgment in *X and Visser*'), paragraphs 99 to 110; of 22 September 2020, *Cali Apartments and HX* (C-724/18 and C-727/18, EU:C:2020:743; 'judgment in *Cali Apartments*'), paragraph 56; and of 20 April 2023, *Autorità Garante della Concorrenza e del Mercato (Municipality of Ginosa)* (C-348/22, EU:C:2023:301, paragraph 40).

[15] On the system of commercial monopolies in the European Union, see Berrod, F. and Picod, F.: 'Monopoles publics', *Jurisclasseur Europe*, Instalment 1510, 1 November 2020.

[16] The Court has held, for example, that Italian legislation prohibiting private companies from providing a safekeeping service of cinerary urns had the effect of conferring a monopoly on municipal departments. In that case, Article 1(3) of Directive 2006/123 excluded the application of the directive to the national legislation, the lawfulness of which had to be assessed exclusively in relation to Article 49 TFEU (judgment of 14 November 2018, *Memoria and Dall'Antonia* (C-342/17, EU:C:2018:906, paragraphs 41 and 42)).

[17] The monopoly on the cultivation, import and sale of unmanufactured tobacco, laid down by Law 907/1942 of 17 July 1942, was repealed by Article 1 of Decreto legge 30 novembre 1970, n. 870, Attuazione del Regolamento C.E.E. sulla politica agricola comune del tabacco greggio e integrazione delle disposizioni di cui alla legge 13 maggio 1966, n. 303. (Decree-law 870/1970 of 30 November 1970 implementing the EEC Regulation on the common agricultural policy for raw tobacco and the integration of the provisions of Law 303/1966 of 13 May 1966) (GURI No 303 of 30 November 1970), converted with amendments into Law 3/1971 of 27 January 1971 (GURI No 24 of 29 January 1971).

46. It is apparent from the information in the case file that both outlets and establishments holding secondary licences are in the hands of independent individuals, who provide the public with the service of selling manufactured tobacco products. [18] Therefore, there is no monopoly on sales or on provision of the service.

47. The grant of licences for outlets and of secondary licences entails the exercise of public powers by the Italian authorities, which authorise the points of sale. That does not mean, however, that the State provides that service or that the ADM is entitled to interfere in strictly commercial decisions of the licensed operators of points of sale once those have been allocated. State outlets belonging to the former tobacco sales monopoly were abolished in 1983. [19]

48. It is true, as the referring court states, [20] that the retail sale of manufactured tobacco products is a commercial activity that is not entirely comparable to other economic activities because the distribution channels are restricted and because it concerns a product that is harmful to public health. It is also true that aspects of that activity, such as tobacco advertising and the price of tobacco, are strictly regulated. However, I must stress that those factors do not make the retail sale of tobacco in Italy a State monopoly and do not eliminate the (limited) competition between the suppliers of this type of service.

49. In short, the Spanish Government's plea must be dismissed.

50. The Italian Government refers to Article 2 and recital 8 of Directive 2006/123 in support of its argument that that directive is inapplicable. It submits that tobacco outlets perform an economic activity of general interest which allows the 'fiscal monopoly' on the sale of tobacco to operate. [21]

51. The Court has held that 'it is quite clear from Article 2(2)(a) of Directive 2006/123, read in conjunction with recitals 17, 70 and 72 of that directive, that the rules laid down by that directive are applicable, in principle, to services of general economic interest, only non-economic services of general interest being excluded from the scope of those rules'. [22]

52. Based on that premiss, the Italian Government's position cannot be accepted. If the retail sale of manufactured tobacco products in Italy were classified as a service of general interest, that would be in the form of a service of general *economic* interest, subject to the requirements of Directive 2006/123.

53. The questions referred for a preliminary ruling are therefore admissible as regards the interpretation of the provisions of Directive 2006/123 applicable to the national legislation at issue. Furthermore, I believe that it is helpful to deal with the questions together.

[18] The retail sale of tobacco products is a service within the meaning of Article 4(1) of Directive 2006/123, in accordance with the judgment in *X and Visser*, paragraph 91.

[19] Article 2 of the Legge 13 maggio 1983, n. 198, Adeguamento alla normativa comunitaria della disciplina concernente i monopoli del tabacco lavorato e dei fiammiferi (Law 198/1983 of 13 May 1983 bringing the rules on the monopolies in tobacco and matches into line with Community legislation) (GURI No 138 of 21 May 1983) deleted point (a) of Article 19(1) of Law 1293/1957, which allowed the direct retail sale by the State of manufactured tobacco products. See judgment of 14 December 1995, *Banchero* (C-387/93, EU:C:1995:439, paragraphs 30, 42 and 49).

[20] Order for reference, paragraph 13.

[21] Observations of the Italian Government, paragraph 10. At the hearing, the Italian Government insisted that a 'fiscal monopoly' exists, but that alleged monopoly means in practice that authorised points of sale help with the collection of excise duty levied on tobacco consumption, preventing the unlawful (untaxed) sale of contraband tobacco.

[22] Judgments of 23 December 2015, *Hiebler* (C-293/14, EU:C:2015:843, paragraphs 43 and 44), and of 11 April 2019, *Repsol Butano and DISA Gas* (C-473/17 and C-546/17, EU:C:2019:308, paragraph 43).

B. Assessment of the substance: compatibility with Directive 2006/123 of national legislation restricting the sale of manufactured tobacco products

54. The referring court requests the interpretation of Article 15 of Directive 2006/123. After stating that it 'does not call into question the legality of the authorisation scheme provided for in Article 9 of Directive 2006/123 for the sale to the public of monopoly goods, and, in particular, tobacco products and accessories', the referring court takes the view that that scheme is justified by an overriding reason relating to the public interest. [23]

55. However, the referring court is unsure whether the geographical and demographic criteria included in the Italian provision (to which Article 15(2)(a) of Directive 2006/123 refers) are compatible with the principles of necessity and proportionality, in that:

– From the perspective of *necessity*, the restrictions in force are not really suitable for discouraging the consumption of tobacco products, which would require the distance between points of sale to be calculated in kilometres, not in metres. Nor does the (admitted) proliferation of vending machines discourage the consumption of tobacco.

– From the perspective of *proportionality*, those restrictions, even if they were necessary, could prove excessive in relation to what is necessary to attain the objective of health protection through a balanced relationship between supply and demand, on account of their rigidity (minimum distance) and because they are linked to data taken purely from the registry records (resident population).

– In order to observe the principle of proportionality, the ADM should be able to take into consideration other objective circumstances, even where the distance and population limits are not complied with, if they show that the opening of a new ordinary outlet would satisfy demand for the service and therefore would not specifically lead to an over-supply. That is the situation in the present case, since there are actually many more service users than is apparent from the registry data, since the municipality has a high level of tourism.

1. 'Authorisation scheme' or 'requirement' within the meaning of Directive 2006/123

56. Article 4 of Directive 2006/123 defines the terms 'authorisation scheme' and 'requirement' in points 6 and 7. [24] Authorisation schemes are covered by Articles 9 to 13 of Directive 2006/123. Requirements prohibited or subject to evaluation are governed by Articles 14 and 15 of the directive.

57. An 'authorisation scheme' is distinct from a 'requirement' inasmuch as it involves steps being taken by the service provider, which is followed by a formal decision of the authority which authorises that service provider's activity. [25] On the other hand, a requirement is a general and impersonal rule that applies to all service providers, irrespective of any action undertaken or procedure followed in order to obtain the authorisation of the envisaged activity. [26]

[23] It cites in support of that assertion the judgment of 14 December 1995, *Banchero* (C-387/93, EU:C:1995:439), in which the Court held that the provisions of the EEC Treaty did not preclude national legislation, such as that in force in Italy, from reserving the retail sale of manufactured tobacco products to distributors who have been authorised by the State.

[24] See the definitions in point 5 of this Opinion.

[25] Judgments in *X and Visser*, paragraph 115, and in *Cali Apartments*, paragraph 49.

[26] Opinion of Advocate General Bobek of 2 April 2020 in *Cali Apartments and HX* (C-724/18 and C-727/18, EU:C:2020:251, point 69).

58. In the judgment in *X and Visser*, the prohibition, contained in a municipal zoning plan, on carrying out the activity of retail trade in goods in a particular area of the city, was considered to be a requirement, within the meaning of Directive 2006/123.[27] Any other rule or general limitation, applicable by law to a certain type of service activity, also has that character.

59. In my view, the rules governing the retail sale of manufactured tobacco products laid down by the Italian legislation come within the definition of 'authorisation scheme'. A service provider wishing to be the licensed operator of an ordinary or special outlet or the holder of a secondary licence must submit an application to the ADM, which will grant or reject that application.

60. To that end, the ADM must previously have drawn up a six-month plan for the roll-out of points of sale and launched a public tendering procedure so that interested parties can submit their applications. In accordance with that plan, the ADM allocates the outlets and secondary licences to the appropriate operators, authorising them to carry out that activity.

61. For the purposes of drawing up the six-month plan and granting licences, the ADM indeed applies the statutory (geographical and demographic) requirements, but it does so at the end of an administrative procedure involving an application from the provider and a subsequent favourable decision of the authorities.

62. In other words, the Italian provision requires persons wishing to engage in the retail sale of manufactured tobacco products 'to undergo a procedure which obliges them to take steps in order to obtain a formal decision from a competent authority enabling them to access and to exercise that service activity.'[28]

63. Accordingly, this case concerns an 'authorisation scheme' within the meaning of Article 4(6) and not merely a 'requirement' within the meaning of Article 4(7) of Directive 2006/123.

64. As such an authorisation scheme, it must be subject to the provisions laid down in Section 1 ('Authorisations') of Chapter III ('Freedom of establishment for providers') of Directive 2006/123. Moreover, it must not include requirements prohibited by Article 14 of that directive.[29]

2. Is access subject to an economic test?

65. It is necessary to verify whether the authorisation scheme established by Italy for the retail sale of manufactured tobacco products is caught by the prohibition laid down in Article 14(5) of Directive 2006/123. Although it is not one of the articles mentioned by the referring court in the request for a preliminary ruling, that provision must be examined.

66. In accordance with that provision, it is prohibited to '[make] the granting of authorisation subject to proof of the existence of an economic need or market demand, an assessment of the potential or current economic effects of the activity or an assessment of the appropriateness of the activity in relation to the economic planning objectives set by the competent authority'.[30]

[27] Judgment in *X and Visser*, paragraphs 119 and 120.

[28] Judgment in *Cali Apartments*, paragraph 51.

[29] The application of the provisions of Directive 2006/123 relating to authorisation schemes does not exclude the application of the provisions relating to requirements contained in Articles 14 and 15 of the directive, as the judgment of 23 December 2015, *Hiebler* (C-293/14, EU:C:2015:843, paragraphs 48 to 54), makes clear.

[30] Article 14(5) goes on to state that that prohibition 'shall not concern planning requirements which do not pursue economic aims but serve overriding reasons relating to the public interest'.

67. The prohibition of an *economic test*[31] reflects the case-law of the Court to the effect that reasons of an economic nature cannot constitute overriding reasons in the public interest justifying a restriction on the freedom of establishment.[32]

68. The Italian Republic had established at the relevant time an economic requirement (minimum productivity) for the licensing of outlets. The Commission considered that requirement[33] to be incompatible with Article 14(5) of Directive 2006/123, which led to the adoption of Decree 51/2021. That decree removed the requirement and introduced instead the criterion of the relationship between points of sale for manufactured tobacco products and the resident population.

69. Does the demographic criterion constitute an *economic test* incompatible with Article 14(5) of Directive 2006/123? The Commission[34] takes the view that it can be inferred from the Italian legislation and case-law that the licensing of outlets still depends, to a certain extent, on factors which relate to the economic conditions of the sector.

70. At the hearing, the Commission stated that the administrative infringement procedure brought against Italy was closed for reasons of political expediency, and not because the uncertainties regarding the existence of an economic test had vanished. According to the Commission, it is possible that Article 3(2)(b) of Decree 38/2013 could contain a concealed economic test, as the six-month plans for the grant of licences for outlets are drawn up taking account of the *interest of the service* and, inter alia, the objective of safeguarding *revenue*.[35]

71. It is for the referring court to interpret its domestic law. Subject to its ruling, I think it is possible to consider that the population-to-outlet ratio is intended to ensure a balanced ('spread out') distribution of the activities of outlets across national territory, in order to ensure the *legal* supply of this product, taking into account orographic features and population distribution in Italy.

72. Construed in that way, the administrative authorisation scheme based on population ratio:

– Governs the retail sale of tobacco, as a product that is harmful to health, under conditions which reduce its supply to what is strictly necessary to meet the demand of smokers, while preventing smokers from buying contraband tobacco at a much lower price, a situation which would encourage consumption and reduce the amount of tax collected.

– Contributes to safeguarding (at least tendentiously) the protection of public health, within a framework which has ruled out, on the ground that it is impracticable, the general prohibition of tobacco.

[31] According to recital 66 of Directive 2006/123, 'access to or the exercise of a service activity in the territory of a Member State should not be subject to *an economic test*. The prohibition of economic tests as a prerequisite for the grant of authorisation should cover economic tests as such, but not requirements which are objectively justified by overriding reasons relating to the public interest, such as the protection of the urban environment, social policy or public health …'. Emphasis added.

[32] Judgments of 11 March 2010, *Attanasio Group* (C-384/08, EU:C:2010:133, paragraph 55), and of 16 June 2015, *Rina Services and Others* (C-593/13, EU:C:2015:399, paragraphs 35 to 40).

[33] Procedure EU-Pilot 8002/15/GROW.

[34] Paragraph 36 of its written observations. The Commission argues that, despite the amendment introduced by Ministerial Decree No 51 of 2021, the Italian provision could still be classified, prima facie, as a requirement relating to the existence of an economic need, or of market demand, or to the evaluation of potential economic effects, with respect to economic planning objectives.

[35] In addition to the revenue received by sellers of manufactured tobacco products, such revenue is also defined as State revenue from the tax on the consumption of manufactured tobacco products, which raises significant funds for the public purse.

73. The demographic criterion is not, therefore, purely economic in nature, for the purposes of Article 14(5) of Directive 2006/123, since its main aim is not to guarantee sufficient revenue for sellers of manufactured tobacco products or to maximise the collection of tax on tobacco consumption. It is, rather, a measure based on overriding reasons relating to the public interest, in particular, the protection of public health.

3. Conditions for the granting of authorisation

74. The compatibility of a national authorisation scheme with Directive 2006/123 must be assessed in the light of Article 9(1) of the directive. Member States may establish such a scheme only if it is non-discriminatory, is justified by an overriding reason relating to the public interest, and is proportionate to its objective.

75. The conditions for obtaining authorisation must comply with Article 10 of Directive 2006/123. In accordance with that article, authorisation schemes must be based on criteria which delimit the exercise of the power of assessment by competent authorities and satisfy the characteristics set out in paragraph 2 thereof.

76. Article 9(1), relating to justification, and Article 10(2) of Directive 2006/123, on the criteria for granting authorisation, both lay down clear, precise and unconditional obligations giving them direct effect. [36]

77. The administrative authorisation scheme must therefore comply with those two articles. That compliance requires an assessment that the restriction of the right of establishment '(i) does not discriminate on grounds of nationality, (ii) is justified by an overriding reason relating to the public interest and (iii) is suitable for securing the attainment of the objective pursued, does not go beyond what is necessary to attain that objective and may not be replaced by other, less restrictive measures which attain the same result.' [37]

(a) Discrimination

78. It cannot be inferred from the information in the case file that the authorisation scheme is discriminatory, since it applies equally to traders established in Italy and to nationals of other Member States, or resident in other Member States, who wish to pursue that independent economic activity on Italian territory.

(b) Justification based on overriding reasons relating to the public interest

79. The Italian Government submits that the authorisation scheme, even though it entails a restriction of the right of establishment, is justified by an overriding reason relating to the public interest, namely the protection of public health. [38] In particular, it seeks to ensure a limited, demand-driven supply of manufactured tobacco products, with a view to reducing the consumption of those products and thus combatting smoking.

[36] Judgment in *Cali Apartments*, paragraph 58.

[37] Judgment of 23 December 2015, *Hiebler* (C-293/14, EU:C:2015:843, paragraph 55).

[38] As I have already pointed out, the Italian Government argues that there is also the overriding requirement to protect tax revenue from the sale of manufactured tobacco. However, it does not expand on that justification and concentrates on the protection of public health.

80. I do not believe that there are any reasonable doubts regarding the negative effects of tobacco consumption on public health, which is recognised by international bodies [39] and by the Court of Justice. [40] Without going so far as to prohibit the sale of tobacco, EU law has provisions aimed at reducing tobacco consumption. [41]

81. The protection of public health is thus an overriding reason relating to the public interest on which a Member State may rely to justify an authorisation scheme for the retail sale of manufactured tobacco products. As I have already pointed out, the referring court does not deny that the restrictions at issue here pursue that objective.

(c) Is the restriction appropriate to achieve the objective pursued?

82. Although it is for the referring court to determine whether the Italian scheme is appropriate to achieve its underlying objective of the protection of public health, the Court may provide it with some useful guidance for its assessment.

83. When conducting its assessment, the referring court must bear in mind that the Member States have a measure of discretion, within the limits set by EU law, to determine the level of protection of public health on their territory. [42]

84. Specifically, the assessment requires a determination of whether an authorisation scheme which allows the ordered and controlled retail sale of manufactured tobacco products, by the application of geographical and demographic criteria, is appropriate for protecting that objective.

85. Admittedly, the best way to combat smoking and to protect public health would be to prohibit the sale of manufactured tobacco products. However, that maximalist option has not been followed internationally or adopted by the EU legislature. The latter recognises the Member States' ability to determine which methods to allow in their territory for the retail sale of manufactured tobacco products.

86. Having excluded the maximalist option, an administrative authorisation scheme that is subject to geographical and demographic criteria may be more appropriate for combatting smoking than its alternative, in other words, allowing the unrestricted sale of manufactured tobacco products.

87. The Italian Government states that, since tobacco consumption is legal in Italy, that authorisation scheme protects public health because it ensures that smokers have the necessary supply of tobacco to prevent their exposure to the adverse effects of sudden abstinence.

[39] The preamble to the World Health Organisation Framework Convention on Tobacco Control, signed in Geneva on 21 May 2003, to which the European Union and its Member States are party, recognises that 'scientific evidence has unequivocally established that tobacco consumption and exposure to tobacco smoke cause death, disease and disability' and that 'cigarettes and some other products containing tobacco are highly engineered so as to create and maintain dependence, and that many of the compounds they contain and the smoke they produce are pharmacologically active, toxic, mutagenic and carcinogenic, and that tobacco dependence is separately classified as a disorder in major international classifications of diseases'.

[40] In accordance with the judgment of 4 May 2016, *Philip Morris Brands and Others* (C-547/14, EU:C:2016:325, paragraph 152), '… it is undisputed that tobacco consumption and exposure to tobacco smoke are causes of death, disease and disability …'.

[41] Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC (OJ 2014 L 127, p. 1).

[42] The judgment of 1 June 2010, *Blanco Pérez and Chao Gómez* (C-570/07 and C-571/07, EU:C:2010:300, paragraph 44), states: '… it is for the Member States to determine the level of protection which they wish to afford to public health and the way in which that level is to be achieved. Since the level may vary from one Member State to another, Member States should be allowed a measure of discretion'.

88. The Italian Government adds that the objective is to ensure that the usual demand for and the available supply of manufactured tobacco products are balanced at the lowest possible level. This means that consumption above usual levels is not encouraged while at the same time ensuring that tobacco-dependent consumers are able to obtain tobacco easily without needing to make a great effort or to resort to contraband products, which are sold outside the State's control and at lower prices, thereby stimulating their consumption.

89. Directive 2006/123 does not preclude Member States' legal systems from making access to, or the exercise of, a service activity subject to the requirement to comply with 'quantitative or territorial restrictions, in particular in the form of limits fixed according to population or of a minimum geographical distance between providers' (Article 15(2)(a)). That requirement is one of those which must be assessed in an authorisation scheme.

90. The combination of the geographical criterion and the demographic criterion may, simultaneously, guarantee supply throughout the territory and prevent the uncontrolled increase in supply which results in higher tobacco consumption. Indeed, the Court has held that authorisation schemes which used, in other public health related activities,[43] demographic and geographical criteria similar to those applied by Italy to the retail sale of manufactured tobacco products were compatible with EU law.

91. It is possible to draw guidance from that case-law which can be applied to this case *mutatis mutandis*:

– '… as regards the rule imposing a minimum distance between two opticians' shops, … this requirement leads members of the public to be more confident that they have … access to a healthcare provider nearby and thus also contributes to a better protection of public health in the territory concerned.'[44]

– 'The rule that only one optician's shop may be established for a given number of residents is likely to facilitate the even distribution of opticians' shops throughout the territory concerned and thus ensure that the entire population has appropriate access to the services offered by them.'[45]

92. In both those cases, the restrictions were intended to facilitate (ordered) access for users, whereas the Italian authorisation scheme is aimed, in part, at restricting such access in order to combat smoking and, in part, to ensure supply which meets smokers' needs. It is, undoubtedly, a difficult balance to strike but I do not believe, however, that that difference is sufficient to rule out the application to this dispute of the case-law referred to.

93. In particular, it is open to debate whether the *specific* rules on minimum distances (between 300 and 200 metres, depending on the location) between two points of sale are better or worse at serving the stated objectives. The referring court has the final say on the

[43] See judgments of 1 June 2010, *Blanco Pérez and Chao Gómez* (C-570/07 and C-571/07, EU:C:2010:300), relating to the establishment of pharmacies in Spain, and of 26 September 2013, *Ottica New Line* (C-539/11, EU:C:2013:591), relating to the establishment of opticians' shops in Italy.

[44] Judgment of 26 September 2013, *Ottica New Line* (C-539/11, EU:C:2013:591, paragraph 42).

[45] Ibid., paragraph 41.

reasonableness of those rules, which it must examine having regard to the fact that the compatibility of the numerical criterion with those objectives falls, in principle, within the competence of the national legislature. [46]

(d) Proportionality and consistency of the restriction

94. The next step is to determine whether the Italian authorisation scheme:

– Is proportionate vis-à-vis the overriding requirement of the protection of public health, in the sense that it does not go beyond what is necessary to attain that objective and no less restrictive alternative for attaining it exists. [47]

– Satisfies the requirement that it must be consistent and systematic with a view to the attainment of the underlying objective. [48]

95. It is for each Member State to demonstrate that those cumulative conditions are met. [49] The referring court is responsible for applying the test to determine whether the national measure is proportionate, with the assistance of the Court of Justice which provides it with criteria for doing so.

96. In its order for reference, the national court is unsure whether the Italian legislation complies with the principle of proportionality, in particular in view of the proliferation of vending machines, which promote access by consumers to tobacco without any (or with fewer) restrictions as to time.

97. I agree with the referring court that, while the aim of the authorisation scheme for points of sale is to limit supply to what is necessary to meet demand from smokers, the proliferation of vending machines for manufactured tobacco products appears to go in the opposite direction.

[46] See, in that respect, point 101 of this Opinion.

[47] Judgments of 23 February 2016, *Commission* v *Hungary* (C-179/14, EU:C:2016:108, paragraph 166), and of 6 October 2020, *Commission* v *Hungary (Higher education)* (C-66/18, EU:C:2020:792, paragraph 178).

[48] Judgment of 17 December 2020, *Onofrei* (C-218/19, EU:C:2020:1034, paragraph 32).

[49] Judgments of 18 June 2020, *Commission* v *Hungary (Transparency of associations)* (C-78/18, EU:C:2020:476, paragraph 77), and of 6 October 2020, *Commission* v *Hungary (Higher education)* (C-66/18, EU:C:2020:792, paragraph 179).

98. Following the explanations furnished by the Italian Government at the hearing, it appears that the use of cigarette vending machines is limited to outlets and secondary licences. That is provided for by Law 556/1977, [50] in Article 20 thereof, [51] and ADM Circular No 509/2007. [52]

99. Pursuant to those provisions, vending machines may be installed inside outlets or outside outlets within 10 metres of the centreline of the entrance. Premises having the right to obtain secondary licences may opt for the installation of a cigarette vending machine upon receipt of administrative authorisation and as an alternative to such a licence.

100. It is in the light of those explanations that the referring court will have to assess whether the scheme applied to cigarette vending machines complies with the requirement of proportionality or whether, on the other hand, it leads to an excessive increase in the supply of tobacco, which causes the geographical distance and population density criteria to be applied inconsistently.

101. As regards the arguments of the referring court calling into question the proportionality of the geographical criterion, a deterrent effect would definitely be created if the minimum distances between points of sale were set in kilometres and not in metres. However, that is a decision which, owing to its significant effects on legal consumption, it is for the legislature to weigh up: the desire to strike a balance between supply and demand, in the light of territorial coverage, may result in a system of lesser or greater distances without, in my view, the Court of Justice being able to indicate to the referring court the most appropriate distance. [53]

102. Lastly, as regards the alleged rigidity of the geographical and demographic criteria (the latter being related to data from the census of residents), the referring court states that the ADM should have the power to take into consideration other factors which are not connected with the strict distance and population limits.

103. A legislative option having a certain degree of rigidity appears to me to be legitimate, in so far as it is intended to provide legal certainty through predetermined objective criteria. Furthermore, the application of the geographical and demographic factors is mitigated in Article 3(1) and (2) of

[50] Legge 8 agosto 1977, n. 556, semplificazione delle procedure dei concorsi di accesso alle carriere e categorie del personale dell'Amministrazione autonoma dei monopoli di Stato, modificazione dei ruoli organici del personale operaio dell'Amministrazione stessa e modifiche alla legge 14 novembre 1967, n. 1095 (Law 556/1977 of 8 August 1977 simplifying competition procedures for access to professions and categories for staff of the autonomous administration of State monopolies, amending the organic functions of employees of the administration and amending Law 1095/1967 of 14 November 1967) (GURI No 228 of 23 August 1977).

[51] In accordance with that provision, vending machines may be installed by the licensed operators of authorised outlets: (a) outside and in the vicinity of their premises; (b) inside premises situated in the area of commercial influence of each outlet, as an alternative to the option of obtaining a secondary licence which is subject to the same conditions as those laid down by legal and administrative provisions.

[52] Circolare di 11-01-2007, n. 509/2007, distributori automatici di sigarette. Aggiornamento disposizioni operative (Circular No 509/2007 of 11 January 2007 on cigarette vending machines. Update of the applicable provisions). Available at https://www.indicenormativa.it/sites/default/files/aggiornamento_disposizioni_operative.pdf. See also Circolare n. 28/2021, modifiche introdotte dal d.m. 51/2021 in tema di distribuzione dei generi di monopolio alla luce delle ulteriori prescrizioni di cui alla determina direttoriale Prot. n. 231333/RU del 2 luglio 2021 in materia di rivendite speciali presso impianti di distribuzione di carburanti e di trasferimenti fuori zona (Circular No 28/2021 on amendments introduced by Ministerial Decree No 51 of 2021 concerning the distribution of monopoly goods in the light of the additional requirements laid down in Directorial Decision Prot. No 231333/RU of 2 July 2021 on special resales at fuel distribution plants and transfers outside the area). Available at https://www.adm.gov.it/portale/documents/20182/6822722/Circolare+dm+51 + 2021.pdf/77aad5ed-9c8b-94e1-d197-7a6f803ffbc5?t= 1627895644180.

[53] At the hearing, the Commission argued that the distances do not appear to have been set following any studies for that purpose, and instead those distances are derived from the historical inertia of the scheme applied to the retail sale of manufactured tobacco products.

Decree 38/2013, which contains a number of supplementary criteria for the authorisation of outlets and secondary licences. As the Italian Government claims, [54] their use may give the system flexibility.

104. For example, specific circumstances (including those of a seasonal nature, such as the increase in the actual population, and not just the census population, for several months of the year as a result of tourism) could be taken into account. The opening of new points of sale in such cases would not necessarily lead to over-supply to cover users who are away from home.

105. Subject to the assessment carried out by the referring court, which, naturally, is better acquainted with its own legal system, Article 3(1) and (2) of Decree 38/2013 would allow the ADM to take account of areas where there is new housing and commercial development, the specific importance of road junctions and the main urban meeting places, and the presence of offices or production structures that are particularly important and well-used, which might demonstrate an interest of the service.

106. Therefore, nothing appears to prevent the referring court from determining whether, with those elements of flexibility, the ADM could, on the basis of its specific features, take account of the constant tourist footfall in Finale Ligure for the purposes of allocating a new outlet.

107. As regards the impact of the World Health Organisation Framework Convention on Tobacco Control, the referring court points out that it does not provide for the imposition of restrictions on sellers as one of the recommended measures for reducing the supply of and demand for tobacco. [55] The Italian State has a measure of discretion when it chooses the methods it considers to be the most suitable for protecting public health against the effects of smoking. An administrative authorisation scheme subject to restrictive criteria is, in principle, suitable for ensuring the fulfilment of that objective.

108. In short, the combination of geographical and demographic criteria, supplemented, as appropriate, by other elements of flexibility, may pass the proportionality test and satisfy the requirements of Article 10(1) and (2) of Directive 2006/123. As concerns the installation of vending machines, this must not lead to an unjustified increase in the supply of manufactured tobacco products, a matter which it is for the referring court to determine.

[54] Paragraph 47 of its written observations. According to the Italian Government, the referring court 'has not taken into consideration the fact that the Italian legislation already contains the dose of flexibility to which it refers'. The Italian Government adds, however, that the national legislature, in the reasonable exercise of its discretion, did not consider tourist flow to be a suitable criterion for increasing the supply of tobacco, due to its seasonal nature, randomness and variability, features which are at odds with the stability particular to an ordinary outlet.

[55] However, the Convention sets out other useful and effective methods of curbing tobacco consumption. In terms of reducing demand, these include fiscal measures, banning smoking in a wide range of places, communicating information to the public on the toxic ingredients of tobacco products, and so forth. Supply reduction steps include measures to combat illegal trade, the prohibition of sale to minors, the prohibition on selling cigarettes singly or in small packets, and so forth.

V. Conclusion

109. In the light of the foregoing considerations, I suggest that the Court of Justice reply to the Tribunale Amministrativo Regionale per la Liguria (Regional Administrative Court, Liguria, Italy) as follows:

Article 9(1), Article 10(1) and (2), Article 14(5) and Article 15(2)(a) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market

must be interpreted as meaning that:

– they do not preclude, in principle, national legislation which makes the grant of authorisation for pursuit of the activity of the retail sale of tobacco products subject to compliance with certain restrictions which are fixed on the basis of the resident population and a minimum distance between service providers;

– it is for the referring court to determine whether the combination of the specific geographical and demographic criteria contained in the national legislation, supplemented, as appropriate, by other elements of flexibility, is capable of complying with the principle of proportionality and fulfilling the requirements of Article 10(1) and (2) of Directive 2006/123. It is also for the referring court to determine whether the installation of vending machines leads to an unjustified increase in the supply of manufactured tobacco products, contrary to the underlying objective of health protection of the national legislation.