

SUMMARY

ECJ 19 December 2019, case C-465/18 (Comune di Bernareggio), Miscellaneous

AV, BU – v – Comune di Bernareggio (intervener: CT), Italian case

Summary

An unconditional right of pre-emption to pharmacists employed by the municipal pharmacy in a tendering procedure is contrary to the freedom of establishment.

Legal background

Article 49 TFEU prohibits restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State. Such prohibition also applies to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Article 12(2) of Law No 362/1991 is an Italian law that states that in the event of a transfer of ownership of a municipal pharmacy, the employees thereof shall have a right of pre-emption.

Article 2112 of the Codice civile (Civil Code) is an Italian law that protects the employees of an undertaking in case of a transfer of that undertaking and implements Directive 2001/23. This Civil Code aims to ensure that the employment relationship with the transferee continues and employees retain all rights under that relationship.

Facts and initial proceedings

In order to sell a municipal pharmacy, the Municipality of Bernareggio launched a tendering procedure. The highest bidders, in this case AV and BU, would be granted the transfer of the license for the pharmacy starting from a basic contract value of 580 000 euros. However, the license was awarded to a pharmacist employed by the municipal undertaking (CT) based on

the conditional right of pre-emption. CT had not joined the tendering procedure and was accorded precedence ex Article 12(2) of Law No 362/1991. AV and BU argued that the former article was contrary to the principles of free competition and equal treatment laid down in EU law.

Question

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

Consideration

Restriction of the freedom of establishment

First, the Court notes that it must be examined whether Article 12 (2) of Law No 362/1991 constitutes a restriction of the freedom of establishment ex Article 49 TFEU. In this light, the Court notes that Article 49 TFEU precludes any national measure which, even though it is applicable without discrimination on grounds of nationality, is liable to hinder or render less attractive the exercise by EU nationals of freedom of establishment (*Apothekerkammer des Saarlandes and Others*, C|171/07 and C|172/07 paragraph 22). Given the time and money associated with the tendering procedure, the unconditional right of pre-emption for the pharmacists employed by that pharmacy is likely to discourage pharmacists from other Member states to participate in such a tendering procedure. Especially since a pharmacist who is employed by the municipal pharmacy is able to match the most economically advantageous bid without participating in the call for tenders. Consequently, the Court concludes that the unconditional right of pre-emption granted to the pharmacists employed by a municipal pharmacy, in the event of the sale of that pharmacy by tender, by conferring an advantage on the pharmacists employed by the municipal pharmacy, tends to discourage or even prevent pharmacists from other Member States from acquiring a fixed place of business for the practice of their profession in Italy. Article 12 (2) of Law NO 362/1991 thus constitutes a restriction of the freedom of establishment.

Justification restriction of the freedom of establishment

The unconditional right of pre-emption granted to the pharmacists employed by a municipal pharmacy aims to ensure that pharmacies are run more effectively in two ways: by ensuring continuity in the employment relationship of pharmacists and by capitalizing on the experience gained by those pharmacists in running the pharmacy. The latter may justify the restriction of Article 49 TFEU on the ground of protecting public health. In addition, a

justification of the restriction of the freedom of establishment could be the objective to ensure that the public has a supply of medicinal products which is reliable and of good quality (*Venturini and Others*, C|159/12 to C|161/12, paras. 40 and 41).

The restriction regarding the freedom of establishment must be appropriate for ensuring attainment of the objective pursued and, if so, the restriction must not go beyond what is necessary to obtain that objective (*Apothekerkammer des Saarlandes and Others*, C|171/07 and C|172/07, paras. 25 and 52). Given the foregoing, the continuity in the employment relationship of the pharmacists is not appropriate to attain the objective to protect the public health. In principle, the rights of the employees of a municipal pharmacy, in the event of that pharmacy's sale, are already ensured in Article 2112 of the Civil Code. Moreover, the capitalization on the experience gained by pharmacists in running the pharmacy cannot be considered as appropriate to attain the objective to protect the public health since this reasoning gives rise to a non-rebuttable presumption. That presumption entails that pharmacists employed by a municipal pharmacy are best placed to manage that pharmacy as owners. This reason behind the grant of the right of pre-emption is not based on any real assessment of the experience actually gained, the quality of service provided, or the duties actually performed within the municipal pharmacy.

As a concluding remark, the selling of a pharmacy is regulated with certain safeguards under national law, namely that pharmacies can only be sold to pharmacists whose names appear in the register of pharmacists and who either have the requisite qualifications to acquire a pharmacy or at least two years' professional experience. Given the latter, the objective of capitalizing on the professional experience gained could be attained through less restrictive measures such as the award of additional points under the tendering procedure to tenderers who provide proof of experience in managing a pharmacy.

Ruling

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

Note

As a primary point, the Court held (paras. 26-31) that only Article 49 TFEU is relevant in deciding the dispute in the main proceedings since the acquisition of a pharmacy for an indefinite period falls within the scope of Article 49 TFEU, in that it enables an economic activity to be pursued by means of a stable arrangement (*Gebhard*, C|55/94, para. 39; *Apothekerkammer des Saarlandes and Others*, C|171/07 and C|172/07, paras. 23-24). In addition,

the Court notes that the request for the preliminary ruling is admissible given several reasons (see paras. 32-36).

Creator: European Court of Justice (ECJ)

Verdict at: 2019-12-19

Case number: C-465/18