ISSN 2384-9169
Fascicolo n. 4 - 2020
rivista.eurojus.it

"Economic interests" and free movement justifications in the more recent case-law of the European Court

DI MICAELA LOTTINI*

Sommario: 1. Preliminary remarks. – 2. Public interest justifications and mandatory requirements: the case-law of the CJEU. – 3. The "economic limit": market v State. – 4. A recent decision on the Italian pharmaceutical system and the "economic limit". – 5. Conclusions.

1. Preliminary remarks

As is well known, the application of the free movement rules[1] provided by the Treaty on the Functioning of the European Union (hereinafter TFEU) to foster the integration of the internal market, can be derogated to allow Member States (hereinafter MSs) to adopt national regulatory measures aimed at protecting and satisfying specific "public interests"[2].

Some "interests" are indicated in the Treaty and are known as "public interest justifications"[3]; others, are developed through the case-law of the Court of justice of the European Union (hereinafter CJEU), as they are invoked by the Member States as a defence for a restriction on a fundamental freedom; these are known as "mandatory requirements" or "overriding reasons relating to the public interest"[4].

All in all, under certain conditions, the rules of the internal market can be derogated to pursue overriding public objectives, the protection of which cannot be left to the normal dynamics of the market and need a public (national) intervention. However, this intervention is

* Associate Professor of Administrative Law and State and market in EU law, at the Law Department of the University of Rome 'Roma Tre'.
[1] Articles 28 and ss. of the Treaty on the Functioning of the European Union (TFEU).
[2] For a comprehensive analysis, see, C. BARNARD, *The substantive law of the EU. The four freedoms*, Oxford, 2019, *passim*.
[3] Cfr., par. 2 of this article.
[4] *Ibid*.

considered subsidiary and must have a sound justification; in this sense, the case-law of the CJEU offers a narrow reading and the national measures are often stroke down as they are not considered the 'less restrictive (on free movement) option' available to MSs to protect the public interest concerned.

Hence, MSs are free to indicate the public interests they need to protect and give a content and a meaning to the ones indicated by the Treaty. Whereas, the Court is generally focused on the scrutiny of the regulatory measures, which have to be suitable/appropriate for achieving the objective and necessary (proportionality test)[5].

However, the freedom of the MSs to decide which interests are to be protected is subject to a general limit. The Court makes it clear that MSs cannot hinder free movement to pursue "economic aims", which must be left "to the market". For the sake of ease of reference, this will be referred to as the "economic limit".

Within this context, on 19 December 2019, the Court issued a judgement regarding the Italian pharmaceutical system (*AV and BU v Comune di Bernareggio*)[6], where it was called upon to decide whether a national regulatory measure restrictive of the freedom of establishment, but aimed at protecting public health, hid, *de facto,* an economic objective and consequently could not be justified.

This decision, which is in line with the previous case-law of the Court, nonetheless, gives us the opportunity to make some considerations on the issue of the public interest justifications and their application, having particular regard to the more recent judgments dealing with the "economic limit", in order to draw some final conclusions.

2. Public interest justifications and mandatory requirements: the case-law of the CJEU

In accordance with the provisions of the TFEU, the free movement of goods, capitals, workers, services (and the right of establishment) in the internal market can be limited by the MSs on grounds of «public morality, public policy or public security» (arts. 36, 45 n. 3, 65, n. 1, 52, n. 1, TFEU).

Also, limitations of free movement of goods can be justified to «protect the health and life of humans, animals or plants, national treasures possessing artistic, historic or archaeological value; industrial and commercial property». However, they must not constitute a means of arbitrary discrimination between Member States» (art. 36 TFEU).

These are the "public interest justifications", namely a series of public interests recognised as overriding by the Treaty itself and considered worthy of protection even in derogation of the rules of the internal market. Or more precisely, the protection of which has to be balanced with the interests of the internal market, interests that can be hindered only to the extent necessary to allow that protection.

[5] On the principle of proportionality in UE law and beyond, see, D.U. GALETTA, *General principles of EU law as evidence of the development of a common European legal thinking: the example of the proportionality principle (from the Italian perspective)*, in H-J. BLANKE, P. CRUZ VILLALÓN, T. KLEIN, J. ZILLER (eds), *Common European legal thinking. Essays in honour of Albrecht Weber*, HeidelbergDordrecht-London-New York, 2016, p. 221.
[6] Judgment of 19 December 2019, *AV and BU v Comune di Bernareggio*, C-465/18, EU:C:2019:1125.

All in all, MSs are free to give a content and a meaning to these general formulas. Whereas, the Court is generally focused on the evaluation of the regulatory measures, which have to "pass" the proportionality test.

The Court clearly ruled, for example, that «it is for each Member State to determine in accordance with its own scale of values and in the form selected by it, the requirements of public morality in its territory» and, more in particular, «to make their own assessments of the indecent or obscene character of certain articles»[7].

By the same token, Member States «essentially retain the freedom to determine the requirements of public policy and public security in accordance with their national needs, which can vary from one Member State to another and from one era to another»; even though the Court specifies that «those requirements must nevertheless be interpreted strictly»[8]. Accordingly, the "public policy"[9] justification «presupposes the existence […] of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society»[10], whereas, the "public security" justification covers specifically the internal and external security of the State[11].

Having regard to the health and life of humans, the Court stresses that they «rank foremost among the interests protected by the treaty». And again, «it is for the Member States to decide what degree of protection they wish to ensure, and the manner in which that degree can be achieved»[12].

Also, a "spill-over effect" is allowed, as the public interest justifications indicated, for example, by article 36 TFEU for the free movement of goods, can be applied by MSs in other sectors, such as, the free movement of services[13].

In addition to the public interests listed in the Treaty, with the seminal decision *Cassis de Dijon*[14], the judges identified another set of interests that can justify obstacles to free movement, namely: «the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer»[15].

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[7] However, a measure which prohibits the importation of certain goods on the ground that they are indecent or obscene cannot be justified relying on article 36 if the same goods are manufactured and marketed freely in its territory. Judgment of the Court of 11 March 1986, *Conegate*, C-121/85, EU:C:1986:11, paras. 14-16.

[8] Judgment of the Court of 2 May 2018, *K.*, C-331/16, EU:C:2018:296, paras. 40-42; judgment of the Court of 13 July 2017, *E.*, C-193/16, EU:C:2017:542, para. 18; judgment of the Court of 22 May 2012, *I.*, C-348/09, EU:C:2012:300, para. 23.

[9] For some considerations on the concept of 'public policy', see, G.M. KELLY, *Public policy and general interest exceptions in the jurisprudence of the European Court of Justice*, in *European review of private law*, 1996, p. 17.

[10] Judgment of the Court of 24 June 2015, *T.*, C-373/13, EU:C:2015:413, para. 79.

[11] Judgment of the Court of 23 November 2010, *Tsakouridis*, C-145/09, EU:C:2010:708, para. 43. Internal security may be affected by, *inter alia*, a direct threat to the peace of mind and physical security of the population of the Member State concerned (judgment of the Court of 22 May 2012, *I.*, *cit*., para. 28). External security may be affected by, *inter alia*, the risk of a serious disturbance to the foreign relations of that Member State or to the peaceful coexistence of nations (*Tsakouridis*, cit., para. 44).

[12] Judgment of the Court of 28 September 2006, *Ahokainen*, C-434/04, EU:C:2006:609, para. 33; judgment of the Court of 19 May 2009, *Apothekerkammer des Saarlandes*, joined cases C-171/07 and C-172/07, EU:C:2009:316; judgment of the Court of 19 May 2009, *Commission v Italian Republic*, C-531/06, EU:C:2009:315.

[13] Judgment of the Court of 26 February 1991, *Commission v Hellenic Republic*, C-198/89, EU:C:1991:79; judgment of 18 March 1980, *Coditel*, C-62/79, EU:C:1980:84.

[14] Judgment of the Court of the Court of 20 February 1979, *Rewe-Zentral*, C-120/78, EU:C:1979:42.

[15] *Ibid*., para. 8.

They are indicated as "mandatory requirements". In the aftermath of the Cassis case, Member States are made free to invoke other public interests as a defence for a restriction on the fundamental freedoms, without any apparent limit. As a matter of fact, «it does seem that the Court has been reluctant to refuse to recognise mandatory requirements put forth by the Member States»[16].

Hence, the range of mandatory requirements acceptable to the Court has expanded in the years to include, inter alia,: the need to encourage the creation of cinematographic works[17]; the social protection for victims of road traffic accidents[18]; a cultural policy whose aim is to safeguard the freedom of expression of the various — in particular social, cultural, religious and philosophical — components[19]; the protection of general interests relating to the proper appreciation of places and things of historical interest and the widest possible dissemination of knowledge of the artistic and cultural heritage of the Country[20], the protection of the environment[21], the proper functioning of the land register system and the legality and legal certainty of documents concluded between individuals[22], etc.

If it is for Member States to decide which public interest to protect, the Court is normally focused on the national measure aimed at protecting the public interest in question; measure which, in order to be considered lawful, is subject by the Court to the 'proportionality test'; that is to say, «it must be suitable to ensuring the attainment of the objective it pursues and must not go beyond what is necessary to attain it»[23]. Also, the Court makes it clear that the national measure can be considered appropriate for securing attainment of the objective relied upon only if «it genuinely reflects a concern to attain that objective in a consistent and systematic manner»[24]. Moreover, in general terms (as the case-law of the Court is not always consistent on the matter)[25], having regard to the "mandatory requirements" the national measure must not be directly[26] discriminatory in order to be justifiable[27].

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[16] J. SCOTT, *Mandatory or imperative requirements in the EU and the WTO*, in C. BARNARD and J. SCOTT (eds), *The law of the single European market: unpacking the premises*, Oxford, 2002, p. 269.
[17] Judgment of the Court of 11 July 1985, *Cinéthèque*, C-60/84, EU:C:1985:329, para. 23.
[18] Judgment of the Court of 28 April 2009, C-518/06, *Commission v Italian Republic*, EU:C:2009:270, para. 73
[19] Judgment of the Court of 25 July 1991, *Gouda*, C-288/89, EU:C:1991:323, paras. 22-23.
[20] Judgment of the Court of 26 February 1991, *Commission v French Republic*, C-154/89, EU:C:1991:76.
[21] Judgment of the Court of 20 September 1988, *Commission v Kingdom of Denmark*, C-302/86, EU:C:1988:421.
[22] Judgment of the Court of 9 March 2017, *Piringer*, C-342/15, EU:C:2017:196.
[23] Judgment of the Court of 25 July 1991, *Gouda and Others*, cit., paras 13 to 15; judgment of the Court of 31 March 1993, *Kraus*, C-19/92, EU:C:1993:125 para. 32; judgment of the Court of 30 November 1995, *Gebhard* C-55/94, EU:C:1995:411, para. 37.
[24] Judgment of the Court of 6 March 2007, *Placanica and Others,* joined cases C-338/04, C-359/04 and C-360/04, EU:C:2007:133, paras. 53 and 58; judgment of the Court of 17 July 2008, *Corporación Dermoestética*, C-500/06, EU:C:2008:42, paras 39 and 40.
[25] See, footnote n.26.
[26] As it is well known, starting from the seminal case *Dassonville* (judgment of the Court of 11 July 1974, C-8/74, EU:C:1974:82), for a national regulatory measure to be considered in breach of the rules of free movement, it is sufficient that the measure in question (even if not directly discriminatory on the basis of nationality or residence) *is* nonetheless «*capable of hindering, directly or indirectly, actually or potentially, the free movement of the factors of production*».
[27] See, in this respect, judgment of the Court of 17 June 1981, *Commission v Ireland*, C-113/80, EU:C:1981:139; judgment of the Court of 25 January 1977, *Bauhuis*, C-46/76, EU:C:1977:6. Also, see, V. *HATZOPOULOS, Exigences essentielles. Impératives ou impérieuses ; une théorie, des théories ou pas de théorie du tout?*, in *Revue trimestrielle du droit Européen*, 1998, p. 191. On the contrary, other legal scholars point out that this distinction is blurrier and, in some cases, the Court allowed a justification on the basis of a mandatory requirement even when the national measure was directly discriminatory (judgment of the Court of 1 July 2014, *Ålands vindkraft*, C-

3. The "economic limit": market v State

As mentioned above, the CJEU tends to accept the public interests put forth by MSs to provide a justification for restrictive measures and the indication by the same MSs of the content and meaning of the general formulas of the Treaty. The only limit indicated by the Court is that the interest and the aim in question must be "non-economic". As legal scholars point out: «of the public interest reasons submitted by the Member States only those of an […] economic nature have not been recognised by the Court»[28].

As a matter of fact, already in a judgment of 1961 (*Commission v. Italy*)[29], the Court made it clear that the application of article 30 EC (now article 36 TFEU) is «directed to eventualities of a non-economic kind».

The concept of "economic interest" is multifaceted. For example, it includes the need to lighten the administration's burden[30], the aim of ensuring the proper functioning of the national economy[31], of guaranteeing the economic interest of an undertaking[32], of recouping the cost of managing cultural assets[33], of maintaining industrial peace[34], of the diminution of tax revenue[35] and that of avoiding an erosion of the tax base,[36] etc.

It has to be noted, however, that in relation to specific sensitive areas, for example, the organisation and management of the social security systems (or the ensuring of a minimum supply of petroleum products in the Country)[37], the Court, without departing from its doctrine of the "economic limit", nonetheless adopts a more "permissive" approach.

The national intervention, which is economic in nature, can nonetheless be justified, if it is «instrumental towards safeguarding a non-economic objective». The decision is made on a case by case basis, taking into consideration the interests involved and the national measure at issue.

For example, the achievement of the economic aim of the profitability of an undertaking can nonetheless be justified, if it is necessary for the protection of public health[38]. The

573/12, EU:C:2014:2037; judgment of the Court of 9 July 1997, *De agostini*, C-34/95, EU:C:1997:344). In this sense**,** P. OLIVER, *Some further reflections on the scope of articles 28-30 (ex 30-36) EC*, in *Common market law review*, 1999, p. 783. On this distinction, see, also, J. SCOTT, *Mandatory or imperative requirements in the EU and the WTO*, in C. BARNARD and J. SCOTT (eds), *The law of the single European market: unpacking the premises*, Oxford, 2002, p. 269, at 274.

[28] J. SCOTT, *Mandatory or imperative requirements in the EU and the WTO*, *cit*., p. 269.

[29] Judgment of the Court of 19 December 1961, *Commission v Italian Republic*, C-7/61, EU:C:1961:31.

[30]Judgment of the Court of 20 May 1976, *de Peijper*, C-104/75, EU:C:1976:67, para. 18.

[31] In this case, the national rules were adopted in order to settle long-standing disputes between tourist guides and travel and tourist agencies and thereby prevent any adverse effects on tourism, and consequently on the Country's economy. Judgment of 5 June 1997, *Syndesmos*, C-398/95, EU:C:1997:282**.**

[32] the need to ensure continuity, financial stability and a proper return on past investments for licence holders (for horse-race betting operations), cannot be accepted as overriding reasons in the general interest justifying a restriction of a fundamental freedom guaranteed by the Treaty. Judgment of the Court of 13 September 2007, *Commission v Italian Republic,* C-260/04, ECLI:EU:C:2007:508, para. 35.

[33] Judgment of the Court of 16 January 2003, *Commission v Italian Republic*, C-388/01, EU:C:2003:30, paras. 18, 19, and 22.

[34] Judgment of the Court of 5 June 1997, *Syndesmos*, C-398/95, EU:C:1997:282.

[35] Judgment of the Court of 16 July 1998, *Colmer,* C-264/96, EU:C:1998:37, para. 28.

[36] Judgment of the Court of 18 September 2001, *Bosal Holding*, C-168/01, EU:C:2003:479.

[37] Judgment of the Court of 10 July, *Campus Oil*, C-72/8, EU:C:1984:256.

[38] Judgment of the Court of 6 October 1987, *Openbaar*, C-118/86, EU:C:1987:424; judgment of the Court of 18 march 1995, *Evans Medical*, C-324/93, EU:C:1995:84, para. 36.

preservation of the financial stability of the social security system can be a justification, if it is necessary to guarantee the balance and survival of the system[39] and, hence, again, the protection of public health.

In the case *Hartlauer*[40], the Court has to rule on the compatibility with the free movement provisions of a national legislation under which an authorisation is necessary for setting up a private health institution in the form of an independent outpatient dental clinic. The authorisation must be refused if there is no "need" for that outpatient clinic, having regard to the care already offered by practitioners who concluded a contract with a social security institution.

The Court has to decide whether, despite being that legislation a restriction on freedom of establishment, it can nonetheless be justified; more specifically, it has to rule on whether the two "economic" objectives invoked (namely, that of «maintaining a balanced high-quality medical or hospital service open to all' and that of «preventing the risk of serious harm to the financial balance of the social security system') may be considered covered by a derogation, in as far as they contribute to achieving a high level of protection of public health.

The answer is negative, but only because of the characteristics of the measure adopted by the MS, measure which is considered non-appropriate. All in all, the system of prior administrative authorisation prescribed by the national legislation in question is not based on objective, non-discriminatory criteria known in advance, hence, it is not capable of adequately circumscribing the exercise by the national authorities of their discretion. The Court reminds that, from settled case-law[41], a prior administrative authorisation scheme cannot render legitimate a discretionary conduct on the part of the national authorities because that would lead to the negation of the effectiveness of EU provisions.

The Court is called upon to make these kinds of considerations also in relation to the pharmaceutical sector; in the case *Apothekerkammer des Saarlandes and Others*[42], it has to decide if a national legislation, which prevents persons not having the status of pharmacist from owning and operating pharmacies is contrary to EU law and in particular to freedom of establishment.

After having made it clear that the national legislation in question is indeed a restriction on free movement, nonetheless the Court concludes that it is justifiable in the light of the risks to the financial balance of the pharmaceutical system and ultimately of public health, which could be guaranteed only by ensuring that the provision of medicinal products to the public is reliable and of good quality.

In this case, the risks to public health and to the financial balance of the system are considered intertwined and linked by the need to guarantee that medical products are purchased and used only if necessary.

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[39] Judgment of the Court of 28 April 1998, *Kohll*, C-158/96, EU:C:1998:171; judgment of 12 July 2001, *B.S.M. Smits*, C-157/99, EU:C:2001:404.

[40] Judgment of the Court of 10 March 2009, *Hartlauer*, C-169/07, EU:C:2009:141, paras 44, 46 and 47.

[41] See, to that effect, *inter alia*, judgment of the Court of 20 February 2001, *Analir*, C-205/99, EU:C:2001:107; judgment of the Court of 13 May 2003, *Müller-Fauré*, C-385/99, EU:C:2003:270.

[42] Judgement of the Court of 19 May 2009, *Apothekerkammer des Saarlandes and Others*, C-171/07 and C-172/07, EU:C:2009:316. For a comment, see, C. GÜNTHER, *The European Court of Justice lets the pharmacist stay in his pharmacy: no branch pharmacies for pharmaceutical companies*, in *European law reporter*, 2009 p. 285.

As a matter of fact, medicinal products must be distinguished from other goods because of their therapeutic effects. If they are consumed unnecessarily or incorrectly, they may cause serious harm to health, without the patient being in a position to realise that when they are administered. Overconsumption or incorrect use of medicinal products leads, also, to a waste of financial resources for healthcare, which evidently are not unlimited. There is a direct link between those financial resources and the profits of businesses operating in the pharmaceutical sector, because in most MSs the prescription of medicinal products is borne financially by the health insurance bodies concerned.

Hence, Member States may make persons entrusted with the retail supply of medicinal products subject to strict requirements, including as regards the way in which the products are marketed and the pursuit of profit. In particular, MSs 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. Member States may require that medicinal products be supplied by pharmacists enjoying professional independence. That is because pharmacists are presumed to operate the pharmacy also from a professional viewpoint. Their private interest connected with the making of a profit is thus tempered by their training, professional experience and by the responsibility which they owe, given that any breach of the rules of law or professional conduct undermines not only the value of their investment, but also their own professional existence[43].

4. A recent decision on the Italian pharmaceutical system and the "economic limit"

Do the principles of freedom of establishment, non-discrimination, equal treatment, preclude a provision of national (Italian) law, 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? More in particular, can that provision be considered a 'restrictive measure' and if so, can it be justified because it pursues the legitimate objective of protecting public health, in as much as it ensures that pharmacies are run more effectively, first, by ensuring continuity in the employment relationship of pharmacists employed by the pharmacy, and secondly, by capitalising on the experience gained by those pharmacists in running the pharmacy?

This is the question referred by the Italian Council of State to the Court of Justice for a preliminary ruling. The request is made in proceedings concerning the decision of the municipality of Bernareggio, after having launched a tendering procedure, to award the ownership of a municipal pharmacy to a pharmacist who had exercised her right of pre-emption under national law and not to the tenderers who had been provisionally awarded the contract for having submitted the most economically advantageous tender.

First of all, the Court makes it clear that the unconditional right of pre-emption in question is a restriction on freedom of establishment. Given the time and money needed to participate in a call for tenders, it is likely to discourage or even prevent pharmacists from other Member States from participating in the tendering procedure in order to acquire a fixed place of business for the practice of their profession in Italy.

[43] Judgement of the Court of 19 May 2009, *Apothekerkammer des Saarlandes and Others*, *cit*., paras 25, 27 and 28.

The question then is whether the national measure can be justified, hence if it is "appropriate" and "necessary" to the attainment of a legitimate objective. The answer of the Court is negative and the national measure is considered unlawful.

All in all, the Italian municipality contends that the right of pre-emption is aimed at guaranteeing «that pharmacies are run more effectively», hence, *de facto*, at protecting "public health". More in particular, in accordance with the Italian municipality, this should be obtained by «ensuring continuity in the employment relationship of pharmacists employed by that pharmacy», and by «allowing to capitalise on the experience gained by those pharmacists in running the pharmacy».

The Court points out that restrictions on freedom of establishment can be justified by the objective of «ensuring the effectiveness of the pharmaceutical system» (and ultimately the protection of public health), if the national measure is "appropriate" for attaining that objective and the restriction does not go beyond what is necessary (hence there are no less restrictive measures just as effective).

However, the Court retains that the objective of «ensuring the continuity in the employment relationship in order for the pharmacies to be run effectively» cannot be considered an overriding public interest. On the contrary, this is in fact "an economic objective" related to the rights of the employees and regulated by Directive 2001/23 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[44] (transposed in Italy by article 2112 of the Civil Code).

By the same token, «capitalising on the professional experience gained» is yet again (apart from being a non-proved presumption) a professional/economic issue.

Moreover, at a national Italian level, the effectiveness of the pharmaceutical service is already guaranteed by the rule in accordance to which pharmacies can be sold only 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 of professional experience. These conditions offer safeguards concerning the professional ability of potential purchasers of municipal pharmacies.

In any event, and in compliance with the European rules of free movement and competition, the objective of capitalising on the professional experience gained may be attained by the award of additional points under the tendering procedure to tenderers who provide proof of experience in managing a pharmacy.

Hence, the Italian legislation in question is to be considered non-justifiable and contrary to EU law[45].

5. Conclusions

[44] 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*, *JL 82, 22.3.2001.*

[45] This conclusion comes with a caveat. During the review process for publication, the referee expressed the view that: «Nella sentenza commentata, la ratio della restrizione era più che altro sociale, e non "economica" in senso stretto». In other words, the referee holds the opinion that the protection of public health does not hid, *de facto,* an economic objective.

In order to balance the (sometimes) conflicting interests of market integration and public regulation, the Treaty indicates a set of public interest grounds that can justify restriction on the free movement of the factors of production.

These are complemented by the "mandatory requirements", normally put forth by MS at their discretion and recognised by the Court, with the exception of the ones having an "economic nature".

All in all, «the finding that an interest is economic means that the aim itself cannot be legally pursued»[46], or more specifically, that the State cannot protect the interest in question if this means affecting the free movement rules.

It is evident that, drawing the dividing line between, on the one hand, interests which are "non-economic" (and hence acceptable) and, on the other hand, interests which are considered "economic", can be very challenging, especially in sensitive areas, such as the essential functions of the State and the organisation and management of social services, where economic and non-economic issues are intertwined and difficult to differentiate.

In this respect, the question that has to be answered by the Court in the relevant cases is two-fold: does the protection of the public interest in question hide an economic objective? And should that be the case or should the MS invoke an economic aim, is the protection of that economic interest appropriate and necessary to protect a public overriding interest, such as for example human health?

The Court makes its decisions on a case by case basis and its jurisprudence is not always consistent and straightforward[47], as it is clearly shown by the judgments on the pharmaceutical service. Here, the Court is called upon to verify whether economic aims can be accepted as justifications or, as in the Comune di Bernareggio judgement, whether the social aims put forth hide instead economic interests that cannot be considered necessary to obtain a high level of health protection and cannot justify a restriction to free movement.

In this respect, it has to be pointed out that the distinction between what is "economic" and what is "non-economic" goes straight to the very heart of the European system and involves the political and economic debate on what it has to be left to the market and what it has to be considered a responsibility of the State.

As always, the Court is called upon to balance these conflicting interests and its case-law reflects the contradictions and difficulties that are inherent in the drawing of this dividing line.

As a matter of fact, EU rules in general apply to economic situations, whereas the non-economic ones are left to the Member states[48]. Article, 51 TFEU expressly states that the rules on the free movement of services and freedom of establishment do not apply to the activities «connected even occasionally with exercise of official authority». Article 45, n. 4 TFEU excludes from the ambit of free movement of workers «employment in the public service».

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[46] J. SNELL, *Economic justifications and the role of the State*, in P. KOUTRAKOS, N. NIC SHUIBHNE, P. SYRPIS (eds), *Exceptions from EU free movement law: derogation, justification and proportionality*, Oxford, 2016, p. 12, at 13.

[47] S. ARROWSMITH, *Rethinking the approach to economic justifications under the EU's free movement rules*, in *Current legal problems*, 2015, p. 307.

[48] As Advocate General Kokott clearly explains in her Opinion in the case *Viacom Outdoor*, «an economic activity (as an undertaking) consists in offering goods and services on the market; this should be distinguished from activity as a public authority 'exercising public powers'. Opinion delivered on 28 October 2004, *Viacom Outdoor*, C-134/03, EU:C:2004:676, para. 72.

«The interpretation of these exceptions has given rise to fundamental considerations concerning the nature of public authority as a means to identify the activities that are not subject to EU law» [49]. Hence they are interpreted strictly [50] and in disregard of the national classifications[51].

Conversely, "public" economic activities (which consist in offering goods and services on the market)[52] are subject to the rules of the internal market[53], as «any entity engaged in economic activity, regardless of the legal status, the way in which it is financed [or its non-profit motive][54] is subject to the free movement and competition rules»[55].

The Court has struggled to draw the line between what is purely "economic" and what is "public" in every context, having regard to the definition of "service"[56], of "undertaking", that of "civil servants" [57], or to the issue whether to apply EU law to the management and organisation of social security schemes[58].

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[49] W. SAUTER and H. SCHEPEL, *State market in European Union law*, Cambridge, 2010, p. 61.

[50] Advocate General Mayras, in his Opinion in the Reynes case, makes it clear that: «official authority is that which arises from the sovereignty and majesty of the State; for him who exercises it, it implies the power of enjoying the prerogatives outside the general law, privileges of official power and powers of coercion over citizens». Opinion delivered on 28 May 1974, *Reyners*, C-2/74, EU:C:1974:59, p. 664. In its decision on the case (judgement of the Court of 4 July 2019, *Reyners*, C-2/74, EU:C:1974:68), the Court ruled that the exception in question must be restricted to the activities which in themselves involve a 'direct and specific connection' with the exercise of official authority. In this sense, the whole Belgian profession of 'avocat' cannot be exonerated from the rules in the Treaty by the fact that it is connected with the functioning of the administration of justice. Despite de fact that the profession of legal practitioner involves contacts, even regular and organic, with the Courts, including even compulsory cooperation in their functioning, nonetheless it cannot be considered connected with the exercise of official authority, as the activities exercised leave the discretion of judicial authority and the free exercise of judicial power intact. On the same line, more recently, the Court concluded that University teaching activities, being activities of civil society, do not constitute activities which are connected with the exercise of official authority, despite the fact that they involve the award of a degree. The exercise of official authority ex art. 51 requires a sufficiently qualified exercise of prerogatives outside the general law, privileges of official power or powers of coercion. The conferral of a degree, which may be carried out, where appropriate, under the supervision of and under conditions defined by the public authorities, cannot be regarded as involving such an exercise of official authority. Judgement of the Court of 4 July 2019, *Kirschstein,* C-393/17, EU:C:2019:563.

[51] Judgment of the Court of 12 February 1974, *Sotgiu*, C-152/73, EU:C:1974:13.

[52] Judgement of the Court of 16 June 1987, *Commission v Italian Republic*, C-118/85, EU:C:1987:283. The Amministrazione Autonoma dei Monopoli di Stato exercises an economic activity inasmuch as it offers goods and services on the market in the manufactured tobacco sector. Judgment of the Court of 26 March 2009, *SELEX*, C-113/07 P, EU:C:2009:191.

[53] See also, Judgement of the Court of 11 December 1997, *Job Centre*, C-55/96, EU:C:1997:603.

[54]The Court make it clear that (….): «where a banking foundation, acting itself in the fields of public interest and social assistance, uses the authorisation given it by the national legislature to effect the financial, commercial, real estate and asset operations necessary or opportune in order to achieve the aims prescribed for it, it is capable of offering goods or services on the market in competition with other operators, for example in fields like scientific research, education, art or health. On that hypothesis, which is subject to the national court's assessment, the banking foundation must be regarded as an undertaking, in that it engages in an economic activity, notwithstanding the fact that the offer of goods or services is made without profit motive, since that offer will be in competition with that of profit-making operators». Judgement of the Court of 10 January 2006, *Cassa di Risparmio di Firenze and others*, C-222/04. EU:C:2006:8.

[55] Advocate General Kokott Opinion delivered on 28 October 2004, *Viacom Outdoor*, C-134/03, EU:C:2004:676, para. 72.

[56] Judgment of the Court of 17 March 2011, *Peñarroja Fa*, joined cases C-372/09 and C-373/09, EU:C:2011:156.

[57] Judgment of the Court of 10 September 2014, *Haralambidis,* C-270/13, EU:C:2014:2185.

[58] Judgment of the Court of 27 September 1988, *Humbel*, C-263/86, EU:C:1988:451; judgment of the Court of 7 December 1993, *Wirth*, C-109/92, EU:C:1993:916.

The Court employs a «teleological approach, geared to guaranteeing strict proportionality and the unity of EU law»[59], sometimes at the expense of consistency and clarity and reaching controversial conclusions[60].

All in all, the jurisprudence of the Court on the "economic limit" to the justifications is perfectly in line with its general approach on the definition of economic activities, especially in relation to border-line issues.

The Court adopts a functional approach, taking into consideration each and every aspect of the situation, both regulatory and factual, to draw the line between the public and private spheres, the market and the State, balancing the interests involved, in a European "Constitutional" system where competition and liberalisation have to coexist with public national intervention, and where the primary concern of the Court is that of fostering the integration of the internal market, reducing that intervention to what is "really" necessary and proportionate.

[59] W. SAUTER and H. SCHEPEL, *State market in European Union law*, Cambridge, 2010, p. 61.
[60] *Ibid*.