Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 2 October 2019[1]

Case C-465/18

AV,
BU
v
Comune di Bernareggio,
joined parties:
CT

(Request for a preliminary ruling from the Consiglio di Stato (Council of State, Italy))

(Reference for a preliminary ruling — Article 49 TFEU — Freedom of establishment — Transfer of a municipal pharmacy following a tender procedure — National legislation providing a pre-emption right to employees of a municipal pharmacy — Tender finally awarded to employee who had not participated in the tendering procedure following exercise of pre-emption right)

I. Introduction

1. This request for a preliminary ruling, lodged with the Court Registry on 16 July 2018 by the Consiglio di Stato (Council of State, Italy), concerns the interpretation of Articles 45, 49 to 56 and 106 TFEU and 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, on the one hand, and the Comune di Bernareggio (Municipality of Bernareggio, Italy) and CT, on the other.

3. In the main proceedings, AV and BU, the owners of a pharmacy located outside the Municipality of Bernareggio, were provisionally awarded the contract for the purchase of a municipal pharmacy following the completion of a tender procedure.

4. Despite the fact that AV and BU had submitted the most economically advantageous tender and were provisionally awarded the contract, precedence was nonetheless given to CT, a pharmacist employed by the Azienda Speciale Farmacie Vimercatesi - the body entrusted with the operation of the municipality's pharmacies. The events leading to this state of affairs will be set out in greater detail in the course of this Opinion.

5. Following the provisional award of the contract, CT (who is an employee of the municipal pharmacy in question, but who had not participated in the tender procedure) exercised by letter a right of pre-emption granted by statute to employees of municipal pharmacies in the event of the transfer of such pharmacies. CT consequently obtained the final award of the contract in question.

1 Original language: English.

6. AV and BU challenged that final award before the Italian administrative courts.

7. The request for a preliminary ruling affords the Court an opportunity to rule, for the first time, on the legality of a national rule granting a right of pre-emption to employees in the event of a transfer of ownership of a municipal pharmacy following a tender procedure.

II. Legal context

A. Italian law

8. Article 9 of Legge 2 aprile 1968, n. 475, Norme concernenti il servizio farmaceutico (Law No 475 of 2 April 1968 laying down provisions applicable to the provision of pharmaceutical services) provides:

'Up to 50% of the ownership of pharmacies which become vacant and of new pharmacies established following the review of the *pianta organica* (territorial grid) may be taken up by the municipality …'

9. Article 12 of that law provides:

'…

A transfer [of a pharmacy] may be made only to a registered pharmacist or to a pharmacist who has been found to have the requisite qualifications in a previous competition.

…'

10. Article 4 of Legge 8 novembre 1991, n. 362, Norme di riordino del settore farmaceutico (Law No 362 of 8 November 1991 relating to a reorganisation of the pharmaceutical sector; 'Law No 362/1991') provides:

'1. The transfer of vacant pharmacies or newly established pharmacies that may be operated by private individuals shall be decided by means of a competition …

2. Nationals of the Member States of the European Economic Community … whose names appear in the registers of professional pharmacists shall be eligible for participation in competitions as referred to in paragraph 1 …

…'

11. Article 12(2) of that law provides:

'In the event of a transfer of ownership of a municipal pharmacy, the employees thereof shall have a right of pre-emption …'

12. Article 2112 of the Codice civile (Italian Civil Code) provides:

'On the transfer of an undertaking, the employment relationship shall continue with the transferee and employees shall retain all rights under that relationship. …

…

… the transfer of the undertaking shall not in itself constitute grounds for dismissal. Employees whose working conditions are substantially altered in the 3 months following the transfer of an undertaking shall be entitled to take redundancy …'

III. The main proceedings and the question referred for a preliminary ruling

13. By notice published on 31 January 2014, the Municipality of Bernareggio launched a tender procedure for the transfer of a municipal pharmacy.[2] According to the tender notice, the contract would be awarded to the tenderer offering the highest price. The minimum or starting contract value for the pharmacy in question was EUR 580 000. It should nevertheless be observed that it had been stipulated in the tender notice that the transfer of the pharmacy to the provisionally successful tenderer was conditional on the non-exercise of the right of pre-emption provided for by Article 12(2) of Law No 362/1991, by, inter alia, any of the pharmacists employed under contracts of indefinite duration by the Azienda Speciale Farmacie Vimercatese — the body entrusted with the operation of municipal pharmacies.

14. On 11 March 2014, the Municipality of Bernareggio declared that the contract was to be provisionally awarded to AV and BU, the owners of a pharmacy located in an adjacent municipality, who had submitted the most economically advantageous tender of EUR 600 000. As I have already stated, however, on completion of the tender procedure, precedence was given to CT, a pharmacist employed by the Azienda Speciale Farmacie Vimercatesi. CT, who did not participate in the tender procedure, exercised by letter of 27 March 2014 the statutory right of pre-emption pursuant to Article 12(2) Law No 362/1991 and consequently obtained the final award by Decision of the Municipality of Bernareggio nº31 of 12 May 2014.

15. The final award of the contract to CT was challenged before the Tribunale amministrativo regionale, Lombardia-Milano (Regional Administrative Court, Lombardy-Milan, Italy) by AV and BU. In their action AV and BU claimed, inter alia, that the statutory right of pre-emption of employees of municipal pharmacies is contrary to the principles of free competition and equal treatment laid down in EU law. They noted that the right of pre-emption entails a significant advantage for those employees. The employees in question may replace competitors in a tender procedure, without even participating in the procedure upon exercising their unconditional right conferred by statute to conclude the contract. AV and BU submitted that the statutory right of pre-emption at issue is not legally justifiable.

16. The Tribunale amministrativo regionale Lombardia-Milano (Regional Administrative Court, Lombardy-Milan) having dismissed their action, AV and BU brought an appeal before the referring court on the same grounds as those on which they had based their action at first instance.

17. The Consiglio di Stato (Council of State, Italy) notes that the right of pre-emption granted by Article 12(2) of Law No 362/1991 operates for the benefit of employees of municipal pharmacies in the event of their transfer to private operators.[3] The referring court, citing its own judgment No 5329 of 5 October 2005,[4] stated that Article 12(2) of Law No 362/1991 addresses the need for better management of pharmaceutical services and is premised on the belief that a pharmacist, who has already been employed in the municipal pharmacy that is being transferred, will be able to ensure continuity and also capitalise on the experience gained in running that pharmacy. The Consiglio di Stato (Council of State) has doubts, however, whether the right of pre-emption is in fact justified by any genuinely significant overriding public interest.

2 In addition to the transfer of the pharmacy itself, there were also terms concerning, inter alia, the furniture, fixtures and fittings and the stock of the pharmacy.

3 It thus gives preference to collective rights rather than private rights.

4 Judgment of the Consiglio di Stato (Council of State), fifth chamber, No 5329 of 5 October 2005.

18. The referring court considers that the pre-emption right is excessive as Article 2112 of the Italian Civil Code, which transposes, inter alia, 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 [5] in particular, guarantees the continuance of the employment relationship and safeguards all of the rights of the employees of the business being transferred.

19. In addition, if the purpose of the right of pre-emption is to ensure that the experience gained by employees in the provision of pharmaceutical services is preserved, that end could, according to the referring court, be achieved by other means — such as a stipulation in the invitation to tender that an appropriate number of points will be awarded on the basis of experience — without sacrificing competition and equal treatment.

20. In any event, the referring court has doubts about the reasonableness and proportionality of the measure in the light of the social objectives pursued by the right of pre-emption as: (i) in a professional context in which a high level of qualification is required and in which pharmacies may be transferred only to pharmacists whose names appear in the register of pharmacists who have the requisite qualifications to operate a pharmacy or who have at least 2 years' professional experience, there are no valid reasons for ascribing greater value to the experience gained in any particular pharmacy; (ii) that right confers an unconditional preference on the employee, with no account being taken of whether or not the pharmacy in question has actually been well run; and (iii) in order to enjoy the right of pre-emption it is sufficient to have worked as an 'employee' of the pharmacy, a fact which does not necessarily coincide with being the person responsible for the pharmacy's operation.

21. In the referring court's view, it is therefore questionable whether the right of pre-emption achieves a reasonable balance between the requirements of a free market, freedom to provide services and the protection of public health. It drew attention to the fact that a provision such as that under consideration could be regarded as a protectionist policy which confers an unjustified advantage on a particular group of citizens over other Italian nationals and, indeed, nationals of other Member States.

22. The referring court considers that the preference accorded by law to the employees of a municipal pharmacy amounts to a restriction of the freedom of establishment. The pre-emption right thus discriminates against other parties hoping to be awarded the contract both from the same Member State and from other Member States. Moreover, one may question the reasonableness and proportionality of the limitation of the principles of the protection of competition and of equal treatment among economic operators thus brought about, and of the restriction of the freedom to conduct a business and the freedom to pursue an occupation.

23. The referring court considers that account must also be taken of the fact that the provision under consideration hinders the access by potential operators to a market that is already subject to quotas, one where the number of pharmacies is limited by a national plan for their distribution and where the opening of new pharmacies is subject to their being assigned on completion of an open competition and the subsequent issue of an authorisation to the successful tenderer.

24. In addition, according to the referring court, it would not appear that the aim of the pre-emption right is to protect health, inasmuch as it does not appear to be necessary to the attainment of the objective of ensuring that the provision of medicinal products to the public is reliable and of good quality.

5 OJ 2001 L 82, p. 16.

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 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?'

IV. Procedure before the Court

26. Written observations were submitted by AV and BU, the Municipality of Bernareggio and the European Commission.

27. Following a request by CT, who did not submit written observations, the Court, by decision dated 14 May 2019, decided pursuant to Article 76(3) of the Rules of Procedure of the Court that a hearing should be held on 3 July 2019.

28. AV and BU, the Municipality of Bernareggio, CT and the Commission submitted oral observations at the hearing of 3 July 2019.

V. The applicable provisions of EU law

29. In the present proceedings, the referring court seeks an interpretation of Articles 45, 49 to 56 and 106 TFEU and Articles 15 and 16 of the Charter.

30. The case in the main proceedings concerns a dispute between, on the one hand, AV and BU (both of whom are pharmacists) and, on the other hand, the Municipality of Bernareggio and CT, a pharmacist employed by that municipality in the pharmacy which was the subject of the tender in question.

31. Given that upon completion of the purchase, the pharmacy in question is to be operated by either AV and BU or CT in a stable manner for an indefinite period, I consider that Article 49 TFEU on the freedom of establishment is applicable.

32. In the light of the information in the file before the Court, in my view, neither Article 45 TFEU concerning the free movement of employed workers nor Article 56 TFEU concerning the freedom to provide services is applicable.[6] Given that the tenderers are themselves Italian nationals, they have not exercised free movement rights such as would bring these provisions into play in a situation which is otherwise internal to the Italian State.

33. Moreover, given that the pre-emption right in question in the main proceedings was exercised by an employee of a municipal pharmacy, namely CT, and that that employee's offer thus prevailed over that of the pharmacists AV and BU, there is insufficient information in the file before the Court which would tend to indicate that the dispute in the main proceedings centres on or indeed relates in

6 Moreover, I consider that in the light of Article 2(f) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36), which excludes all healthcare services from its scope, that that directive is not relevant in the present proceedings.

any manner to the operation of public (or, indeed, private) undertakings, 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.

34. As regards Article 15(2) of the Charter, that provision states, inter alia, that every citizen has the freedom to exercise the right of establishment in any Member State. In the present proceedings, the reference to the freedom to exercise the right of establishment must be understood as meaning that Article 15(2) of the Charter refers, inter alia, to Article 49 TFEU.[7] In my view, where national legislation complies with Article 49 TFEU, it also complies with Article 15(2) of the Charter.[8]

35. In addition, Article 16 of the Charter provides that 'the freedom to conduct a business in accordance with Union law and national laws and practices is recognised'. Thus, when identifying the scope of the freedom to conduct a business, Article 16 of the Charter refers specifically to European Union law. That reference to European Union law must be understood, in the present proceedings, as meaning that Article 16 of the Charter refers in turn to Article 49 TFEU.

36. In the light of all the above circumstances and given that the question referred concerns, in reality, the freedom of establishment only, I consider that the national legislation at issue in the main proceedings should be assessed with regard to Article 49 TFEU[9] alone.[10]

VI. The admissibility of the reference for a preliminary ruling

37. It is clear from the documents submitted to the Court that all the facts in the main proceedings are confined within a single Member State, namely, the Republic of Italy.

38. In that regard, it must be observed that it is settled case-law that the provisions of the FEU Treaty on the freedom of establishment do not apply to situations which are confined in all respects within a single Member State.[11] Moreover, in order for Article 49 TFEU to apply in relation to public procurement activities in respect of which all the relevant elements are confined to a single Member State, it is necessary for the contract at issue in the main proceedings to be of certain cross-border interest.[12]

39. In my view, the referring court has not established specific findings of fact which would assist the Court in ascertaining whether, in the case in the main proceedings, there is certain cross-border interest in the purchase of municipal pharmacies in Italy.[13] The referring court, did however note that the tender procedure in question was open under national law to all EU adults enrolled as pharmacists

7 In effect, Article 52(2) of the Charter provides that rights recognised by the Charter for which provision is made in the treaties are to be exercised under the conditions and within the limits defined in the treaties; see judgment of 7 April 2016, *ONEm and M.* (C-284/15, EU:C:2016:220, paragraph 33).

8 See, by analogy, judgment of 7 April 2016, *ONEm and M.* (C-284/15, EU:C:2016:220, paragraphs 33 and 34).

9 And the exceptions thereto pursuant to Article 52 TFEU and the case-law of this Court on justifications for overriding reasons relating to the general interest.

10 See judgment of 13 February 2014, *Sokoll-Seebacher* (C-367/12, EU:C:2014:68, paragraphs 22 and 23).

11 See judgment of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874, paragraph 47 and the case-law cited). In paragraphs 50 to 53 of that judgment, the Court referred to the four situations in which it could, nonetheless, be necessary for the resolution of the disputes in the main proceedings to interpret the provisions of the Treaties relating to fundamental freedoms, even though the disputes in the main proceedings were confined in all respects within a single Member State, leading the Court to find that those requests for a preliminary ruling are admissible.

12 See judgment of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others* (C-113/13, EU:C:2014:2440, paragraph 46).

13 As is clear from Article 94 of the Rules of Procedure of the Court of Justice, in the version in force with effect from 1 November 2012, the Court must be able to find in a request for a preliminary ruling a summary of the facts on which the questions are based and the connection, inter alia, between those facts and the questions. Therefore, the findings necessary to verify the existence of certain cross-border interest, and more generally all the findings to be made by the national courts and on which the applicability of an act of secondary and primary legislation of the European Union depends, must be made before the questions are referred to the Court. Judgment of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others* (C-113/13, EU:C:2014:2440, paragraph 46).

and relying on the judgments of 13 February 2014, *Sokoll-Seebacher* (C-367/12, EU:C:2014:68), and of 1 June 2010, *Blanco Pérez and Chao Gómez* (C-570/07 and C-571/07, EU:C:2010:300, paragraph 40), stated that the national legislation in question is likely to have cross-border effects. Moreover, the Consiglio di Stato (Council of State) also referred, inter alia, to EU rules on the recognition of the qualifications of pharmacists. [14]

40. Despite the absence of specific findings of fact in the request for a preliminary ruling on this matter, it must be noted that the Court has nevertheless regarded requests for preliminary rulings concerning the interpretation of provisions of the Treaties relating to the fundamental freedoms as admissible even though the disputes in the main proceedings were otherwise confined in all respects within a single Member State. The Court has taken this view in this type of case on the ground that it was not inconceivable that nationals established in other Member States had been or were 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, was capable of producing effects which were not confined to the Member State in question. [15]

41. In my view, given that national legislation such as Article 12(2) of Law No 362/1991 applies, according to its wording, to Italian nationals and nationals of other Member States alike, it is quite possible that pharmacists in Member States other than the Republic of Italy have been or are interested in purchasing and operating a municipal pharmacy in the Republic of Italy. It follows that Article 12(2) of Law No 362/1991 may thus affect intra-Union trade. [16]

42. Moreover, it must be recalled that a dispute, despite the fact that it is between nationals of a single Member State, must be considered to have a connecting factor with Article 49 TFEU that makes the interpretation of that provision necessary for the referring court to give judgment in that dispute, where national law requires the referring court to grant the same rights to those nationals as the rights which a national of another Member State in the same situation would derive from EU law. [17]

43. In that regard, the Commission indicated in its written observations and at the hearing, without being contradicted by the other parties, that Italian law prohibits reverse discrimination against Italian nationals.

44. It would appear therefore that Italian law requires the referring court to grant an Italian national the same rights as those which a national of another Member State in the same situation would derive from EU law. [18]

45. It follows that the question submitted is admissible in so far as it refers to Article 49 TFEU on the freedom of establishment.

14 See for example, Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') (OJ 2013 L 354, p. 132).

15 See judgment of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874, paragraph 50 and the case-law cited). I would stress that the referring court relied specifically on this line of case-law in order to justify the cross-border relevance of its question.

16 In its judgment of 1 June 2010, *Blanco Pérez and Chao Gómez* (C-570/07 and C-571/07, EU:C:2010:300, paragraph 40), the Court held that it is far from inconceivable that nationals established in Member States other than the Kingdom of Spain have been or are interested in operating pharmacies in the Autonomous Community of Asturias. See also, by analogy, judgment of 11 March 2010, *Attanasio Group* (C-384/08, EU:C:2010:133, paragraphs 22 to 24) in relation to the sale of motor fuel.

17 See judgment of 14 November 2018, *Memoria and Dall'Antonia* (C-342/17, EU:C:2018:906, paragraph 23).

18 See judgments of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874, paragraph 52), and of 10 May 2012, *Duomo Gpa and Others* (C-357/10 to C-359/10, EU:C:2012:283, paragraph 28).

VII. Analysis of the substance of the question referred

46. According to settled case-law, Article 49 TFEU precludes any national measure which, even if applicable without discrimination on grounds of nationality, is liable to hinder or to render less attractive the exercise by Union nationals of the freedom of establishment that is guaranteed by the Treaty. [19]

47. I consider that given that participating in a tender procedure requires the expenditure of time, effort and money, a pre-emption right such as the one in question in the main proceedings would undoubtedly discourage pharmacists from other Member States from participating in that procedure. In that regard, even where a pharmacist from another Member State has submitted the most economically advantageous offer he or she has absolutely no guarantee of obtaining the tender due to the fact that an employee of the municipal pharmacy, by exercising their right of pre-emption and matching that offer can, in effect, 'trump' that offer. [20] It is, accordingly, plain that the national pre-emption right in question gives a distinct advantage to any employee of the municipal pharmacy who might wish to exercise that right, even at the expense of the most economically advantageous tenderer.

48. In my view, the effect of the pre-emption right contained in Article 12(2) of Law No 362/1991 is to hinder and render less attractive the exercise by pharmacists from other Member States of their right to participate in a tender procedure for the purchase of a municipal pharmacy in the Italian Republic. Such a pre-emption right thereby hinders and renders less attractive the exercise by pharmacists from other Member States of their free movement activities on Italian territory through a fixed place of business.

49. Consequently, a provision of national legislation such as Article 12(2) of Law No 362/1991 which is at issue in the case before the referring court constitutes, in my view, a restriction on the freedom of establishment within the meaning of Article 49 TFEU. It is, accordingly, necessary to examine the extent to which the national provision at issue in the main proceedings can be justified by virtue of one of the reasons set out in Article 52(1) TFEU or, in accordance with the case-law established by the Court, by overriding reasons in the public interest. It is to that issue which I now turn.

A. The justification for the restriction on the freedom of establishment

50. It is apparent from Article 52(1) TFEU that the protection of public policy, public security or public health can justify restrictions on the freedom of establishment.

51. Moreover, it is settled case-law that restrictions on freedom of establishment which are applicable without discrimination on grounds of nationality may be justified by overriding reasons relating to the general interest, provided that the restrictions are appropriate for securing attainment of the objective pursued and do not go beyond what is necessary for attaining that objective. [21]

52. It would appear from the file before the Court that Article 12(2) of Law No 362/1991 applies without discrimination on grounds of nationality.

19 See judgment of 11 March 2010, *Attanasio Group* (C-384/08, EU:C:2010:133, paragraph 43 and the case-law cited). See also judgment of 19 May 2009, *Apothekerkammer des Saarlandes and Others* (C-171/07 and C-172/07, EU:C:2009:316, paragraph 22).

20 It must be recalled that in the case in the main proceedings, the manner in which the pre-emption right operated was stipulated in the tender notice.

21 See judgment of 19 May 2009, *Apothekerkammer des Saarlandes and Others* (C-171/07 and C-172/07, EU:C:2009:316, paragraph 25 and the case-law cited).

53. As it is incumbent on the referring court in the context of a case referred to the Court under Article 267 TFEU to identify the objectives of the national legislation in question which may justify restrictions on the freedom of establishment,[22] the referring court,[23] briefly stated that Article 12(2) of Law No 362/1991 addresses the need for better management of pharmaceutical services and is premised on the belief that a pharmacist, that has already been employed in the municipal pharmacy which is being transferred, will be able to ensure continuity and also capitalise on the experience gained in running that pharmacy.[24]

54. In the light of that explanation, legislation such as that at issue in the main proceedings would appear to pursue the objective of protecting public health which can, in accordance with Article 52(1) TFEU, in principle justify restrictions on the freedom of establishment.[25] More specifically, in paragraph 28 of the judgment of 19 May 2009, *Apothekerkammer des Saarlandes and Others* (C-171/07 and C-172/07, EU:C:2009:316), the Court stated that restrictions on the freedom of establishment may be justified by the objective of ensuring that the provision of medicinal products to the public is reliable and of good quality.

55. It is, however, necessary to determine whether legislation such as Article 12(2) of Law No 362/1991 is appropriate to the attainment of that objective and, if so, whether the restriction on freedom of establishment goes beyond what is necessary to attain the objective pursued, that is to say, whether there are less restrictive measures by means of which that objective could be achieved.[26]

56. As regards the need to ensure continuity identified by the referring court, it is not entirely clear whether what is in question is the need to ensure the continuity of employment of pharmacists of municipal pharmacies in order to safeguard their rights in the event of the transfer of such a pharmacy,[27] on the one hand, or (as I think) the continuity of employment of pharmacists of municipal pharmacies in order to ensure the continuity of service or the level of service provided by such a pharmacy to the public, on the other.

57. In my view, the aim of ensuring the continuity of employment of pharmacists of municipal pharmacies in order to safeguard their rights in the event of the transfer of such a pharmacy is based on employment and social considerations rather than on public health considerations. That aim is therefore not appropriate, in the light of the circumstances in question in the main proceedings, for justifying, on grounds of public health pursuant to Article 52(1) TFEU, restrictions on freedom of establishment introduced by the national legislation at issue in the main proceedings.

22 See to that effect, judgment of 5 December 2013, *Venturini and Others* (C-159/12 to C-161/12, EU:C:2013:791, paragraph 39 and the case-law cited).

23 As indicated in point 17 of this Opinion.

24 In its written pleadings, the Municipality of Bernareggio referred to the judgment of the Consiglio di Stato (Council of State), fifth chamber, No 5329 of 5 October 2005 in which that court stated that the tender procedure under Article 12(2) of Law No 362/1991 is aimed, inter alia, at maximising the profit that can be obtained from the privatisation in question. Article 12(2) of Law No 362/1991 lays down the conditions in accordance with which the pre-emption right must be exercised. That right, which grants a preference to the employee of the municipal pharmacy, seeks to protect salaried pharmacists and the optimal management of the pharmacy.

25 The importance of the objective of protecting public health is confirmed by Article 168(1) TFEU and Article 35 of the Charter under which, inter alia, a high level of protection for human health is to be ensured in the definition and implementation of all policies and activities of the European Union. 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 and the case-law cited). It is settled case-law that the aim of maintaining the quality of medical services, such as pharmaceutical services, may be covered by one of the exceptions provided for in Article 52(1) TFEU, in so far as it contributes to the attainment of a high level of health protection. Judgment of 16 December 2010, *Commission* v *France* (C-89/09, EU:C:2010:772, paragraph 53 and the case-law cited).

26 According to the Court's settled case-law, when assessing whether the principle of proportionality has been observed in the field of public health, account must be taken of the fact that it is for the Member State to determine the level of protection which it wishes to afford to public health and the way in which that level is to be achieved. Since the level of protection may vary from one Member State to the other, Member States must be allowed discretion. Judgment of 5 December 2013, *Venturini and Others* (C-159/12 to C-161/12, EU:C:2013:791, paragraph 59 and the case-law cited).

27 It is arguable that this is not the aim of the national legislation in question as the Consiglio di Stato (Council of State) referred in this context to the 'better management of pharmaceutical services'. I shall however, deal with this for the sake of completeness.

58. Moreover, even if that aim could be justified by overriding reasons relating to the general interest, namely, safeguarding employees' rights against dismissal in the event of the transfer of a municipal pharmacy, the referring court indicated that that aim is already secured by Article 2112 of the Italian Civil Code, which transposes, inter alia, Council Directive 2001/23 which contains such protections. In such circumstances, if that were, indeed, the objective then national legislation such as Article 12(2) of Law No 362/1991 goes well beyond what is necessary to attain such an objective and cannot be justified in the light of that objective.

59. As regards the aim of securing the continuity of employment of pharmacists employed by municipal pharmacies in order to ensure the continuity of service or the level of service provided by such a pharmacy to the public and thus ultimately the better management of pharmaceutical services, it must be stressed that in accordance with the file before the Court, AV, BU and CT are all qualified pharmacists. [28]

60. Moreover, AV and BU were qualified in all respects under Italian law to purchase and operate the pharmacy in question in the main proceedings, as is evidenced by the fact that they were provisionally awarded the contract for that purchase.

61. It would thus appear that the only distinguishing feature in terms of professional qualifications or experience between the pharmacists in question which was given any relevance in the actual final award of the tender was the fact that CT was at the relevant time an employee at the municipal pharmacy in question and exercised the pre-emption right.

62. In addition, there is no indication in the file before the Court whatsoever as to why another equally qualified and experienced pharmacist to CT would not be able to ensure continuity or, indeed, why a pharmacist previously employed by the municipality could not continue in that capacity under the new ownership. [29]

63. Both the Municipality of Bernareggio and CT stressed the fact that the latter was not in fact just a mere employee of the municipal pharmacy in question but that that person had in fact managed the municipal pharmacy in question and its stock for many years.

64. While that may in fact well be the case, it would appear, subject to verification by the referring court, that Article 12(2) of Law No 362/1991, other than requiring that a pharmacist be registered or have the requisite qualifications in a previous competition, does not take into account the actual number of years of employment of the pharmacist in the municipal pharmacy, the quality of the service rendered by that pharmacist or, indeed, whether the pharmacist acted as a mere employee or in a managerial capacity. In effect, provided the terms of Article 12(2) of Law No 362/1991 are fulfilled, the pre-emption right operates automatically.

65. Thus, in accordance with the file before the Court and subject to verification by the referring court, the national legislation in question does not require any comparison of the qualifications and experience of the pharmacists in question to be compared and weighted in any manner whatsoever during the tender procedure. Indeed, CT did not even participate in the tender procedure other than to exercise the pre-emption right under Article 12(2) of Law No 362/1991.

28 The Court has drawn attention to the very particular nature of medicinal products, whose therapeutic effects distinguish them substantially from other goods. Judgment of 19 May 2009, *Apothekerkammer des Saarlandes and Others* (C-171/07 and C-172/07, EU:C:2009:316, paragraph 31). It has accepted, in particular, that the Member States may make persons entrusted with the retail supply of medicinal products subject to strict requirements, including with regard to the way in which the products are marketed and the pursuit of profit. In particular, the Member States may restrict the retail sale of medicinal products, in principle, to pharmacists alone, because of the safeguards which pharmacists must provide and the information which they must be in a position to furnish to consumers. See, to that effect, inter alia, judgment of 19 May 2009, *Commission* v *Italy* (C-531/06, EU:C:2009:315, paragraph 58).

29 See in that regard, Article 2112 of the Italian Civil Code, which, according to the referring court, transposes, inter alia, Council Directive 2001/23.

66. If, moreover, the object of the legislation was to promote the continuity of pharmaceutical services, it is not easy to see why it applies simply to the transfer of municipal pharmacies only and not to other types of pharmacies which are in private hands. [30]

67. I therefore consider that there is no evidence in the file before the Court that the aim pursued by the legislation in question put forward by the referring court for justifying pursuant to Article 52(1) TFEU on grounds of public health restrictions on the freedom of establishment is appropriate in that regard and that, in any event, even if there were, this goes beyond what is necessary to attain the objective in question. For all the reasons stated elsewhere in this Opinion, I take the view that the legislation fails to meet any clear public health objectives and, in any event, the means adopted are manifestly disproportionate for any such purpose.

68. It follows from the foregoing that the answer to the question referred is that Article 49 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, 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.

VIII. Conclusion

69. In view of all the foregoing considerations, I consider that the Court should answer the question referred by the Consiglio di Stato (Council of State, Italy) as follows:

Article 49 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, 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.

30 In saying this I do not wish to imply that legislation of this kind which applied indistinctly to the transfer of all pharmacies would comply with the requirements of Article 52 TFEU.