



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

2 July 2015 *

(Reference for a preliminary ruling — Articles 49 TFEU, 102 TFEU and 106 TFEU — Freedom of establishment — Principle of non-discrimination — Abuse of dominant position — Article 15 of the Charter of Fundamental Rights of the European Union — Inadmissibility)

In Case C-497/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per la Sicilia (Italy), made by decision of 9 October 2012, received at the Court on 7 November 2012, in the proceedings

Davide Gullotta,

Farmacia di Gullotta Davide & C. Sas

v

Ministero della Salute,

Azienda Sanitaria Provinciale di Catania,

THE COURT (Fourth Chamber),

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

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Gullotta and Farmacia di Gullotta Davide & C. Sas, by G. Spadaro and G.F. Licata, avvocati,
- Federfarma — Federazione Nazionale Unitaria dei Titolari di Farmacia Italiani, by M. Luciani, A. Arena, G.M. Roberti and I. Perego, avvocati,
- the Italian Government, by G. Palmieri, acting as Agent, and by F. Urbani Neri, avvocato dello Stato,

* Language of the case: Italian.

— the Greek Government, by E. Skandalou, acting as Agent,
— the Spanish Government, by S. Centeno Huerta, acting as Agent,
— the European Commission, by E. Montaguti and H. Tserepa-Lacombe, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 12 March 2015,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 49 TFEU, 102 TFEU and 106 TFEU and of Article 15 of the Charter of Fundamental Rights of the European Union ('the Charter').
- 2 The request has been made in proceedings between Mr Gullotta and Farmacia di Gullotta Davide & C. Sas, on the one hand, and the Ministero della Salute and the Azienda Sanitaria Provinciale di Catania, on the other hand, concerning the refusal to grant Mr Gullotta authorisation to sell in one of his para-pharmacies medicinal products for which a prescription is required but the cost of which is not borne by the health service.

Legal context

EU law

- 3 Recital 26 in the preamble to Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22) states:

'This Directive does not coordinate all the conditions for access to activities in the field of pharmacy and the pursuit of these activities. In particular, the geographical distribution of pharmacies and the monopoly for dispensing medicines should remain a matter for the Member States. This Directive leaves unchanged the legislative, regulatory and administrative provisions of the Member States forbidding companies from pursuing certain pharmacists' activities or subjecting the pursuit of such activities to certain conditions.'

Italian law

- 4 Law No 468 of 22 May 1913 defined the provision of pharmaceutical services as 'a primary State activity' which could only be engaged in by municipal pharmacies or by private pharmacies operating under government licence.
- 5 In order to ensure a proper distribution of dispensing pharmacies throughout the national territory and to prevent them from becoming concentrated solely in commercially more desirable areas, an administrative instrument for controlling supply was established, the 'pianta organica', which provides that the distribution of those dispensing pharmacies, in the territory, is to be subject to quotas considered appropriate to meet demand from the people concerned in order to afford each such dispensing pharmacy a market share and to meet the requirements for medicinal products throughout the national territory.

- 6 Article 122 of a Royal Decree, No 1265 of 27 July 1934, had reserved the sale of medicinal products exclusively to pharmacies.
- 7 Law No 537 of 24 December 1993 later recategorised medicinal products on the basis of the following classes, namely ‘Class A’ for essential medicinal products and medicinal products for chronic diseases; ‘Class B’ for medicinal products other than those falling into ‘Class A’ and of significant therapeutic interest, and ‘Class C’ for medicinal products other than those falling within Class A or Class B. Under Article 8(14) of Law No 537 of 24 December 1993, the cost of medicinal products falling within Class A or Class B is to be wholly borne by the national health service, whereas the cost of medicinal products in Class C is to be wholly borne by the customer.
- 8 Subsequently, Article 85(1) of Law No 388 of 23 December 2000 abolished Class B, while Article 1 of Law No 311 of 30 December 2004 created a new category of medicinal products — Class C-bis — to cover medicinal products for which a prescription is not required and which, unlike products falling within the other categories, may be publicly advertised. As in the case of Class C medicinal products, the cost of Class C-bis medicinal products is to be borne by the customer.
- 9 Decree-Law No 223 of 4 July 2006, converted into Law No 248 of 4 August 2006, allowed the opening of para-pharmacies, by means of which their owners were authorised to sell medicinal products falling within the scope of Class C-bis. More recently, Decree-Law No 201/2011, converted into Law No 214/2011, further extended the categories of medicinal product that can be sold by para-pharmacies, so that they can now offer to the public some of the Class C medicinal products for which no medical prescription is required.

The facts of the main proceedings and the questions referred for a preliminary ruling

- 10 The applicant in the main proceedings, a qualified pharmacist registered with the Ordine dei Farmacisti di Catania (Catania Order of Pharmacists, Italy), is the proprietor of several para-pharmacies. He applied to the Ministero della Salute for authorisation to sell in one of his para-pharmacies medicinal products for which a prescription is required and the cost of which is borne entirely by the customer.
- 11 The Ministero della Salute rejected that request on the ground that, in accordance with the legislation in force, the sale of those medicinal products may take place only in pharmacies.
- 12 The applicant in the main proceedings brought an action against that refusal before the referring court, claiming that that legislation is contrary to EU law.
- 13 In those circumstances, the Tribunale amministrativo regionale per la Sicilia decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:
 - ‘(1) Do the principles of freedom of establishment, non-discrimination and the preservation of competition under Article 49 et seq. TFEU preclude national legislation which does not allow a pharmacist, who is qualified and entered in the relevant professional register but does not own a pharmacy included on the “pianta organica”, also to offer for retail sale, in the para-pharmacy owned by that pharmacist, pharmaceutical products which are subject to a prescription in the form of a “ricetta bianca” — that is to say, pharmaceutical products the cost of which is borne, not by the Italian national health service, but wholly by the citizen — and which thereby also establishes in that sector a prohibition on the sale of certain categories of pharmaceutical products, as well as a quota in relation to the number of commercial outlets which may be established within the national territory?

- (2) Must Article 15 of the Charter be interpreted as meaning that the principle therein established also applies, without restriction, to the profession of pharmacist, and that the public-interest aspect of that profession does not justify the application of different arrangements to the proprietors of pharmacies and to the proprietors of para-pharmacies as regards the sale of the medicinal products referred to in Question 1 above?
- (3) Must Articles 102 TFEU and 106(1) TFEU be interpreted as meaning that the prohibition of the abuse of a dominant position must apply without restriction to the profession of pharmacist, inasmuch as a pharmacist who owns a traditional pharmacy, and sells medicinal products under a contractual arrangement with the Italian national health service, benefits from the ban on the sale of Class C medicinal products by proprietors of para-pharmacies, without this being properly justified on the basis of the undeniably special features of the profession of pharmacist arising from the public interest in safeguarding public health?
- 14 By letter of 16 December 2013, the Registrar of the Court sent the referring court the judgment in *Venturini and Others* (C-159/12 to C-161/12, EU:C:2013:791), asking it to inform the Court whether, in the light of that judgment, it wished to maintain its request for a preliminary ruling.
- 15 By a decision of 10 July 2014, received at the Court on 1 August 2014, the referring court informed the Court that it wished to maintain the second and third questions.

Consideration of the questions referred

The second question

- 16 By its second question, the referring court asks, in essence, whether Article 15 of the Charter must be interpreted as meaning that the principle established therein also applies, without restriction, to the profession of pharmacist, and that the public-interest aspect of that profession does not justify the application of different arrangements to the proprietors of pharmacies and to the proprietors of para-pharmacies as regards the sale of the medicinal products which are subject to a ‘ricetta bianca’, that is to say, pharmaceutical products the cost of which is borne, not by the Italian national health service, but wholly by the citizen.
- 17 In that regard, in order for the Court to be able to give an interpretation of EU law that is useful to the national court, Article 94(c) of the Rules of Procedure of the Court of Justice provides that the request for a preliminary ruling must contain a statement of the reasons which prompted the referring court to inquire about the interpretation or validity of certain provisions of EU law, and the relationship between those provisions and the national legislation applicable to the main proceedings.
- 18 As regards the second question, the order for reference does not, however, meet those requirements.
- 19 As the Advocate General noted in points 68 to 74 of his Opinion, that order does not make clear why the referring court expresses doubts concerning the compatibility of the legislation at issue in the main proceedings with Article 15 of the Charter and it contains no information allowing the Court to provide the referring court with guidance on the interpretation of EU law which would enable it to resolve the legal problems before it.
- 20 According to settled case-law, the Court may refuse to rule on a question referred by a national court only where the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, to that effect, judgment in *OTP Bank*, C-672/13, EU:C:2015:185, paragraph 27 and the case-law cited).

- 21 Given that the Court does not have before it the material necessary to give a useful answer, the second question must be declared inadmissible.

The third question

- 22 By its third question, the referring court asks, in essence, whether Articles 102 TFEU and 106(1) TFEU must be interpreted as meaning that the prohibition of the abuse of a dominant position must apply without restriction to the profession of pharmacist, inasmuch as a pharmacist who owns a traditional pharmacy, and sells medicinal products under a contractual arrangement with the Italian national health service, benefits from the ban on the sale of Class C medicinal products by proprietors of para-pharmacies, without this being properly justified on the basis of the special features of the profession of pharmacist arising from the public interest in safeguarding public health.
- 23 According to settled case-law, the mere creation of a dominant position through the grant of special or exclusive rights within the meaning of Article 106(1) TFEU is not in itself incompatible with Article 102 TFEU. A Member State will be in breach of the prohibitions laid down by those two provisions only if the undertaking in question, merely by exercising the special or exclusive rights conferred upon it, is led to abuse its dominant position or where such rights are liable to create a situation in which that undertaking is led to commit such abuses (judgment in *Servizi Ausiliari Dottori Commercialisti*, C-451/03, EU:C:2006:208, paragraph 23 and the case-law cited).
- 24 Consequently, the question arises not only as to whether the national legislation has had the effect of granting pharmacies special or exclusive rights within the meaning of Article 106(1) TFEU, but also as to whether such legislation can have led to abuse of a dominant position (see, to that effect, judgment in *Servizi Ausiliari Dottori Commercialisti*, C-451/03, EU:C:2006:208, paragraph 24).
- 25 However, as the Advocate General noted in points 79 and 82 of his Opinion, the order for reference lacks any explanation as to why the referring court considers that the legislation at issue does not comply with Articles 102 and 106 TFEU. It does not explain, in particular, why that legislation would be likely to induce pharmacies to abuse their position.
- 26 In that regard, it should be noted that, according to the case-law cited in paragraph 20 of the present judgment, a question referred for a preliminary ruling by a national court is inadmissible where the latter does not provide the Court with the factual or legal material necessary to give a useful answer.
- 27 Given that the Court does not have before it the material necessary to give a useful answer, the third question must be declared inadmissible.

Costs

- 28 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:

The questions referred by the Tribunale amministrativo regionale per la Sicilia (Italy), by decision of 9 October 2012, and maintained by that court, are inadmissible.

[Signatures]