



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

26 September 2013*

(Articles 49 TFEU and 56 TFEU — Freedom of establishment — Public health — Opticians — Regional legislation making the establishment of new opticians' shops subject to authorisation — Demographic and geographical limitations — Justification — Appropriateness for attaining the objective pursued — Coherency — Proportionality)

In Case C-539/11,

REQUEST for a preliminary ruling from the Consiglio di Giustizia Amministrativa per la Regione Siciliana (Italy), made by decision of 13 July 2011, received at the Court on 21 October 2011, in the proceedings

Ottica New Line di Accardi Vincenzo

v

Comune di Campobello di Mazara,

Intervener:

Fotottica Media Visione di Luppino Natale Fabrizio e. C. s.n.c.,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, J. Malenovský (Rapporteur), U. Löhmus, M. Safjan and A. Prechal, Judges,

Advocate General: N. Jääskinen,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Czech Government, by M. Smolek and T. Müller, acting as Agents,
- the Spanish Government, by S. Martínez-Lage Sobredo, acting as Agent,
- the Netherlands Government, by C. Wissels and J. Langer, acting as Agents,
- the European Commission, by I. Rogalski and D. Recchia, acting as Agents,

* Language of the case: Italian.

after hearing the Opinion of the Advocate General at the sitting on 30 January 2013,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 49 TFEU and 56 TFEU.
- 2 The request has been made in proceedings between Ottica New Line di Accardi Vincenzo ('Ottica New Line') and the Comune di Campobello di Mazara (Italy) concerning the latter's decision to authorise Fotottica Media Visione di Luppino Natale Fabrizio e. C. s.n.c. ('Fotottica') to carry out the activity of optician, on a permanent basis, in the territory of that municipality.

Legal context

European Union law

- 3 According to recital 22 in the preamble to 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):

'The exclusion of healthcare from the scope of this Directive should cover healthcare and pharmaceutical services provided by health professionals to patients to assess, maintain or restore their state of health where those activities are reserved to a regulated health profession in the Member State in which the services are provided.'

- 4 Article 1(1) of Directive 2006/123 provides:

'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.'

- 5 Article 2(2)(f) of the directive provides:

'This Directive shall not apply to the following activities:

...

- (f) healthcare services whether or not they are provided via healthcare facilities, and regardless of the ways in which they are organised and financed at national level or whether they are public or private.'
- 6 Article 15(2) of the directive comes under Chapter III thereof concerning freedom of establishment for service providers. Pursuant to that article, Member States are to examine whether their legal system makes access to a service activity or the exercise of it subject to compliance 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(3) states that Member States are to verify that such requirements satisfy the conditions of non-discrimination, necessity and proportionality.

Italian law

- 7 Under Article 1 of Regional Law No 12 ('Rules governing the activity of optician and amendment to Regional Law No 28 of 22 February 1999') (legge regionale n. 12 'Disciplina dell'esercizio dell'attività di ottico e modifica alla legge regionale 22 febbraio 1999, n. 28') of 9 July 2004 (*Gazzetta ufficiale della Regione Siciliana* No 30 of 16 July 2004; 'Regional Law No 12/2004'):

'1. For the purposes of the grant of authorisation by the relevant municipal authority to exercise the activity of optician, in addition to entry in the appropriate special register provided for under Article 71 of Regional Law No 25 of 1 September 1993, account shall be taken of the ratio of inhabitants to opticians' shops, in order to secure a rational distribution of supply throughout the territory. That ratio shall be established on the basis of one optician's shop per 8 000 residents. The distance between one optician's shop and another may be no less than 300 metres. The above limits shall not apply to premises which transfer from rented to owner-occupied premises or which are compelled to transfer as a result of eviction or other reasons of *force majeure*. Authorisations granted before the entry into force of this law shall not be affected.

2. Where the existence of territorial needs has been substantiated, the competent municipal authority shall, in derogation from paragraph 1, issue the relevant authorisation or transfer an existing authorisation, after obtaining the mandatory opinion of the provincial committee of the Chamber of Commerce, referred to in Article 8 of the regulation implementing Article 71 of Regional Law No 25 of 1 September 1993, enacted by Presidential Decree No 64 of 1 June 1995.

3. In municipalities in which the number of inhabitants does not exceed 8 000, the competent municipal authority may, without obtaining the opinion of the committee referred to in paragraph 2, grant a maximum of two authorisations. Applications processed prior to the entry into force of this law shall not be affected.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 8 By decision of 18 December 2009, the comune di Campobello di Mazara authorised Fotottica to establish an optician's shop in its territory.
- 9 It is not disputed that that decision was issued in breach of Article 1(1) of Regional Law No 12/2004, since that establishment did not comply the limits relating to population density and on distance between opticians' shops laid down in that provision.
- 10 Ottica New Line contested that decision before the Tribunale amministrativo regionale per la Sicilia. By decision of 18 March 2010, that court ruled out the application of Article 1(1) of Regional Law No 12/2004, holding that it was incompatible with European Union law, and dismissed Ottica New Line's action.
- 11 Ottica New Line appealed against the decision of the Tribunale amministrativo regionale per la Sicilia before the referring court. The latter is uncertain as to whether it is possible to transpose the principles arising from the Court of Justice's judgment in Joined Cases C-570/07 and C-571/07 *Blanco Pérez and Chao Gómez* [2010] ECR I-4629 to applications to establish an optician's shop. In that judgment, the Court of Justice concluded that European Union law does not preclude, in principle, national legislation which makes the establishment of new pharmacies conditional upon limits based on population density and on distance between pharmacies, in so far as such limits are likely to result in an even distribution of pharmacies throughout the national territory, so as to ensure that the population as a whole has adequate access to pharmaceutical services and, as a consequence, to improve the reliability and the quality of the provision of medicinal products to the public.

- 12 According to the referring court, the profession of optician, even more so than that of pharmacist, is indisputably subject to commercial considerations. However, it considers that the existence of an analogous healthcare interest in introducing and maintaining a particular system for the territorial distribution of opticians' shops cannot be entirely excluded. In that regard, the referring court draws attention to the potential danger that, without any form of regulation, opticians' shops would end up converging on localities which are regarded as being the most profitable, with the result that other, less attractive localities would suffer a shortfall in numbers of opticians.
- 13 In those circumstances, the Consiglio di Giustizia Amministrativa per la Regione Siciliana decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- '(1) Must European Union law on the freedom of establishment and the freedom to provide services be interpreted as meaning that a provision of national law (in the present case, Article 1 of [Regional Law No 12/2004] under which the establishment of opticians' [shops] in the territory of a Member State (in the present case, in a part of that territory) is subject to restrictions based on population density and the distance between [such shops] – restrictions which, in theory, constitute an infringement of those fundamental freedoms – reflects an overriding reason relating to the public interest, linked to the need to protect human health?
- (2) If the answer to Question (1) is in the affirmative, then, under European Union law, must the restrictions based on population density (one [establishment] for every 8 000 residents) and on distance (300 metres between one [optician's shop] and the next), laid down by [Regional Law No 12/2004] for the establishment of opticians' [shops] in the regional territory, be regarded as appropriate for the purposes of attaining the objective reflecting the abovementioned overriding reason relating to the public interest?
- (3) If the answer to Question (1) is in the affirmative, then, under European Union law, are the restrictions based on population density (one [establishment] for every 8 000 residents) and on distance (300 metres between one [optician's shop] and the next), laid down by [Regional Law No 12/2004] for the establishment of opticians' [shops] in the regional territory, proportionate – that is to say, not excessive – for the purposes of attaining the objective reflecting the abovementioned overriding reason relating to the public interest?'

Consideration of the questions referred

- 14 By its questions, which need to be examined together, the referring court asks, in essence, whether European Union law precludes regional legislation, such as that at issue in the main proceedings, which limits the grant of authorisation for the establishment of a new optician's shop in providing that:
- in each geographical area, only one optician's shop may be established, in principle, for every 8 000 residents, and
 - each new optician's shop must, in principle, be a minimum distance of 300 metres from an existing optician's shop.

Preliminary observations

- 15 First of all, the Court notes that, although the referring court makes reference, in its questions, to both European Union rules on the freedom to provide services and those on the freedom of establishment, the legislation at issue must be assessed in the light only of the rules on the freedom of establishment.

- 16 The legislation at issue in the main proceedings governs only the conditions for establishing an optician's shop in a part of Italian territory, with a view to a stable and continuous participation of such professionals in the economic life of that Member State. In those circumstances, the provisions concerning the freedom to supply services, which apply only if those relating to the freedom of establishment do not apply, are not relevant (see, by analogy, Case C-384/08 *Attanasio Group* [2010] ECR I-2055, paragraph 39 and the case-law cited).
- 17 Secondly, the Court notes that Directive 2006/123 is not applicable in the present case, even though it governs the freedom of establishment of providers from other Member States and it is alluded to by the referring court.
- 18 It is apparent from Article 2(2)(f) of Directive 2006/123, read in the light of recital 22 in the preamble thereto, that the directive does not apply to healthcare services provided by health professionals to patients to assess, maintain or restore their state of health where those activities are reserved to a regulated health profession in the Member State in which the services are provided.
- 19 First, the Court has already held that the intervention of opticians was likely to limit certain health risks and thus ensures the protection of public health (see, to that effect, Case C-108/09 *Ker-Optika* [2010] ECR I-2213, paragraph 64).
- 20 Second, the referring court points out that the opticians at issue in the main proceedings not only supply, check and adjust devices to correct sight defects, but may also themselves correct sight defects by using corrective visual devices or acting to prevent eye problems. As noted by the Advocate General in points 20 and 21 of his Opinion, an optician who is authorised to conduct eye tests, to measure visual acuity, to define and check the ocular correction needed, to detect eye problems and to treat defects of vision using corrective optical devices, to advise customers in that regard and to refer them to an ophthalmic specialist is exercising an activity encompassed by the protection of public health. By contrast, opticians who carry out technical activities, such as assembling frames and repairing spectacles, and who sell products which do not, strictly speaking, form part of the treatment of visual problems, such as non-prescription sunglasses or spectacle care products, exercise a commercial activity which is not associated with the protection of public health.
- 21 Moreover, the referring court points out that the activity of optician is a regulated profession in Italy.
- 22 In those circumstances, pursuant to Article 2(2)(f) of Directive 2006/123, the activities of the opticians at issue in the main proceedings are excluded from the scope of that directive.
- 23 Accordingly, the restrictions at issue in the main proceedings need to be examined only with regard to their compatibility with the TFEU and, more specifically, with Article 49 thereof.
- 24 Third, the Court notes that, in accordance with Article 168(7) TFEU, as interpreted in its case-law, European Union law does not detract from the power of the Member States to adopt provisions aimed at organising their health services. In exercising that power, however, the Member States must comply with European Union law, in particular the provisions of the TFEU on the freedom of establishment, which prohibit the Member States from introducing or maintaining unjustified restrictions on the exercise of that freedom in the healthcare sector (see, to that effect, Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and Others* [2009] ECR I-4171, paragraph 18, and *Blanco Pérez and Chao Gómez*, paragraph 43).

Whether there is a restriction on the freedom of establishment

- 25 It is settled case-law that any national measure which, albeit applicable without discrimination on grounds of nationality, is liable to hinder or render less attractive the exercise by European Union nationals of the freedom of establishment guaranteed by the Treaty constitutes a restriction within the meaning of Article 49 TFEU (Case C-140/03 *Commission v Greece* [2005] ECR I-3177, paragraph 27, and *Blanco Pérez and Chao Gómez*, paragraph 53).
- 26 A national rule which makes the establishment of a service provider from another Member State conditional upon the issue of prior authorisation falls within that category, since it is capable of hindering the exercise by that service provider of the freedom of establishment by preventing it from freely pursuing its activities through a fixed place of business. First, that service provider may have to bear the additional administrative and financial costs involved in any grant of such an authorisation. Second, the prior authorisation system excludes from the pursuit of self-employed activity economic operators who do not satisfy predetermined requirements, compliance with which is a condition for the issue of that authorisation (Case C-169/07 *Hartlauer* [2009] ECR I-1721, paragraphs 34 and 35, and *Blanco Pérez and Chao Gómez*, paragraph 54).
- 27 Moreover, national legislation constitutes a restriction where it makes the pursuit of an activity subject to a condition which is linked to the economic or social needs for that activity, since it tends to limit the number of service providers (*Hartlauer*, paragraph 36, and *Blanco Pérez and Chao Gómez*, paragraph 55).
- 28 In so far as concerns the dispute in the main proceedings, the Court notes, firstly, that Regional Law No 12/2004 makes the establishment of new opticians' shops subject to prior administrative authorisation.
- 29 Secondly, that legislation takes account of the ratio between population density and the number of opticians' shops, with a view to distributing supply throughout the given territory in a rational manner. In authorising the establishment of only a limited number of opticians' shops in a given territory, that legislation thus restricts the access of opticians to their economic activity in that territory.
- 30 Thirdly, the legislation at issue in the main proceedings is capable of preventing opticians from freely choosing where to exercise their independent activity, in so far as those seeking to establish shops are required to observe a minimum distance of 300 metres from existing opticians' shops.
- 31 The effect of such rules is thus to hinder and render less attractive the exercise by opticians from other Member States of their activities in Italian territory through a fixed place of business.
- 32 Consequently, regional legislation such as that at issue in the main proceedings amounts to a restriction on the freedom of establishment within the meaning of Article 49 TFEU.

Justification for the restriction on the freedom of establishment

- 33 It is settled case-law that restrictions on the 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 (*Hartlauer*, paragraph 44, and *Apothekerkammer des Saarlandes and Others*, paragraph 25).

- 34 In that regard, it is clear from Article 52(1) TFEU that restrictions on the freedom of establishment may be justified by the general objective of the protection of public health (see, to that effect, *Hartlauer*, paragraph 46, and *Apothekerkammer des Saarlandes and Others*, paragraph 27).
- 35 It is also apparent from the Court's case-law that that general objective may seek, more specifically, to ensure even distribution of healthcare providers throughout the national territory (see, to that effect, *Blanco Pérez and Chao Gómez*, paragraphs 64, 70 and 78).
- 36 In pursuing such an objective, the establishment of service providers, such as pharmacies, may be subject to planning. That may include prior authorisation for the establishment of a pharmacy, where that planning proves indispensable for filling in possible gaps in access to public health services and for avoiding the duplication of structures, so as to ensure the provision of public health care which is adapted to the needs of the population, which covers the entire territory and which takes account of geographically isolated or otherwise disadvantaged regions (see, to that effect, *Blanco Pérez and Chao Gómez*, paragraph 70).
- 37 Those principles appear to be transposable to the establishment of opticians' shops, in so far as, as noted in paragraph 20 above, the opticians at issue in the main proceedings provide services aimed at assessing, maintaining or restoring the state of health of patients, with the result that those services are encompassed by the protection of public health.
- 38 The legislation at issue in the main proceedings introduces planning measures concerning the establishment of opticians' shops throughout the territory of the Region of Sicily. It contains two main rules, namely (i) that only one optician's shop may be established per 8 000 residents, and (ii) that there must be a minimum distance of 300 metres between opticians' shops.
- 39 It is not disputed, first of all, that Regional Law No 12/2004 does not discriminate on grounds of nationality.
- 40 Next, in so far as concerns the rule that only one optician's shop may be established per 8 000 residents, the Court has already held that national authorities may adopt measures to avoid the risk of healthcare providers converging on localities in the territory concerned which are considered to be attractive. Thus, national authorities may opt, in the light of that risk, for legislation which provides that only one service provider may be established for a given population density, since such a rule seeks to encourage such service providers to establish premises in parts of the national territory where access to healthcare is lacking (see, to that effect, *Blanco Pérez and Chao Gómez*, paragraphs 72 to 77).
- 41 In those circumstances, 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.
- 42 Finally, as regards the rule imposing a minimum distance between two opticians' shops, it is apparent from the Court's case-law that, together with the rule referred to in the preceding paragraph, 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 (see, to that effect, *Blanco Pérez and Chao Gómez*, paragraphs 81 and 82).
- 43 The Court points out, however, that it is not indispensable, as a general rule, for customers to obtain optical products quickly, and even less indispensable that they obtain them immediately. It follows that the need for rapid access to those products is less great than is inherently the case for the provision of many medicinal products, with the result that the interest in having an optician's shop close by is not as acute as is the case with the distribution of medicinal products.

- 44 None the less, the Court notes that it is for the Member States to decide on the degree of protection which they wish to afford to public health and on the way in which that protection is to be achieved. Since the level may vary from one Member State to another, Member States should be allowed a margin of discretion (see, to that effect, *Apothekerkammer des Saarlandes and Others*, paragraph 19, and *Blanco Pérez and Chao Gómez*, paragraph 44).
- 45 In exercising that margin of discretion, it is permissible for the Member States to organise the planning of opticians' shops in a way comparable to that provided for the distribution of pharmacies, notwithstanding the differences which exist between the two types of healthcare service.
- 46 In those circumstances, it must be found that legislation such as that at issue in the main proceedings is, in principle, appropriate for securing attainment of the general objective pursued of protecting public health and, in particular, the objectives of ensuring even distribution of opticians' shops throughout the national territory and ensuring rapid access to such establishments.
- 47 None the less, it is also necessary that the way in which Regional Law No 12/2004 pursues those objectives is coherent. According to the Court's case-law, the national legislation as a whole and the various relevant rules are appropriate for ensuring attainment of the objective relied upon only if they genuinely reflect a concern to attain that objective in a consistent and systematic manner (see, to that effect, *Hartlauer*, paragraph 55, and *Apothekerkammer des Saarlandes and Others*, paragraph 42).
- 48 In that regard, it is ultimately for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent Regional Law No 12/2004 satisfies those conditions (see, to that effect, Case 171/88 *Rinner-Kühn* [1989] ECR 2743, paragraph 15, and Joined Cases C-4/02 and C-5/02 *Schönheit and Becker* [2003] ECR I-12575, paragraphs 82 and 83).
- 49 However, the Court of Justice, which is called on to provide answers of use to the national court, may provide guidance based on the documents relating to the main proceedings and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment (Case C-187/00 *Kutz-Bauer* [2003] ECR I-2741, paragraph 52, and *Schönheit and Becker*, paragraph 83).
- 50 To that end, the Court points out, first of all, that Article 1(1) to (3) of Regional Law No 12/2004 lays down conditions which differ for municipalities with fewer than 8 000 residents and those with more than that number. It is not inconceivable that the municipalities which fall within the first category are largely free to authorise the establishment of two opticians' shops in their territory, whereas those in the second category can grant such authorisation only if 'the existence of territorial needs has been substantiated' and if those municipalities have gained the prior and mandatory opinion of a committee.
- 51 Such legislation risks bringing about unequal access to the establishment of opticians' shops in the various areas of the region concerned. In particular, as pointed out by the Advocate General in point 82 of his Opinion, in municipalities with populations of between 8 000 and 16 000 – of which there are many, according to the referring court – legislation of that nature could excessively restrict such access.
- 52 The risk of unequal access to the establishment of opticians' shops is accentuated, moreover, by the fact alluded to in the decision to refer that the municipal authorities have significant discretion since the requirement that 'the existence of territorial needs be substantiated' is not further regulated.
- 53 In addition, the competent authorities may authorise the establishment of an additional optician's shop only after receiving a mandatory opinion from a committee of the Chamber of Commerce which is made up, according to the information submitted to the Court, of representatives of opticians active on the market, namely direct competitors of those seeking establishment.

- 54 In those circumstances, Regional Law No 12/2004 risks, as of its implementation, failing to ensure an even distribution of opticians' shops throughout the entire territory concerned and, consequently, an equal level of protection of public health throughout that territory.
- 55 That regional law also gives rise to similar issues in relation to municipalities with fewer than 8 000 residents. It cannot be ruled out that, in those municipalities, the competent authorities enjoy quasi unlimited powers when authorising – or not – the establishment of a second optician's shop. There is thus no guarantee, in that respect, that a second optician's shop would be authorised, even if, in the present case, the requirements of the protection of public health were to deem it necessary.
- 56 None the less, since the Court cannot, a priori, neither presume nor exclude that the risks referred to above related to the implementation of Regional Law No 12/2004 would materialise, it is for the national court to examine, using specific statistical data or other means, whether the competent authorities use appropriately, in accordance with transparent and objective criteria, the powers made available under the legislation, with a view to attaining, in a coherent and systematic manner, the objectives pursued relating to the protection of public health throughout the territory concerned.
- 57 Having regard to the foregoing, the answer to the questions referred is that Article 49 TFEU must be interpreted as not precluding regional legislation, such as that at issue in the main proceedings, which imposes restrictions on the grant of authorisation for the establishment of a new optician's shop, by providing that:
- in each geographical area, only one optician's shop may be established, in principle, for every 8 000 residents, and
 - each new optician's shop must, in principle, be a minimum distance of 300 metres from an existing optician's shop,

provided that the competent authorities use appropriately, in accordance with transparent and objective criteria, the powers made available under the legislation concerned, with a view to attaining, in a coherent and systematic manner, the objectives pursued by that legislation relating to the protection of public health throughout the given territory, which is a matter for the national court to assess.

Costs

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

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

Article 49 TFEU must be interpreted as not precluding regional legislation, such as that at issue in the main proceedings, which imposes restrictions on the grant of authorisation for the establishment of a new optician's shop, by providing that:

- **in each geographical area, only one optician's shop may be established, in principle, for every 8 000 residents, and**
- **each new optician's shop must, in principle, be a minimum distance of 300 metres from an existing optician's shop,**

provided that the competent authorities use appropriately, in accordance with transparent and objective criteria, the powers made available under the legislation concerned, with a view to attaining, in a coherent and systematic manner, the objectives pursued by that legislation relating to the protection of public health throughout the given territory, which is a matter for the national court to assess.

[Signatures]