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The Compatibility of the Swedish Alcohol Monopoly with EC Law

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Summary

Sweden has traditionally pursued a restrictive policy on alcohol. One of the fundamental and outstanding features of this policy is the monopolization of the retail sales of alcoholic beverages. Spirits, wine and beer with an alcohol content of more than 3.5 per cent by volume may only be sold by the State-owned Systembolaget AB.

The products available in Systembolaget's shops are selected and purchased centrally, based on their price-quality ratio and a 'blind test' carried out by Systembolaget's tasters. The products that are eventually purchased must then reach a certain sales volume during an introductory period, failing which they will not be included in Systembolaget's basic assortment. Similarly, products that are included in this assortment will be dropped if their sales fail to reach a certain volume.

In 1997 the European Court of Justice had the opportunity to pronounce on the compatibility of Systembolaget's monopoly in the so-called *Franzén* case. The owner of a food shop had unlawfully sold wine in his shop and maintained that the statutory monopoly was contrary to the Community rules on the free movement of goods. To the surprise of most lawyers, the monopoly was upheld by the Court. What was particularly surprising was the Court's approach regarding the applicability of Art. 28 EC. It held that Art. 31 EC was «specifically applicable to the exercise, by a domestic monopoly, of its exclusive rights¹» and refused to examine the monopoly under Art. 28 EC. This approach was totally at odds not only with the opinion of the Advocate General, but also with the Court's previous case-law and even with the judgements in the energy monopoly cases, which were handed down on the very same day.

The Court's judgement was far from convincing on a number of points. First of all, the Court did not state whether *Franzén* marked a general change of direction in its case-law concerning Art. 28 EC or whether that Article would continue to be applicable to State monopolies of a commercial character. To deny the applicability of Art. 28 EC to State monopolies, however, would lead to the paradox result that such monopolies are privileged over less harmful obstacles to the free movement of goods. While Art. 28 EC prohibits all kinds of quantitative restrictions, Art. 31 EC only forbids discriminative measures. If, however, it was not the Court's intention to exclude the applicability of Art. 28 EC in general, the question remains why it did not apply that Article to Systembolaget's

¹ Case C-189/95, para. 35.

monopoly. Had an examination under Art. 28 EC taken place, the Court would in all likelihood have come to the conclusion that the monopoly constituted a measure having equivalent effect to quantitative restrictions and was therefore prohibited under Community law. Moreover, the Court only examined whether the rules governing Systembolaget's monopoly were applied in a discriminatory manner. If, what should have happened, it had examined whether these rules excluded any possibility of discrimination, the outcome of the case might well have been a different one.

Some commentators have therefore seen *Franzén* as a mainly politically motivated judgement. The judges, they argue, may have been deeply split in their opinions and did not want to take a decision against a Member State in such a sensitive political field without having a clear majority. *Franzén* should therefore be interpreted as a judgement based solely on its particular facts and circumstances and does not prejudice the outcome of further legal actions against the Swedish alcohol monopoly.

While the Court in *Franzén* focused its assessment on the free movement rules, it is clear that other provisions of the Treaty may be equally applicable to the monopoly. From a competition law perspective, Art. 82 and 86 EC are of a particular relevance. As a monopoly undertaking, Systembolaget clearly holds a dominant position on the retail market for alcoholic beverages, which it may not abuse. Moreover, the State may not create a situation in which Systembolaget cannot avoid abusing this position. The main purpose behind the Swedish alcohol monopoly is the limitation of the sales of alcoholic beverages. This is to be achieved, *inter alia*, by the limitation of the accessibility of such beverages. It is therefore not Systembolaget's purpose to satisfy the actual demand for alcoholic beverages. On the contrary, the rules governing Systembolaget's activities are designed to render the access to such products more difficult. In practice, this is achieved by limiting Systembolaget's sales network to 417 shops and 570 agents, through which alcoholic beverages can be ordered. Several factors indicate that this sales network is not apt to satisfy the actual demand for such products. By reserving the retail sale of alcoholic beverages to Systembolaget and by imposing restrictive rules on that company, the Swedish State has therefore left Systembolaget in a position where it cannot avoid abusing its dominant position.

In summary, it must be held that the Swedish statutory rules on the retail sale of alcoholic beverages are contrary to both Art. 28 and 31 EC as well as Art. 86 in connection with Art. 82 EC.

Preface

From a continental perspective, the monopolization of the retail sale of alcoholic beverages is one of the more peculiar aspects of Swedish legislation. For most people with a background outside the nordic countries, the idea of having to take recourse to a very limited network of State-owned stores is at least remarkable. This is why I have chosen to take a closer look at how this system works in practice and to examine whether it is compatible with Community law. From a Swiss point of view, the outcome of this study is also interesting with a view to the fate of existing Swiss monopolies in the event of the country's accession to the EU.

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Abbreviations

A/S	aksjeselskap (limited company)
AB	Aktiebolag (limited company)
AF	Alkoholförordning (1994:2046) (Decree on Alcohol)
AG	Aktiengesellschaft (limited company)
AL	Alkohollag (1994:1738) (Law on Alcohol)
APU	Alkoholpolitiska utredningen (alcohol policy committee)
art.	article(s)
CFI	Court of First Instance
ch.	chapter
CMLR	Common Market Law Review
DN	Dagens Nyheter
e.g.	exemplum gratia
EC	1. European Community 2. Treaty establishing the European Community (when used in connection with a Treaty article)
ECJ	European Court of Justice
EEA	European Economic Area
EFTA	European Free Trade Association
et al.	et alii
et seq.	et sequentes
etc.	et cetera
EU	European Union
GP	Göteborgs-Posten
h	hour(s)
i.e.	id est
i.f.	in fine
i.i.	in initio
km	kilometre(s)
LAS	Lag (1994:1564) om alkoholskatt (Law on Alcohol Tax)
m	million
m.v.	med videre (and others)
no.	numero
nr.	number
NV	naamloze vennootschap (limited company)
NZZ	Neue Zürcher Zeitung
oAF	Alkoholförordning (1994:2046) as in force before January 1, 2000
oAL	Alkohollag (1994:1738) as in force before January 1, 2000
OJ	Official Journal of the European Communities
p.	page
para.	paragraph(s)

pp.	pages
s.	see
SA	société anonyme (limited company)
SEK	Swedish Krona(s)
SFS	Svensk Författningssamling (official compilation of Swedish laws)
SOU	Statens Offentliga Utredningar (Swedish public investigations and reports)
SvD	Svenska Dagbladet
V & S	V & S Vin och Sprit AB

I. Introduction

The compatibility of Systembolaget's (not ubiquitously popular) monopoly with EC law has been questioned ever since Sweden started its negotiations for an accession to the European Union. Much to the surprise of many commentators, the ECJ upheld the monopoly in its well-known *Franzén* judgement in 1997. This judgement, however, did anything but end the discussions. Too many question marks remained, too inconsistent was the Court's approach with its previous case-law. Moreover, the judgement only dealt with the Treaty rules on the free movement of goods; competition law aspects were left aside. The compatibility of the Swedish alcohol monopoly with EC law therefore remains an open question.

After a short description of the historical background of the Swedish policy on alcohol, an overview of the relevant Swedish legislation as it is in force today is given in chapter three. Chapter four is dedicated to a detailed discussion of the monopoly under various aspects of Community law. The relationship between Art. 28 and 31 EC and the compatibility of the monopoly with the Community rules on the free movement of goods and competition are given particular consideration in this chapter. In chapter five several alternatives are suggested to the current Swedish alcohol policy. The conclusions which are to be drawn from these discussions are summarized in chapter six.

II. Historical Background

1. The Years Before 1855

The abuse of alcohol is a far from new phenomenon - records of excessive consumption of alcohol can already be found in Greek and Roman mythologies. However, it was not before alcohol was produced by means of distillation that it became a general social problem.

Aqua vitae (distilled wine) was first imported into Sweden in 1467 as an ingredient for gunpowder². Very soon, however, it was discovered that it could also be used as a beverage. Even though various measures were taken to limit the consumption of alcohol the popularity of *aqua vitae* as well as - in later years - spirits gained from wheat and potatoes continued to increase³. By 1829 the annual consumption of spirits had reached 46 litres *per capita*⁴.

2. Alcohol legislation from 1855 to 1994

In the early and mid-19th century alcohol abuse had become a serious problem for the Swedish society. The reforms of the Decree on Spirits (*brännvinsförordning*) and the Decree on Production (*tillverkningsförordning*) in 1855 respectively 1860 pursued a twofold strategy in order to address this problem: private profits generated through the retail sale of alcohol should be eliminated and alcohol should only be sold to consumers in a socially responsible way - principles which still govern the Swedish legislation on alcohol today⁵. Even though these reforms did not establish any monopolies, many cities started to control the serving (and in later years also the sale) of spirits through so-called *systembolag* ('system companies')⁶. This model was introduced country-wide in 1905 and the

² <http://www.systembolaget.se/svenska/om/historia/xindex.htm> (2002/04/15, 13:33h).

³ Ibidem. Measures included the ban of production and sale of distilled wine in the city of Stockholm (1494), the prohibition of home production of spirits (1698; repealed in 1787) and an import ban for most alcoholic drinks (1756). In 1590 Swedish soldiers learned how to use wheat as a basis for spirits in Russia and in 1746 it was discovered that spirits can also be gained from potatoes.

⁴ Ibidem.

⁵ BILLUM/GROTH/HAMMAR, p. 9; ERIKSSON, p. 3.

⁶ ERIKSSON, p. 3. The most famous of these companies was the so-called *Göteborgssystemet*, which took over the serving of spirits in Gothenburg; s. BILLUM/GROTH/HAMMAR, p. 9.

systembolag were put under the control of the State⁷. In 1917 the production, import and wholesale trade of alcohol were monopolized and put in the hands of the State-owned AB Vin & Spritcentralen⁸.

Between 1919 and 1955 the Swedish alcohol policy was characterized by a detailed and comprehensive system of restrictions⁹. The purchase of spirits was made subject to a licence and limited to four litres per person and month¹⁰. Only persons with a solid economy and conduct of life were granted a licence¹¹. In its strive to eliminate the negative effects of alcohol the State even proposed a total prohibition of alcohol. A referendum which was held on this question in 1922 was rejected by a majority of only 51 per cent¹².

Over time the licence system was used more and more as a means of collective alcohol rationing rather than individual control¹³. Its opponents therefore argued that it had lost its justification and proposals were made for a reform of the system¹⁴. The *nykterhetsreform* ('sobriety reform') of 1955 brought about a considerable liberalisation of the rules on the sale of alcohol. The leading principles of the reform were individual freedom and responsibility¹⁵. The licence system was abolished and a new monopoly undertaking, Systembolaget AB, took over all retail sales of alcohol¹⁶.

Information and preventive measures as introduced by the sobriety reform did not, however, have the effects its initiators had hoped for; on the contrary, the sales of alcohol increased dramatically¹⁷. In order to counteract this development a committee of experts (APU) was set up, whose report, delivered in 1974, laid the basis for the modern Swedish policy on alcohol¹⁸. Influenced by the so-called total consumption model of the French demographer Sully Ledermann, it proposed to aim for a reduction of the total consumption of alcohol

⁷ BILLUM/GROTH/HAMMAR, p. 9; <http://www.systembolaget.se/svenska/om/historia/xindex.htm> (2002/04/15, 13:33h).

⁸ ERIKSSON, p. 3; <http://www.systembolaget.se/svenska/om/historia/xindex.htm> (2002/04/15, 13:33h).

⁹ BILLUM/GROTH/ HAMMAR, p. 9.

¹⁰ Licences were called *motbok*. The serving of spirits in restaurants was only allowed in connection with the consumption of a meal and subject to quantitative restrictions; s. BILLUM/GROTH/ HAMMAR, p.10.

¹¹ In practice an age-limit of 25 years was applied. Married women were not granted a licence; s. BILLUM/GROTH/ HAMMAR, p.10.

¹² BILLUM/GROTH/HAMMAR, p. 9; <http://www.systembolaget.se/svenska/om/historia/xindex.htm> (2002/04/15, 13:33h).

¹³ BILLUM/GROTH/ HAMMAR, p. 10.

¹⁴ *Ibidem*.

¹⁵ *Ibidem*; ERIKSSON, p. 3.

¹⁶ <http://www.systembolaget.se/svenska/om/historia/xindex.htm> (2002/04/15, 13:33h).

¹⁷ BILLUM/GROTH/ HAMMAR, p. 10; ERIKSSON, p. 3.

¹⁸ ERIKSSON, p. 3. SOU 1974:90-93; Proposition 1998/99:134, p. 32.

instead of trying to turn as many people as possible into total abstainers¹⁹. In 1977 the Parliament passed a number of bills which were in line with the committee's proposals²⁰. The reduction of alcohol consumption should be achieved by a combination of high taxation, information, treatment, limitation of accessibility and the furthest possible exclusion of private profits²¹. The new legislation provided, *inter alia*, for an exclusive right of the State-owned V & S Vin och Sprit AB to the wholesale trade with and the import and export of spirits, wine and strong beer as well as the production and export of spirits²². In addition to its retail monopoly rights, Systembolaget AB was assigned the exclusive right to carry out all wholesale trade in alcoholic beverages to restaurants. Furthermore, certain ways of marketing such as radio, television and press advertising of alcoholic beverages were prohibited²³.

With the country's accession to the EEA on January 1, 1994, the principles of free movement contained in the EC Treaty as well as the rules on competition became applicable to Sweden. However, Finland, Iceland, Norway and Sweden made a joint declaration, stating that they regarded their alcohol monopolies to be compatible with the agreement²⁴. A contrary opinion to this position was not given by the EC²⁵.

3. Sweden's accession to the EU

When Sweden negotiated about its accession to the EU, the country's legislation on alcohol got back on the agenda. In a correspondence between the Commission and the Swedish government²⁶ the Commission took the position that various aspects of Sweden's legislation on alcohol were incompatible with EC law. In particular, it demanded that the existing import-, export-, wholesale- and production monopolies be abolished²⁷. Initially, the Commission also took a rather critical approach with respect to the retail monopoly²⁸. The availability of an ample selection of products in the monopoly's shops and the expertise of its staff, however, made the

¹⁹ Proposition 1998/99:134, p. 31.

²⁰ Lagen (1977:293) om handel med drycker; lagen (1977:292) om tillverkning av drycker, m.m.; lagen (1978:763) med vissa bestämmelser om maknadsföring av alkoholdrycker. S. Proposition 1998/99:134, p. 32.

²¹ Proposition 1994/95:89, p. 48; ERIKSSON, p. 4; BILLUM/GROTH/HAMMAR, pp. 11-12.

²² *Ibidem*.

²³ ERIKSSON, p. 5.

²⁴ ERIKSSON, p. 5.

²⁵ *Ibidem*.

²⁶ The content of this correspondence is summarized in proposition 1993/94:136, pp. 7-8.

²⁷ S. Proposition 1993/94:136, p. 7.

²⁸ «Guillou: En skymf mot kunderna», Aftonbladet of 2001/08/05.

Commission change its mind²⁹. It therefore declared that - subject to future judgements of the ECJ and its own role as the guardian of the Treaty - it did not see the need to take measures on its own initiative, provided that all «effects discriminating between domestic goods and goods imported from other Member States» be eliminated³⁰. Furthermore, the Commission declared that it wished to take part in a close and regular supervision of the monopoly³¹. In the course of its investigative talks with representatives of the Swedish government, finally, the Commission stated that the selection of goods which were to be sold in the shops of the monopoly had to satisfy the EU's requirements of objectivity and that new goods would have to be made known to consumers in a better way³².

The results of these negotiations together with, amongst others, a detailed opinion on the future of Sweden's alcohol policy by the *alkoholpolitiska kommissionen* ('alcohol policy commission')³³ led to a comprehensive reform of Sweden's alcohol legislation. The details of the legislation in force today will be discussed below³⁴.

²⁹ Ibidem.

³⁰ S. Proposition 1993/94:136, p. 7.

³¹ Proposition 1993/94:136, p. 8.

³² Ibidem.

³³ SOU 1994:24.

³⁴ S. *infra*, III.

III. The Swedish Legislation on Alcohol

1. Sources of Law

1.1. *Law on Alcohol (alkohollagen)*

The Law on Alcohol³⁵ is the main source of the Swedish alcohol legislation. It entered into force on January 1, 1995 as part of a comprehensive reform of that legislation and replaced the Laws on the Production of³⁶ and Trade in Beverages³⁷. As a result of a correspondence and investigative talks between the Swedish government and the Commission regarding Sweden's accession to the EU, the monopolies regarding the import, export and production of and the wholesale in spirits, wine and strong beer were abolished³⁸.

1.2. *Other sources of law*

The Law on Alcohol is supplemented by the Decree on Alcohol³⁹. The relationship between the Swedish State and Systembolaget AB as well as detailed provisions regarding the activities of the latter are laid down in an agreement, which has been published in the official compilation of Swedish laws⁴⁰. The Decree Concerning Instructions to the Alcohol Assortment Board⁴¹ provides for the possibility of suppliers to appeal to a special board decisions by which Systembolaget AB refuses to include a certain product in its assortment⁴². Finally, the taxation of alcoholic beverages and ethyl alcohol is laid down in the Law on Alcohol Tax⁴³, which is supplemented by the Decree on Alcohol Tax⁴⁴.

³⁵ Alkohollag (1994:1738).

³⁶ Lagen (1977:292) om tillverkning av drycker, m.m..

³⁷ Lagen (1977:293) om handel med drycker.

³⁸ BILLUM/GROTH/ HAMMAR, p. 16; ERIKSSON, p. 6; *supra*, II. 3.

³⁹ Alkoholförordning (1994:2046).

⁴⁰ Avtal mellan Systembolaget och staten (SFS 2001:852).

⁴¹ Förordning (1994:2048) med instruktion för Alkoholsortimentsnämnden.

⁴² BILLUM/GROTH/ HAMMAR, p. 17.

⁴³ Lag (1994:1564) om alkoholskatt.

⁴⁴ Förordning (1994:1614) om alkoholskatt.

2. Definitions

The basic notions of the Swedish alcohol legislation are defined in the opening provisions of the Law on Alcohol⁴⁵. Some of these definitions shall be briefly explained in the following.

Alcoholic beverage: Ch. 1 art. 3 of the Law on Alcohol defines an alcoholic beverage as «a beverage which contains more than 2.25 per cent of alcohol by volume.»

Spirits: The Law on Alcohol distinguishes between spirit as a mere ingredient of alcoholic beverages (*sprit*) and as an alcoholic beverage as such (*spritdryck*). The former is defined as «a fluid which contains alcohol in a concentration exceeding 2.25 per cent by volume⁴⁶» and which does not fall under the definitions of wine, beer or strong beer⁴⁷, the latter as an alcoholic beverage which contains *sprit*⁴⁸.

Wine: Ch. 1 art. 5 of the Law on Alcohol provides for a very wide definition of wine. In principle, any beverage with an alcohol content between 2.25 per cent and 22 per cent by volume is considered to be wine unless it falls under the definition of spirits, strong beer or beer⁴⁹. Not only alcoholic beverages produced by means of fermentation of grapes thus fall under the notion of wine but also madeira, port wine, sherry and vermouth and even beverages produced from berries other than grapes, fruit «or other parts of plants⁵⁰».

Beer: In ch. 1 art. 6, para. 2 AL beer is defined as a «fermented, undistilled beverage which is produced from dried or roasted malt [...]» and whose alcohol content exceeds 2.25 but not 3.5 per cent by volume. Beer with an alcohol content of more than 3.5 per cent by volume is called «strong beer» (*starköl*)⁵¹.

The notions of *producer*, *sale*, *retail sale*, *wholesale* and *serving* as laid down in the Law on Alcohol⁵² do not differ from the general understanding of these notions.

⁴⁵ Ch. 1 AL.

⁴⁶ Ch. 1 art. 2, para. 1, sentence 1 AL.

⁴⁷ Ch. 1 art. 2, para. 1, sentence 3 AL.

⁴⁸ Ch. 1 art. 4 AL.

⁴⁹ BILLUM/GROTH/ HAMMAR, p. 24.

⁵⁰ Ch. 1 art. 5 AL.

⁵¹ Ch. 1 art. 6, para. 1 AL.

⁵² Ch.1 art. 8 AL.

3. Production

Under ch. 2 art. 1, para. 1 and ch. 2 art. 2 AL alcohol may only be produced by holders of a manufacturing licence⁵³. An application charge of currently SEK 2,000.00 must be paid when the application is submitted⁵⁴. This charge is generally not reimbursed if the application is rejected⁵⁵. Holders of a manufacturing licence are further required to pay an annual monitoring charge, the amount of which varies according to the volume of production⁵⁶.

4. Import and export

4.1. Commercial importation and exportation

Spirits, wine and strong beer may be imported and exported by any person who has the right to carry out wholesale trade in alcohol⁵⁷. This right is in turn linked to an approval as a warehouse keeper by the tax authority or registration as a consignee with the last-mentioned⁵⁸. With the fulfilment of either of these criteria - approval or registration - the right to import and export spirits, wine and strong beer thus automatically arises. Furthermore, Systembolaget AB may on customer request import spirits, wine and strong beer which it does not have in stock⁵⁹.

4.2. Importation for personal use

According to Council Directive 92/12/EEC no taxes may be levied by the State of importation on alcoholic beverages which are imported from another Member State by private persons for their personal use⁶⁰. When determining the amounts of alcohol which are to be considered as destined for personal use, Member States must not set the limits below a cumulative minimum of 10 litres for spirits, 20 litres for intermediate products, 90 litres for wine (of which up to 60 litres sparkling wine) and 110 litres for beer⁶¹.

However, Sweden was granted a temporary exception in the Act of Accession, which allowed it to provisionally maintain its lower limits

⁵³ No licence is required, however, for the home production of wine, strong beer and beer for personal consumption; s. ch. 2 art. 2 AL.

⁵⁴ Ch. 7 art. 4 AL in combination with art. 10 and 17 AF.

⁵⁵ Art. 21 AF *e contrario*.

⁵⁶ Ch. 7 art. 4 AL in combination with art. 11-15 and 18 AF.

⁵⁷ Ch. 4 art. 2, para. 1 and ch. 4 art. 5 AL; s. *infra*, III. 5.

⁵⁸ Art. 9 and 12 LAS.

⁵⁹ Ch. 4 art. 2, para. 1 in connection with ch. 5 art. 5 AL and art. 2 of the contract between Systembolaget AB and the Swedish State (SFS 2001:852).

⁶⁰ Art. 8 of Council Directive 92/12/EEC [1992] OJ L076/1 et seq.

⁶¹ Art. 9 (2) of Council Directive 92/12/EEC [1992] OJ L076/1 et seq.

for private importation of alcohol⁶². Sweden and the Commission later agreed that this exception should expire on December 31, 2003 and that the limits for private importation of alcohol should be gradually raised⁶³. From January 1, 2002, the following amounts of alcohol may be imported by private persons into Sweden from another Member State without import taxes being levied: 2 litres of spirits, 3 litres of intermediate products, 26 litres of wine and 32 litres of strong beer⁶⁴. On January 1, 2003, these limits will be raised to 5 litres for spirits, 52 litres for wine and 64 litres for strong beer and from January 1, 2004, the minimum limits as laid down in Council Directive 92/12/EEC will apply⁶⁵.

5. Wholesale

Wholesale trade in alcohol may be carried out by any warehouse keeper who is approved by and any consignee who is registered with the Swedish tax authority⁶⁶. In both cases the right to carry out wholesale trade is limited to the goods mentioned in the approval or registration⁶⁷. Moreover, Systembolaget AB is entitled to sell spirits, wine and strong beer by wholesale to restaurants and other holders of a serving licence⁶⁸.

Only traders with a registered office in Sweden can be approved as a warehouse keeper or registered as a consignee⁶⁹. Consequently, traders registered in other Member States are precluded from delivering alcoholic beverages to Swedish retailers unless they have a registered office in Sweden.

⁶² Art. 71 (2) and Appendix IX Art. 3 of the Treaty on the accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the European Union of June 24, 1994; Proposition 1994/95:19.

⁶³ Proposition 1999/2000:121, p. 9; «EU:s regler införs stegvis», DN of 2000/04/19; «Klart om de nya införselreglerna», SvD of 2000/04/19; «Gnadenfrist der EU für Schwedens Alkoholpolitik», NZZ of 2000/04/19.

⁶⁴ Art. 2 lag (1994:1565) om beskattning av viss privatinförsel.

⁶⁵ Proposition 1999/2000:121, p. 9.

⁶⁶ Ch. 4 art. 1, para. 1 AL; s. also *supra*, III. 4.1. Wholesale trade in alcohol may, however, not be carried out by persons under the age of 20 or who are placed under the care of a guardian; ch. 3 art. 7 AL.

⁶⁷ Ch. 4 art. 1, para. 1 AL. Traders are obliged to ensure that sale of alcohol is carried out in the least harmful way possible and that «order and sobriety prevail in the place of sale»; ch. 3 art. 4 AL.

⁶⁸ Ch. 4 art. 1, para. 2 in connection with ch. 5 art. 1, para. 3 AL.

⁶⁹ Telephone conversation with Ann-Kristin Andersson at Särskilda Skattekontoret of May 21, 2001. S. also Särskilda Skattekontoret's information brochure SSK020122: «Information till dig som ansöker om godkännande som upplagshavare eller registrering som varumottagare avseende alkoholvaror», ch. 5 and 6.

No charges are collected for such approval or registration⁷⁰. However, a security payment must be deposited in order to ensure the payment of any taxes incurred⁷¹.

6. Retail Trade

6.1. General provisions

Ch. 3 AL contains a number of general provisions regarding the sale of alcoholic beverages. These provisions are aimed at ensuring that the sale of alcoholic beverages is carried out in a socially responsible way.

Under ch. 3 art. 7 AL only persons aged 20 years or older who are not placed under the care of a guardian are allowed to sell alcoholic beverages. Sellers are obliged to ensure that the sale of alcohol is carried out in the least harmful way possible and «that order and sobriety prevail in the place of sale»⁷². Alcoholic beverages may not be sold to persons «who are perceptibly affected by alcohol or any other intoxicating substance» or if there are reasons to assume that the beverages may unlawfully be made available to a third person⁷³. Moreover, a «satisfactory selection and amount» of non-alcoholic drinks must be made available in the place of sale⁷⁴.

6.2. Retail trade in low-alcoholic beer

Beer with an alcohol content of up to 3.5 per cent by volume may be freely sold in any shop which is approved for the sale of foodstuffs⁷⁵. A licence is not required for the sale of such low-alcoholic beer; however, the seller must notify the municipality on the territory of which the place of sale is located⁷⁶. In the year 2000 approximately 14'000 shops sold low-alcoholic beer⁷⁷. The age-limit for the purchase of low-alcoholic beer is 18 years⁷⁸.

⁷⁰ Telephone conversation with Ann-Kristin Andersson at Särskilda Skattekontoret of May 21, 2001.

⁷¹ Art. 10 and 12, para. 2 LAS.

⁷² Ch. 3 art. 4.

⁷³ Ch. 3 art. 8, para. 2 and 3 AL.

⁷⁴ Ch. 3 art. 6 AL.

⁷⁵ Ch. 5 art. 6, para. 1 AL and ch. 5 art. 2, para. 1 AL *e contrario*.

⁷⁶ Ch. 5 art. 6, para. 2 AL.

⁷⁷ Statens Folkhälsoinstitut at http://212.209.152.178/komhand/folkol/_index.asp (2002/04/23, 09:53h).

⁷⁸ Ch. 3 art. 8, para. 1 AL.

6.3. Retail trade in other alcoholic beverages

6.3.1. The right to sell and to purchase alcoholic beverages

While the retail trade in low-alcoholic beer is open to competition⁷⁹, the right to sell spirits, wine and beer with an alcohol content exceeding 3.5 per cent by volume to consumers is reserved to one single actor. Retail trade in such beverages may be lawfully carried out only by Systembolaget AB, a fully State-owned company⁸⁰.

Alcoholic beverages other than low-alcoholic beer may only be sold to persons aged 20 or older⁸¹. Salespersons are obliged to make sure that the customer has reached this age⁸². Systembolaget has instructed its salespersons to ask all customers who look younger than 25 to produce a proof of identity⁸³.

6.3.2. Systembolaget's activities

6.3.2.1. In general

In the year 2001 Systembolaget sold 317.3 million litres of alcoholic beverages, which corresponds to 33.6 million litres of pure alcohol or 4.7 litres of pure alcohol per inhabitant aged 15 or older⁸⁴. It attained a turnover of SEK 18.2 billion and a net profit of SEK 133.2 million⁸⁵ and employed an average of 3,400 persons⁸⁶.

Systembolaget is set up as a limited company under Swedish law⁸⁷. Due to the fact that the activity it is exercising lies in the public interest and has been assigned to it by the State, Systembolaget has a number of special duties towards the Swedish State. These duties are laid down in an agreement between the State and Systembolaget⁸⁸. In particular, this agreement obliges Systembolaget to set its margins in accordance with objective criteria⁸⁹ and to apply unbiased and customary trading conditions⁹⁰. Moreover,

⁷⁹ S. *supra*, III. 6.2.

⁸⁰ Ch. 5 art. 2 in connection with art. 1, para. 1 AL and art. 2 of the agreement between Systembolaget AB and the Swedish State (SFS 2001:852).

⁸¹ Ch. 3 art. 8, para. 1 AL.

⁸² Ch. 3 art. 8, para. 4 AL.

⁸³ Systembolaget's annual report for 2000.

⁸⁴ <http://www.systembolaget.se/svenska/om/press/020116.html> (2002/04/12, 14:35).

⁸⁵ Systembolaget's sales statistics for 2001, p. 15.

⁸⁶ Systembolaget's sales statistics for 2001, p. 20.

⁸⁷ S. BILLUM/GROTH/ HAMMAR, p. 49.

⁸⁸ Agreement between Systembolaget AB and the Swedish State (SFS 2001:852). In addition to the obligations described hereafter, the agreement in its previous wording imposed a number of social obligations on Systembolaget; s. BILLUM/GROTH/ HAMMAR, p. 49; ERIKSSON, pp. 7-8.

⁸⁹ Art. 6 of the agreement between Systembolaget AB and the Swedish State (SFS 2001:852).

⁹⁰ Art. 14, para. 2 of the agreement between Systembolaget AB and the Swedish State (SFS 2001:852).

Systembolaget is prohibited from acquiring shares in other companies or to become otherwise involved in the activities of other companies without the prior consent of the Swedish government⁹¹. Finally, the agreement contains restrictions as to the establishment, closure and operation of shops and the selection of articles, which shall be described below⁹².

6.3.2.2. Shops and opening hours

Under art. 9, para. 1 of its agreement with the State⁹³ Systembolaget is in principle obliged to establish a shop in every municipality that so wishes. On May 8, 2002, Systembolaget operated a total of 417 shops in nearly all of Sweden's 289 municipalities⁹⁴. This corresponds to one shop per 21,374 inhabitants or one shop per 1,079 km². Moreover, it has a network of agents, mostly located in rural areas, with whom alcoholic beverages may be ordered without extra cost⁹⁵. On May 8, 2002, the number of these agents was approximately 570⁹⁶. In all of Systembolaget's shops products previously had to be ordered at the counter and were handed out to customers by a salesperson. In recent years, however, an increasing number of shops have been converted into self-service shops.

Systembolaget's decisions to establish or close shops shall in principle be influenced only by economic reasons and service considerations⁹⁷. However, the company is obliged to consult the municipal council and the police before it decides to establish or move a shop⁹⁸. Likewise, the municipal council must be consulted before a decision is made on the closure of a shop⁹⁹.

Systembolaget is also prevented from freely deciding on the opening hours of its shops. Under art. 11 of its agreement with the State, the opening hours must be determined in accordance with guidelines that

⁹¹ Art. 3 i.f. of the agreement between Systembolaget AB and the Swedish State (SFS 2001:852).

⁹² S. *infra*, III. 6.3.2.2. and III. 6.3.2.3.

⁹³ Agreement between Systembolaget AB and the Swedish State (SFS 2001:852).

⁹⁴ E-mail from Kajsa Riddersporre, market and communications department at Systembolaget of May 8, 2002.

⁹⁵ Art. 13 of the agreement between Systembolaget AB and the Swedish State (SFS 2001:852); Systembolaget's annual report for 2000; ERIKSSON, p. 8.

⁹⁶ E-mail from Kajsa Riddersporre, market and communications department at Systembolaget of May 8, 2002.

⁹⁷ Art. 9, para. 2 of the agreement between Systembolaget AB and the Swedish State (SFS 2001:852).

⁹⁸ Art. 10 i.i. of the agreement between Systembolaget AB and the Swedish State (SFS 2001:852).

⁹⁹ Art. 10 i.f. of the agreement between Systembolaget AB and the Swedish State (SFS 2001:852). Art. 11 of the previous wording of the agreement imposed an obligation on Systembolaget to locate its points of sale such as to avoid social inconveniences as far as possible. This provision has been removed in the agreement which is in force today; s. ERIKSSON, p. 8.

have been adopted by the Parliament¹⁰⁰. At present, these guidelines allow Systembolaget to keep its shops open from 10 a.m. to 8 p.m. on weekdays and from 10 a.m. to 3 p.m. on Saturdays¹⁰¹.

6.3.2.3. Assortment

6.3.2.3.1. *Legal requirements*

The size and quality of Systembolaget's assortment as well as the availability of a wide range of products even in smaller shops was one of the main reasons why Sweden was allowed to keep its monopoly on the retail sale of alcohol even after the country's accession to the EU¹⁰². In the course of its negotiations with the Swedish government the Commission was quick to point out, however, that Sweden would have to ensure that any discrimination between Swedish goods and goods imported from other Member States had to be eliminated¹⁰³. Moreover, the selection of goods available in Systembolaget's shops would have to satisfy the EU's requirements of objectivity¹⁰⁴. Finally, it demanded that new products be made known to consumers in an effective way¹⁰⁵. The agreement between Systembolaget and the Swedish State therefore obliges Systembolaget to select its products in a non-discriminatory manner and to base its selection only on criteria of quality, health, customer demand and business economy¹⁰⁶. Furthermore, Systembolaget is required to inform its customers of new products in an impartial and non-discriminatory way¹⁰⁷.

6.3.2.3.2. *Assortment categories*

Systembolaget divides its assortment into four categories:

- a basic assortment;
- a provisional assortment;
- a trial assortment; and
- a 'by order' assortment¹⁰⁸.

The basic assortment comprises the most popular products, mostly priced in a lower to medium-range category, which are available

¹⁰⁰ Art. 11 of the agreement between Systembolaget AB and the Swedish State (SFS 2001:852).

¹⁰¹ <http://www.systembolaget.se/english/shops.htm> (2002/05/27, 14:59).

¹⁰² S. *supra*, II. 3.

¹⁰³ Proposition 1993/94:136, p. 7; s. also *supra*, II. 3.

¹⁰⁴ Proposition 1993/94:136, p. 8.

¹⁰⁵ *Ibidem*.

¹⁰⁶ Art. 4 of the agreement between Systembolaget AB and the Swedish State (SFS 2001:852).

¹⁰⁷ Art. 7 of the agreement between Systembolaget AB and the Swedish State (SFS 2001:852).

¹⁰⁸ <http://www.systembolaget.se/svenska/fragor/levinfo/xindex.htm> (2002/04/12, 16:19h); ERICSSON, p. 8; Opinion of Advocate General Elmer in case C-189/95, para. 24.

around the year¹⁰⁹. The provisional assortment is made up of new products, whose acceptance on the market has yet to be evaluated as well as seasonal products¹¹⁰. All new products are presented in a monthly brochure called 'Varunytt', which is available in all shops and by subscription¹¹¹. The trial assortment is made up of products which Systembolaget has refused to include in its provisional assortment but which are sold by way of trial on request of the supplier¹¹². The 'by order' assortment includes products which Systembolaget does not stock but which are stocked by licensed wholesalers¹¹³. Products in this assortment appear in a special price list and can be ordered by customers and are normally delivered within one week¹¹⁴. Finally, products that are not included in any of these assortments can be imported by Systembolaget at the request of a customer¹¹⁵. The minimum quantity which can be ordered is one case¹¹⁶. Handling and transport costs as well as any duties must be paid by the customer¹¹⁷.

The products included in the basic assortment, the provisional assortment and the trial assortment appear in an overall pricelist and form the basis of the products which are available in Systembolaget's shops¹¹⁸. In April 2002 this list contained more than 3,700 alcoholic beverages in a wide range of both price and quality¹¹⁹. For example, the cheapest bottle of red wine, an Italian wine named «Lancellotta», was priced at SEK 29.00; at the other end of the price range, a bottle of 1982 Château Latour was offered at SEK 5,858.00. Only a small number of shops have all the products appearing in the overall pricelist in stock; however, all products are available to order in all shops¹²⁰.

¹⁰⁹ <http://www.systembolaget.se/svenska/fragor/levinfo/xindex.htm> (2002/05/28, 10:26h); Opinion of Advocate General Elmer in case C-189/95, para. 24.

¹¹⁰ Report of the Swedish competition authority to the Commission of December 21, 2001 (Dnr 28/2001), p. 1; <http://www.systembolaget.se/svenska/fragor/levinfo/xindex.htm> (2002/04/12, 16:19h).

¹¹¹ Report of the Swedish competition authority to the Commission of December 21, 2001 (Dnr 28/2001), p. 1.

¹¹² <http://www.systembolaget.se/svenska/fragor/levinfo/xindex.htm> (2002/04/12, 16:19h); Opinion of Advocate General Elmer in case C-189/95, para. 24. S. also *infra*, III. 6.3.2.3.4.

¹¹³ <http://www.systembolaget.se/svenska/fragor/levinfo/xindex.htm> (2002/04/12, 16:19h); ERICSSON, p. 8; Opinion of Advocate General Elmer in case C-189/95, para. 24.

¹¹⁴ *Ibidem*. Systembolaget counts on being able to deliver ordered products within one or two days in the course of 2002, s. Report of the Swedish competition authority to the Commission of December 21, 2001 (Dnr 28/2001), p. 2.

¹¹⁵ <http://www.systembolaget.se/svenska/varor/braveta/varuinfo/xindex.htm> (2002/05/28, 10:29h); Opinion of Advocate General Elmer in case C-189/95, para. 24.

¹¹⁶ For beer the minimum quantity is ten cases; s. *ibidem*.

¹¹⁷ *Ibidem*.

¹¹⁸ ERICSSON, p. 8; Opinion of Advocate General Elmer in case C-189/95, para. 25.

¹¹⁹ www.systembolaget.se/svenska/varor/prislist/xindex.htm (2002/04/12, 14:21h).

¹²⁰ Opinion of Advocate General Elmer in case C-189/95, para. 24.

6.3.2.3.3. Selection of products included in the pricelists

Systembolaget's purchases for resale are centralized¹²¹. A particular shop cannot purchase its stock independently and may only carry products included in the company's overall pricelist¹²². The selection of products that are included in this pricelist follows a standardised procedure.

Systembolaget draws up an annual purchase plan¹²³. On the basis of this plan, the company sends out invitations to tender for products of a certain category (e.g. Rioja, red, reserva, for a maximum price of SEK 79.00) to registered consignees and approved warehouse keepers approximately once a month¹²⁴. Traders who are neither consignees registered with nor warehouse keepers approved by the Swedish tax authority are unable to tender¹²⁵. In practice, this means that tenders can only be made by traders with a registered office in Sweden, since others will not obtain such approval or registration¹²⁶.

The tenders received are first examined by Systembolaget's buyers, who make an evaluation of the price and quality of the products¹²⁷. Following this initial examination approximately two thirds of the tenders are rejected¹²⁸. The products which have been deemed to be interesting then undergo a blind test by five of Systembolaget's testers¹²⁹. The products obtaining the highest scores are purchased and included in the provisional assortment¹³⁰. Only some ten per cent of the tested products are eventually purchased, which means that only one out of thirty tenders is accepted by Systembolaget¹³¹. The products are then sold in Systembolaget's shops for an initial 52

¹²¹ Opinion of Advocate General Elmer in case C-189/95, para. 18; <http://www.systembolaget.se/svenska/fragor/levinfo/xindex.htm> (2002/05/28, 10:26)

¹²² Opinion of Advocate General Elmer in case C-189/95, para. 18.

¹²³ <http://www.systembolaget.se/svenska/fragor/levinfo/xindex.htm> (2002/04/13, 13:02h).

¹²⁴ Ibidem; Opinion of Advocate General Elmer in case C-189/95, para. 26; «Lagligt att minska utbud på Systemet», SvD of 2001/08/07; s. *supra*, III. 5.

¹²⁵ S. *supra*, III. 5.

¹²⁶ S. *ibidem*.

¹²⁷ <http://www.systembolaget.se/svenska/fragor/levinfo/xindex.htm> (2002/04/13, 13:02h); Opinion of Advocate General Elmer in case C-189/95, para. 27; «Lagligt att minska utbud på Systemet», SvD of 2001/08/07.

¹²⁸ E-mail of Kajsa Riddersporre, market and communications department at Systembolaget of May 8, 2002.

¹²⁹ <http://www.systembolaget.se/svenska/fragor/levinfo/xindex.htm> (2002/04/13, 13:02h); «Lagligt att minska utbud på Systemet», SvD of 2001/08/07.

¹³⁰ Ibidem. Likewise, products listed in the 'by order' assortment which reach a certain sales volume will also be included in the provisional assortment; Report of the Swedish competition authority to the Commission of December 21, 2001 (Dnr 28/2001), p. 2.

¹³¹ E-mail of Kajsa Riddersporre, market and communications department at Systembolaget of May 8, 2002.

weeks¹³². For wine the initial period is 26 weeks¹³³. Products which reach a certain volume of sales during this period are included in the basic assortment¹³⁴.

Where Systembolaget has decided not to purchase a product and to include it in the provisional assortment, the trader whose offer has been rejected may request a trial sale¹³⁵. The product is then tested together with other products in the same product category and price range by a panel of independent consumers¹³⁶. If the product obtains a majority of positive votes, it will be included in the trial assortment and put on the market in the same way as products in the provisional assortment¹³⁷.

The products included in the basic assortment are re-evaluated on a yearly basis¹³⁸. If a product is to remain in the basic assortment, it must reach a minimum sales volume¹³⁹. Products failing to fulfil this requirement will in principle be taken out of the assortment¹⁴⁰. However, Systembolaget is free to take special circumstances into consideration¹⁴¹. If a product is dropped from any of Systembolaget's assortments or has been rejected by the consumer panel, it cannot be reconsidered before two years have elapsed¹⁴².

Where Systembolaget has decided not to include a certain product in its basic, provisional or trial assortment or to take a certain product out of its assortment, the trader considered may ask Systembolaget to state the grounds for its decision¹⁴³. Moreover, he may appeal the decision to the Alcohol Assortment Board¹⁴⁴. The board will then examine whether Systembolaget has infringed its obligations

¹³² <http://www.systembolaget.se/svenska/fragor/levinfo/xindex.htm> (2002/04/13, 13:02h).

¹³³ Ibidem.

¹³⁴ Ibidem; «Systemet kapar rejält i sortimentet», SvD of 2001/08/05.

¹³⁵ Report of the Swedish competition authority to the Commission of December 21, 2001 (Dnr 28/2001), p. 3; <http://www.systembolaget.se/svenska/fragor/levinfo/xindex.htm> (2002/04/13, 13:02h).

¹³⁶ Ibidem.

¹³⁷ Report of the Swedish competition authority to the Commission of December 21, 2001 (Dnr 28/2001), p. 3.

¹³⁸ <http://www.systembolaget.se/svenska/fragor/levinfo/xindex.htm> (2002/04/13, 13:02h).

¹³⁹ Report of the Swedish competition authority to the Commission of December 21, 2001 (Dnr 28/2001), p. 1.

¹⁴⁰ <http://www.systembolaget.se/svenska/fragor/levinfo/xindex.htm> (2002/04/13, 13:02h).

¹⁴¹ Opinion of Advocate General Elmer in case C-189/95, para. 32.

¹⁴² Report of the Swedish competition authority to the Commission of December 21, 2001 (Dnr 28/2001), p. 4.

¹⁴³ Art. 4 of the agreement between Systembolaget AB and the Swedish State (SFS 2001:852).

¹⁴⁴ Art. 2 of förordning (1994:2048) med instruktion för Alkoholsortimentsnämnden.

regarding the selection criteria¹⁴⁵. The board's decision cannot be appealed¹⁴⁶ and is binding on Systembolaget¹⁴⁷.

6.3.2.3.4. Selection of products available in shops

As mentioned above, only a small number of shops carry the full basic assortment¹⁴⁸. Smaller shops have to make a selection as to which products should be kept in stock. This selection was previously within the responsibility of the shop managers. In August 2001, however, Systembolaget decided to further centralise the selection procedure¹⁴⁹. Only 20 per cent of the products are now selected by the respective shop managers¹⁵⁰. The rest is centrally selected by Systembolaget's management according to quantitative criteria¹⁵¹. The smallest shops now only carry the very best selling products of each category¹⁵². Less popular products are only available in medium-sized or even only in the largest shops¹⁵³.

In detail, the new selection procedure works as follows: The basic assortment is divided into product categories, namely:

- red wines;
- white wines;
- other wines (e.g. rosé and sparkling wines);
- spirits;
- beer and cider; and
- non-alcoholic drinks¹⁵⁴.

These categories are in turn sub-divided into product segments. In the case of red wine, these are:

- bag-in-box;
- Tetra-Pak;
- glass bottle priced SEK 0-59;
- glass bottle priced SEK 60-69;
- glass bottle priced SEK 70-79;
- glass bottle priced SEK 80-99; and

¹⁴⁵ Ibidem.

¹⁴⁶ Art. 10 of förordning (1994:2048) med instruktion för Alkoholsortimentsnämnden.

¹⁴⁷ Art. 5 of the agreement between Systembolaget AB and the Swedish State (SFS 2001:852).

¹⁴⁸ S. *supra*, III. 6.3.2.3.2.

¹⁴⁹ <http://www.systembolaget.se/svenska/temp/vadhander/xindex.htm> (2002/04/13, 12:04h); «Systemet kapar rejält i sortimentet», SvD of 2001/08/05; «Systemet kritiserar för minskat utbud», SvD of 2001/08/06; «Lagligt att minska utbud på Systemet», SvD of 2001/08/07; «Monopolet i farozonen», DN of 2001/08/07; «Styrt sortiment ska ge lönsamhet», DN of 2001/08/07; «Systembolaget bantar utbudet», Aftonbladet of 2001/08/05.

¹⁵⁰ Ibidem.

¹⁵¹ Ibidem.

¹⁵² Ibidem.

¹⁵³ Ibidem.

¹⁵⁴ <http://www.systembolaget.se/svenska/varor/prislist/xindex.htm> (2002/04/15, 13:33h).

- glass bottle priced over SEK 100¹⁵⁵.

The best selling products of every product segment form the so-called basic module, which is available in all shops¹⁵⁶. In August 2001, 362 products were included in this basic module, of which 20 were red wines and 20 white wines¹⁵⁷. Every fourth of Systembolaget's shops now only carries this minimum assortment complemented by the products selected by the shop manager¹⁵⁸. Less popular products are included in supplementary modules, which are only available in larger shops¹⁵⁹.

7. Serving

Under ch. 6 art. 1, para. 1 AL a licence is required for the serving of spirits, wine and strong beer¹⁶⁰. Beer with an alcohol content of up to 3.5 per cent by volume may be served without a licence in premises which are approved for the sale of foodstuffs provided that the beer is served together with food¹⁶¹.

A licence is tied both to the person of the licensee and to the premises as specified therein and can therefore not be transferred to another person or other premises¹⁶². It may confer the right to serve all categories of alcoholic beverages or may be limited to one or two of these categories¹⁶³. Several operational provisions must be observed in the exercise of this right¹⁶⁴.

The beverages for which the licence is valid must be purchased from legitimate wholesalers or from Systembolaget AB¹⁶⁵. If the licence has been granted only for one single occasion or for a limited period of time the beverages may be purchased only from Systembolaget AB¹⁶⁶.

¹⁵⁵ «Lagligt att minska utbud på Systemet», SvD of 2001/08/07.

¹⁵⁶ Ibidem.

¹⁵⁷ <http://www.systembolaget.se/svenska/temp/vadhander/xindex.htm> (2002/04/13, 12:04h); «Systemet kapar rejält i sortimentet», SvD of 2001/08/05.

¹⁵⁸ «Systemet kapar rejält i sortimentet», SvD of 2001/08/05.

¹⁵⁹ Ibidem.

¹⁶⁰ For exceptions to the licence requirement s. ch. 6 art. 1, para. 2 AL.

¹⁶¹ Ch. 6 art. 1 a, para. 1 AL.

¹⁶² Ch. 7 art. 10 AL; BILLUM/GROTH/ HAMMAR, p. 95-96.

¹⁶³ Ch. 7 art. 5, para. 1 AL.

¹⁶⁴ S. e.g. ch. 3 art. 6 and 8 and ch. 6 art. 2-4 and 6-9 AL.

¹⁶⁵ Ch. 6 art. 5 AL in connection with art. 2 of the contract between Systembolaget AB and the Swedish State (SFS 2001:852).

¹⁶⁶ Ibidem.

8. Marketing

The general rule regarding the marketing of alcoholic beverages to consumers can be found in ch. 4 art. 8, para. 1 AL: «Marketing of alcoholic beverages directed towards consumers is to be carried out with particular restraint. Advertising or other means of marketing which are obtrusive or insisting or which encourage the consumption of alcohol are prohibited.» Para. 2 of the aforementioned provision contains a prohibition of any kind of marketing which is directed particularly towards children or youths.

The marketing of alcoholic beverages by means of media advertising is subject to strong restrictions. While television and radio advertising is prohibited for all kinds of alcoholic beverages¹⁶⁷ only beer with an alcohol content of up to 3.5 per cent by volume may be advertised in periodicals¹⁶⁸. Spirits, wine and strong beer may only be advertised in publications which are available only at places where these beverages are sold¹⁶⁹.

However, this prohibition of alcohol advertising in periodicals has been declared incompatible with Art. 28 and 49 EC in a recent judgement of a Stockholm court¹⁷⁰. The court was not convinced that a lifting of this ban would have considerable effects on the consumption of alcohol since alcohol is advertised in foreign media which are freely available in Sweden. On the other hand, the court found it likely that the admission of alcohol advertising in Swedish periodicals would lead to a *certain* increase of alcohol sales. It therefore concluded that the Swedish ban on alcohol advertising in periodicals was unproportionate and could not be upheld. A final decision on the compatibility of the Swedish legislation on alcohol advertising with EC law will be given by the Stockholm Commercial Court, to whom the judgement has been appealed¹⁷¹.

9. Taxation

The production or import of alcohol of any kind is in principle subject to alcohol tax¹⁷². The rate of taxation is essentially dependent on two factors: the type of alcohol and the alcohol content. Beer is subject to

¹⁶⁷ Ch. 4 art. 10 AL; for the applicability of this prohibition to satellite television s. ch. 4 art. 10 AL in connection with art. 1 and 2 radio- och TV lag (1996:844).

¹⁶⁸ Ch. 4 art. 11 AL *e contrario*.

¹⁶⁹ *Ibidem*.

¹⁷⁰ Judgement T 8-1111-97.

¹⁷¹ «Fritt fram för alkoholreklamen», SvD of 2002/03/06; «Historisk dom om alkoholreklam», GP of 2002/03/05.

¹⁷² Art. 1, para. 1 LAS; for exceptions s. art. 7 LAS.

a tax of SEK 1.47 per litre for every per cent of alcohol by volume¹⁷³. For wine and other fermented beverages the tax is imposed progressively, depending on the alcohol content. The tax rate varies between SEK 7.58 and SEK 45.17 per litre for wine¹⁷⁴ and between SEK 7.58 and SEK 22.08 for other fermented beverages¹⁷⁵. Ethyl alcohol is taxed at a rate of SEK 501.41 per litre of pure alcohol¹⁷⁶.

10. Penalties

Infringements of the provisions laid down in the Law on Alcohol may lead to severe punishment. Under ch. 10 art. 1 and 2 of the Law on Alcohol, anyone who unlawfully produces spirits or sells spirits, wine or beer with an alcohol content exceeding 3.5 per cent by volume is liable to a fine or to a sentence of up to two years' imprisonment¹⁷⁷. Likewise, anyone who imports or exports such beverages without being entitled to do so or failing to declare such importation or exportation is subject to a fine or imprisonment of up to two years¹⁷⁸. Persons contravening the prohibition of television and radio advertising can be punished by a fine of up to SEK 5 million¹⁷⁹. Unlawful advertisements in periodicals can be prohibited from further publication and may lead to the imposition of a fine¹⁸⁰.

Other offences include the unlawful production of wine or beer¹⁸¹, the purchase of alcoholic beverages for a person who is not herself entitled to buy such beverages¹⁸² and the sale of alcoholic beverages

¹⁷³ Art. 2 LAS; no tax is due for beer with an alcohol content of up to 2.8 per cent by volume, s. art. 2, para. 4 LAS.

¹⁷⁴ Art. 3 LAS; no tax is due for wine with an alcohol content of up to 2.25 per cent by volume, s. art. 3, para. 7 LAS. Before December 1, 2001 higher tax rates were imposed on wine than on beer. According to the Commission this different taxation constituted an infringement of Art. 90 EC. Subsequent to a formal notice of the Commission the tax rates for wines with an alcohol content of 2.25 per cent to 15 per cent per volume were lowered by 18.8 per cent, thus eliminating the differences in taxation between beer and wines; s. proposition 2000/01:144, pp. 8 and 9; «Sänk skatten - annars domstol», Aftonbladet of 2001/06/12; «Schwedens Steuerprotektion für einheimisches Bier», NZZ of 2001/06/12.

¹⁷⁵ Art. 4 LAS; no tax is due for fermented beverages with an alcohol content of up to 2.25 per cent by volume, s. art. 4, para. 6 LAS.

¹⁷⁶ Art. 6 LAS; art. 6, para. 1 LAS provides for an exception for certain types of ethyl alcohol whose alcohol content does not exceed 1.2 per cent.

¹⁷⁷ In serious cases, the sentence can be up to four years' imprisonment; ch. 10 art. 3 AL.

¹⁷⁸ Ch. 10 art. 10 AL in connection with art. 3 and 8 lag (2000:1225) om straff för smuggling. In serious cases, the sentence can be up to six years' imprisonment; ch. 10 art. 10 AL in connection with art. 5 and 10 lag (2000:1225) om straff för smuggling.

¹⁷⁹ Ch. 4 art. 12 i.f. AL in connection with art. 24 marknadsföringslag (1995:450).

¹⁸⁰ Ch. 4 art. 12 i.f. AL in connection with art. 14 marknadsföringslag (1995:450).

¹⁸¹ Ch. 10 art. 4 AL.

¹⁸² Ch. 10 art. 6 in connection with ch. 3 art. 9 AL.

to intoxicated or underage persons¹⁸³. Anyone committing such an offence is liable to a fine or imprisonment¹⁸⁴.

11. Excurs: The Norwegian and Finnish Alcohol Monopolies

With the exception of Denmark, all nordic countries have traditionally pursued a restrictive alcohol policy. The common overriding objective of these policies has always been to reduce individual and social harm as a result of alcohol consumption by means of restricting availability and eliminating private-profit interests. Consequently, Finland, Iceland, Norway and Sweden all have placed the retail trade in alcohol in the hands of monopoly undertakings. In the following, a short overview shall be given of the Norwegian and Finnish alcohol monopolies.

11.1. *The Norwegian alcohol monopoly*

The existence and operation of the Norwegian retail monopoly for alcoholic beverages is governed by the Alcohol Act¹⁸⁵. Similar to the Swedish legislation, the Alcohol Act provides that spirits, wine and 'strong beer' may only be sold by retail by a State-owned monopoly undertaking, A/S Vinmonopolet¹⁸⁶. The term 'strong beer' is defined as beer containing more than 4.75 per cent alcohol by volume¹⁸⁷. Beer with an alcohol content between 2.5 per cent and 4.75 per cent by volume may be sold by grocery shops on the basis of a municipal licence¹⁸⁸. Since this provision only applies to beer but not to other alcoholic beverages, however, it has been found to be contrary to Art. 16 of the EEA agreement (which corresponds to Art. 31 EC) by the EFTA Court¹⁸⁹. The Norwegian government has therefore proposed to

¹⁸³ Ch. 10 art. 7, para. 1 i.i. in connection with ch. 3 art. 8 AL.

¹⁸⁴ Ch. 10 art. 4, 6 and 7 AL.

¹⁸⁵ Lov om omsetning av alkoholhaltig drikk m.v. of June 2, 1989.

¹⁸⁶ Ch. 3 art. 3-1, para. 1 Alcohol Act (Lov om omsetning av alkoholhaltig drikk m.v. of June 2, 1989).

¹⁸⁷ Ibidem. S. ch. 1 art. 6 AL, which draws the dividing line at 3.5 per cent alcohol by volume.

¹⁸⁸ Ch. 3 art. 3-1, para. 2 Alcohol Act (Lov om omsetning av alkoholhaltig drikk m.v. of June 2, 1989). Beverages containing less than 2.5 per cent alcohol by volume are not considered to be alcoholic beverages and may thus be freely sold; Ch. 1 art. 1-3, para. 1 Alcohol Act.

¹⁸⁹ Case E-9/00. The EFTA Court held that a provision which allows (mostly domestically produced) beer with an alcohol content between 2.5 per cent and 4.75 per cent alcohol by volume to be sold in grocery shops while requiring that other alcoholic beverages of the same strength be sold only through a monopoly undertaking was discriminatory.

allow also other alcoholic beverages of the same strength to be sold in grocery shops¹⁹⁰.

At the beginning of the year 2001, Vinmonopolet operated 140 outlets, while the number of grocery stores selling beer was around 4,400¹⁹¹. In areas where Vinmonopolet does not operate an outlet, all alcoholic beverages retailed by Vinmonopolet can be ordered by telephone, fax or e-mail and are shipped free of charge.

The procedure by which Vinmonopolet selects its products is very similar to the one followed by Systembolaget. Based on an annual marketing and product plan, Vinmonopolet invites potential suppliers to make offers for particular products¹⁹². Products are selected mainly on the basis of their price and quality¹⁹³. The selection procedure may also include an (optional) blind test¹⁹⁴. The selection must be made in a non-discriminatory manner¹⁹⁵ and is subject to the control of a board which is independent from both Vinmonopolet and the Norwegian government¹⁹⁶.

Similar to Systembolaget, Vinmonopolet divides its total product range into five assortments¹⁹⁷. The basic, test and 'by order' assortments are comparable to Systembolaget's corresponding assortments¹⁹⁸. However, while only a small number of products are included in Systembolaget's test assortment¹⁹⁹, Vinmonopolet's equivalent shall comprise at least ten per cent of the number of products included in the basic assortment²⁰⁰. Vinmonopolet's product range also comprises a 'limited consignment' assortment, which consists of goods that are available only during a limited period of

¹⁹⁰ <http://odin.dep.no/sos/norsk/044051-070008/index-dok000-b-f-a.html> (2002/05/02, 17:11h).

¹⁹¹ http://www.vinmonopolet.no/vp_reader.asp?page_id=291 (2002/05/15, 17:35h); Report for the Hearing in Case E-9/00, para. 7.

¹⁹² Ch. 2 art. 2-3 in connection with ch. 3 art. 3-2, para. 1 of the Regulation on Vinmonopolet's purchasing activity (Forskrift om Vinmonopolets innkjøpsvirksomhet m.v. of November 30, 1995).

¹⁹³ Ch. 3 art. 3-2, para. 2 of the Regulation on Vinmonopolet's purchasing activity (Forskrift om Vinmonopolets innkjøpsvirksomhet m.v. of November 30, 1995).

¹⁹⁴ Ch. 3 art. 3-4, para. 1 of the Regulation on Vinmonopolet's purchasing activity (Forskrift om Vinmonopolets innkjøpsvirksomhet m.v. of November 30, 1995).

¹⁹⁵ Ch. 3 art. 3-1, para. 5 Alcohol Act (Lov om omsetning av alkoholhaltig drikk m.v. of June 2, 1989).

¹⁹⁶ Forskrift om nemnd for prøving av A/S Vinmonopolets beslutninger om innkjøp of January 24, 1996.

¹⁹⁷ Ch. 1 art. 1-4, para. 1 of the Regulation on Vinmonopolet's purchasing activity (Forskrift om Vinmonopolets innkjøpsvirksomhet m.v. of November 30, 1995).

¹⁹⁸ S. *supra*, III. 6.3.2.3.2.

¹⁹⁹ In mid-October 2001, Systembolaget's test assortment comprised 89 articles; s. the Report of the Swedish competition authority to the Commission of December 21, 2001 (Dnr 28/2001), p. 6.

²⁰⁰ Ch. 5 art. 5-3, para. 1 of the Regulation on Vinmonopolet's purchasing activity (Forskrift om Vinmonopolets innkjøpsvirksomhet m.v. of November 30, 1995).

time and in limited quantities and are carried only in selected shops²⁰¹. The supplementary assortment, finally, contains products that are particularly popular in certain regions and may be selected by all outlets in order to meet regional demands²⁰².

11.2. *The Finnish alcohol monopoly*

The provisions governing the Finnish monopoly for the retail sale of alcoholic beverages are laid down in the Finnish Law on Alcohol²⁰³. Under art. 3, para. 1 (4) in connection with art. 13, para. 1 and art. 14, para. 1 of this law, alcoholic beverages with an alcohol content of more than 4.7 per cent by volume may be retailed only by Alko Oy, a company owned entirely by the Finnish State. Fermented beverages with a lower alcohol content may be sold in other shops, on the basis of a county licence²⁰⁴.

Alko Oy currently operates approximately 290 shops and a network of approximately 140 agents throughout Finland²⁰⁵. The products available in these shops and through these agents are selected on the basis of offers and samples submitted by Alko's suppliers²⁰⁶. In contrast to the Swedish and Norwegian monopolies, offers can be submitted at any time; an invitation to tender is not required²⁰⁷. The selection is made by one of Alko's expert teams on the basis of criteria such as the estimated demand, the price of the product and its price-quality ratio²⁰⁸. The suppliers' nationality or domicile must be irrelevant for the decision of the expert teams²⁰⁹. Alko's decisions regarding the listing, delisting and pricing of products can be appealed to the product control agency (*produkttillysncentralen*), which is subordinated to the Ministry of Welfare and Health²¹⁰.

The general assortment forms the basis of the products available in Alko's shops and corresponds to Systembolaget's and Vinmonopolet's basic assortments²¹¹. Products that do not reach the

²⁰¹ E-mail from Bernt Rivelsrud, product department at A/S Vinmonopolet of May 7, 2002.

²⁰² Ch. 4 art. 4-1 of the Regulation on Vinmonopolet's purchasing activity (Forskrift om Vinmonopolets innkjøpsvirksomhet m.v. of November 30, 1995).

²⁰³ Alkohollagen (Nr. 1143/1994).

²⁰⁴ Art. 14, para. 1 Alkohollag (Nr. 1143/1994).

²⁰⁵ [http://www.alko.fi/wwwalkofi/wwwMyyrek.nsf/frmBottomSW?readform\(2002/05/22,11:53\)](http://www.alko.fi/wwwalkofi/wwwMyyrek.nsf/frmBottomSW?readform(2002/05/22,11:53)).

²⁰⁶ «Listing procedure and retail sale of alcoholic beverages», version of January 1, 2002, p. 3.

²⁰⁷ Ibidem.

²⁰⁸ Ibidem.

²⁰⁹ «Listing procedure and retail sale of alcoholic beverages», version of January 1, 2002, p. 2.

²¹⁰ Art. 51, para. 3 and art. 41, para. 1 Alkohollag (1143/1994).

²¹¹ «Listing procedure and retail sale of alcoholic beverages», version of January 1, 2002, p. 2.

required sales volumes for the general assortment or products that are not available in sufficient amounts can be included in the 'by order' assortment²¹². In contrast to Systembolaget and Vinmonopolet, Alko does not have a trial assortment. However, a supplier whose offer may apply for the offered product to be listed in the general assortment at his own risk²¹³. Moreover, Alko's shops may have in their selections up to ten products from the 'by order' assortment²¹⁴.

²¹² «Listing procedure and retail sale of alcoholic beverages», version of January 1, 2002, p. 3.

²¹³ «Listing procedure and retail sale of alcoholic beverages», version of January 1, 2002, p. 5.

²¹⁴ «Listing procedure and retail sale of alcoholic beverages», version of January 1, 2002, p. 3.

IV. The Compatibility of the Swedish Alcohol Monopoly with EC Law

1. General Remarks

Systembolaget's retail sales monopoly has been scrutinized by the ECJ in the well-known *Franzén* case²¹⁵. Much to the surprise of many commentators, the retail monopoly was upheld by the ECJ²¹⁶. However, the judgement does not, in my view, answer once and for all the question of whether or not the Swedish alcohol monopoly is compatible with EC law. Firstly, it is unclear whether the Court's decision to examine the monopoly solely under Art. 31 EC (and not under Art. 28 EC) is to be regarded as a general change of practice or a political decision. Secondly, Systembolaget's new product policy has changed the factual circumstances considerably²¹⁷. Thirdly, the compatibility of the monopoly with the competition rules of the EC Treaty has not been examined by the judgement. A renewed scrutiny of the Swedish retail monopoly for alcoholic beverages, which takes into account these circumstances, is therefore anything but obsolete.

2. The Franzén case

2.1. *Facts of the case*

On the night of January 1, 1995, the day of Sweden's accession to the EU, Harry Franzén sold 20 bottles and one five-litre carton of wine in his grocery shop in the Swedish town Röstånga²¹⁸. Mr. Franzén was prosecuted for the unlawful sale of alcoholic beverages and other criminal offences. He denied having committed an offence and claimed that the Swedish legislation on which the criminal charges were based was contrary to Art. 28 and 30 EC. The Swedish court stayed the proceedings and submitted a number of questions to the ECJ for a preliminary ruling.

²¹⁵ Case C-189/95.

²¹⁶ Ibidem. S. ERIKSSON, pp. 2 and 54; FRITZ, p. 90; PEHRSON/WAHL, p. 834; SLOT, p. 1194.

²¹⁷ S. *supra*, III. 6.3.2.3.4.

²¹⁸ The summary of the facts is based on that given in the Opinion of Advocate General Elmer in case C-189/95, paras. 38-40.

2.2. *The Opinion of Advocate General Elmer*

In his Opinion delivered to the ECJ on March 4, 1997, Advocate General Elmer found the Swedish legislation on the retail sale of alcohol to be incompatible with Art. 28 and 31 EC²¹⁹. He proposed to scrutinize the Swedish statutory system on alcohol as a whole and, in line with previous case-law of the Court²²⁰, to examine this system both under Art. 28 and 31 EC. In his view, Art. 31 (1) EC was designed to supplement the rules laid down in Art. 28 and 29 EC and could not be seen a derogation of these articles. Accordingly, State monopolies were prohibited if they infringed either Art. 28 or Art. 31 EC.

Advocate General Elmer found that the limitation of the number of points of sale, the centralisation of Systembolaget's purchases, Systembolaget's selection procedure and the then valid provisions on the importation of alcohol had the effect of impeding the access of goods from other Member States to the Swedish market and discriminated against traders from other Member States. In his view, the Swedish legislation could not be justified by Art. 30 EC because it did not meet the proportionality test.

2.3. *The judgement of the Court*

The ECJ followed an approach which was fundamentally different from the one that Advocate General Elmer had proposed²²¹. Instead of examining the Swedish statutory system as a whole, it chose to deal with the provisions regarding the retail monopoly and those regarding the importation of alcoholic beverages separately. It declared that the rules relating to the existence and operation of the monopoly would have to be examined only under Art. 31 EC, while the rules relating to intra-Community trade (i.e. the import rules) would have to be assessed under Art. 28 and 30 EC.

The Court came to the conclusion that the provisions regarding the retail monopoly were not discriminative and therefore compatible with Art. 31 EC. The rules governing the importation of alcoholic beverages, on the other hand, were held to be contrary to Art. 28 EC and could not be justified under Art. 30 EC.

²¹⁹ Opinion of Advocate General Elmer in case C-189/95, para. 124.

²²⁰ Case 45/75; Case C-347/88; Case C-387/93; ERIKSSON, p. 54; FRITZ, p. 94; PEHRSON/WAHL, p. 838.

²²¹ Case C-189/95, paras. 35-36. S. FRITZ, p. 90; PEHRSON/WAHL, p. 837; SLOT, p. 1194.

3. Free Movement of Goods

3.1. *Preliminary remarks*

In this section the Swedish statutory rules related to the retail sale of alcoholic beverages shall be examined against the Treaty rules on the free movement of goods. This examination is carried out in three steps. Firstly, it will be discussed whether Art. 28 EC remains applicable to State monopolies of a commercial character even after *Franzén* or whether such monopolies will only have to be examined under Art. 31 EC in the future. Secondly, the compatibility of the Swedish alcohol monopoly with Art. 31 EC will be discussed in the light of the *Franzén* judgement. Thirdly, the monopoly will be examined against Art. 28 EC. At the beginning of each of these steps, a short overview will be given of the content of the respective provisions as well as the most relevant case-law of the ECJ related thereto.

3.2. *The relationship between Article 31 EC and Articles 28-30 EC*

3.2.1. Monist and dualist approaches

Art. 28 and 29 EC prohibit all quantitative restrictions on imports and exports between Member States and all measures having equivalent effect. Art. 31 (1) EC requires Member States to adjust their State monopolies of a commercial character in such a way that any discrimination between nationals of Member States regarding the procurement and marketing of goods is removed. In that such State monopolies constitute an obstacle to intra-Community trade, they constitute a measure having equivalent effect to quantitative restrictions on import or export²²². Art. 28 and 29 EC on the one hand and Art. 31 (1) EC on the other therefore clearly overlap. It is therefore necessary to clarify the relationship between these provisions²²³. Two main approaches have been suggested to solve this problem: one solution is to identify one sole applicable rule (monist approach), the other to apply both rules jointly (dualist approach)²²⁴.

The monist approach allows in turn three possible solutions: Some authors suggest that the former Art. 37 (1) EC (now Art. 31 (1) EC) has lost all its significance after the end of the transitional period and that only Art. 30 or 34 EC (now 28 and 29 EC) should apply²²⁵. The fact that the post-Amsterdam wording of Art. 31 EC does no longer mention a transitional period but that the rest of the provision is still in

²²² HEINEMANN, p. 108.

²²³ BUENDIA SIERRA, p. 112.

²²⁴ Ibidem.

²²⁵ Ibidem, with further references.

force is, however, a clear indication against this view. Others argue that Art. 31 (1) EC is a *lex specialis* to Art. 28 and 29 EC and should therefore prevail²²⁶. However, if Art. 31 EC were to prevail over Art. 28 and 29 EC, this would lead to the result that State monopolies of a commercial character would be privileged over other restrictions. Art. 28 and 29 EC prohibit restrictions of all kinds while only discriminatory restrictions are prohibited under Art. 31 (1) EC²²⁷. In order to avoid such a result, it has been suggested that Art. 31 (1) EC should be interpreted in the light of the *Dassonville*-formula²²⁸. Art. 31 (1) would thus prohibit not only discriminations but also other quantitative restrictions and measures having equivalent effect²²⁹. Finally, it has been submitted that measures intrinsically connected with the operation of the monopoly should be examined solely under Art. 31 (1) EC while Art. 28 and 29 EC should be applicable to all other provisions of national law (doctrine of separable measures)²³⁰.

The dualist approach does not try to identify one single applicable rule, but allows for a joint application of both provisions to the same measure²³¹. This can be done either by using Art. 31 (1) EC as a reference rule to Art. 28 and 29 EC, prohibiting those State monopolies of a commercial character which are incompatible with the latter provisions²³², or by applying Art. 31 (1) EC to discriminatory and Art. 28 and 29 EC to non-discriminatory measures²³³.

In my view, it is this last solution that is the most convincing one. It is compatible with both the wording of the provisions in question and the history behind the creation of the former Art. 37 EC²³⁴. Moreover, it is easy to apply in practice. The supporters of the dualist approach argue convincingly that Art. 31 EC is designed to supplement Art. 28 and 29 EC; the fact that State monopolies of a commercial character are dealt with in a special provision merely stresses the dangers for the free movement of goods that emanate from such monopolies and the necessity to effectively oppose these dangers²³⁵. The

²²⁶ BUENDIA SIERRA, pp. 113 and 219.

²²⁷ HEINEMANN, p. 109; PEHRSON/WAHL, p. 840.

²²⁸ Case 8/74.

²²⁹ HEINEMANN, p. 109, with further references.

²³⁰ BUENDIA SIERRA, p. 113; SAVIA, p. 58.

²³¹ BUENDIA SIERRA, p. 114, with further reference.

²³² BUENDIA SIERRA, pp. 117-188. Art. 31 EC would then have a similar role as Art. 86 (1) EC.

²³³ BUENDIA SIERRA, pp. 114-115; HEINEMANN, p. 110.

²³⁴ Initially, the contracting States did not intend to include a special provision on State monopolies in the EC Treaty; State monopolies should instead be dealt with under the general provisions. However, it was decided during the negotiations to emphasise the particular dangers emanating from State monopolies for the free movement of goods by expressly mentioning these monopolies in the Treaty. S. HEINEMANN, pp. 101 and 108.

²³⁵ HEINEMANN, p. 108; Opinion of Advocate General Elmer in case C-189/95, para. 71.

interpretation of Art. 31 EC as a *lex specialis* to Art. 28 and 29 EC on the other hand seems convincing at first sight, but would lead to the paradox result that State monopolies as one of the gravest forms of impediments against the free movement of goods would be privileged over less harmful measures²³⁶. An analogical application of the *Dassonville*-formula to Art. 31 (1) EC would stretch the provision far beyond its wording. The doctrine of separable measures, finally, can be difficult to apply in practice. The dividing line between rules relating to the existence and the operation of the monopoly and rules that, even though having an effect on intra-Community trade, do not directly concern the monopoly is most often blurred or even impossible to identify²³⁷.

If Art. 31 (1) EC and Art. 28 and 29 EC are applied jointly in the manner suggested above, it would be logical to examine a national measure first under Art. 31 (1) EC. If the measure is found to be discriminative, a test under Art. 28 or 29 EC is not required. If it is not, the measure must be examined under Art. 28 or 29 EC²³⁸. The examination of the Swedish alcohol monopoly carried out hereafter therefore follows this pattern.

3.2.2. The position of the ECJ

The Court's position regarding the relationship between Art. 31 EC and general provisions of the Treaty has been, to say the least, inconsistent. In the early case *Rewe-Zentrale*²³⁹, the Court applied Art. 31 EC and Art. 90 EC jointly. In the *Miritz*-judgement²⁴⁰, published on the same day, it refused to consider Art. 25 EC and instead applied Art. 31 EC exclusively. In *Manghera*²⁴¹, another case handed down in the same year, the Court seemed to have abandoned this latter approach again²⁴². In the following years, the Court has sometimes applied both Art. 31 (1) EC and general Treaty provisions such as Art. 28, 29 and 90 EC either jointly²⁴³ or following the doctrine of separable measures²⁴⁴ and sometimes examined exclusive rights solely under

²³⁶ HEINEMANN, pp. 5 and 108-109; PEHRSON/WAHL, p. 840.

²³⁷ SLOT, p. 1194.

²³⁸ Ibidem; Opinion of Advocate General Cosmas in Cases C-157-160/94.

²³⁹ Case 45/75.

²⁴⁰ Case 91/75.

²⁴¹ Case 59/75, para. 9.

²⁴² Para. 6 of the judgement reads: «For the purposes of interpreting Article [31] [...] it must be considered in its context in relation to [...] its place in the general scheme of the Treaty.» And in para. 9 of the judgement the Court states that «the obligation laid down in paragraph (1) aims at ensuring compliance with the fundamental rule on the free movement of goods throughout the common market, in particular by the abolition of quantitative restrictions and measures having equivalent effect in trade between Member States.». S. also ERIKSSON, p. 31.

²⁴³ Case 90/82; Case C-347/88; Case C-387/93. S. also Cases C-157-159/94, where an examination of exclusive rights under Art. 28 and 34 was not necessary because they were contrary to Art. 31.

²⁴⁴ Case 119/78; Case 120/78.

the general provisions, leaving Art. 31 (1) EC aside²⁴⁵. In any event, the case-law of the Court seemed to suggest that Art. 28 and 29 EC were applicable to State monopolies of a commercial character at least jointly with Art. 31 EC²⁴⁶.

3.2.3. The approach of the ECJ in the *Franzén*-judgement

It came therefore as a great surprise when the ECJ in *Franzén*²⁴⁷ examined the Swedish retail monopoly for alcoholic beverages solely under Art. 31 EC and refused to apply Art. 28 EC²⁴⁸. Remarkably, the Court did not bother to clarify the relationship between Art. 28 and 31 EC, an issue which at least seemed to trouble its Advocate General, nor did it give any explanations for its change of direction²⁴⁹. In para. 35 of the judgement it merely stated:

«Having regard to the case-law of the Court, it is necessary to examine the rules relating to the existence and operation of the monopoly with reference to Article [31] of the Treaty, which is specifically applicable to the exercise, by²⁵⁰ a domestic commercial monopoly, of its exclusive rights²⁵¹.»

Another remarkable aspect is that the Court did not seem to have any difficulty in distinguishing between the rules concerning the monopoly and those affecting intra-Community trade²⁵¹. In support of its view the Court made reference to its judgements in the *Miritz*²⁵², *Cassis de Dijon*²⁵³ and *Hansen*²⁵⁴ cases. However, it does in my view not follow from any of these cases that Art. 31 EC is the only rule under which a State monopoly of a commercial character should be examined²⁵⁵.

²⁴⁵ Case 86/78; Case C-202/88; Case C-369/88; Case C-60/89; Joined Cases C-277/91, C-318/91 and C-319/91; Case C-323/93.

²⁴⁶ In his Opinion in the Gas and Electricity Monopoly cases, Advocate General Cosmas even argued that the *Miritz*-judgement could be interpreted as being in line with this position; s. Opinion of Advocate General Cosmas in Cases C-157-160/94, para. 22.

²⁴⁷ Case C-189/95.

²⁴⁸ ERIKSSON, pp. 2 and 54; FRITZ, p. 90; PEHRSON/WAHL, p. 834; SLOT, p. 1194.

²⁴⁹ PEHRSON/WAHL, p. 837; SLOT, p. 1194.

²⁵⁰ Case C-189/95, para. 35.

²⁵¹ SLOT, p. 1194.

²⁵² Case 91/75.

²⁵³ Case 120/78.

²⁵⁴ Case 91/78.

²⁵⁵ ERIKSSON, p. 54; PEHRSON/WAHL, pp. 838-839. The *Miritz* case dealt with the question of whether a charge on imported alcoholic beverages is contrary to Art. 25 and 31 EC. Para. 5 of the judgement, which is referenced in the *Franzén*-case, reads:

«Since the structure and character of the equalization charge link it to the system of the German alcohol monopoly, the answer to the first question must be ascertained from the text of Article 37, which deals specifically with the adjustment of State monopolies.»

In para. 7 of the well-known *Cassis de Dijon*-judgement, to which reference is made in the *Franzén*-judgement, the Court states that

«[...] Article [31] relates specifically to State monopolies of a commercial character. This provision is therefore irrelevant with regard to national provisions which do not

Particularly the referenced paragraphs in the *Hansen* (and, to a lesser extent, also that in the *Cassis de Dijon*) judgements rather seem to confirm that Art. 31 EC is applicable *together* with other Articles in the Treaty²⁵⁶.

The Court's view on the relationship between Art. 31 EC and Art. 28 EC as expressed in *Franzén* differs diametrically from its judgement in *Banchero*²⁵⁷ regarding the Italian retail monopoly for tobacco, a case with a similar factual background to the one in *Franzén*. In this judgement, the Court first concluded that the monopoly was not discriminatory and therefore did not infringe Art. 31 EC and went on to examine the compatibility of the monopoly with Art. 28 EC²⁵⁸. The *Banchero*-case was decided only two years before *Franzén*. Even more surprisingly, the *Franzén*-judgement also contradicted the Court's decisions in the *Gas and Electricity Monopoly* cases²⁵⁹, which were handed down on the same day as the *Franzén*-judgement. In these cases, the Court held that the monopolies were contrary to Art. 31 EC and that it was therefore not necessary to consider whether they are also contrary to Art. 28 EC²⁶⁰.

It remains to be seen whether, as some authors claim²⁶¹, *Franzén* marks a change of direction in the Court's approach regarding the relationship between Art. 28 EC (and other general provisions of the Treaty) and Art. 31 EC in the sense that it now considers Art. 31 EC to be exclusively applicable to State monopolies of a commercial

concern the exercise by a public monopoly of its specific function [...]. That being the case, the effect on intra-Community trade of the measure referred to by the national court must be examined solely in relation to the requirements under Article 30 [...].»

In the *Hansen*-case, the Court had to examine the compatibility of certain taxes on alcohol with EC law. In the paragraphs to which it makes reference in the *Franzén*-judgement, para. 9 and 10, the ECJ deals with the question whether Art. 31 EC is a *lex specialis* to Art. 87 and 88 EC. The relevant sentences of these paragraphs read: «[...] Article [31] [...] and Articles [87] and [88] [...] pursue the same objective, which is to ensure that [...] action by a State monopoly and the granting of aids do not distort the conditions of competition within the common market or create discrimination against the products or trade of other Member States. [...] It follows that the operations of a State monopoly are not exempted from the application of Article [31] by reason of the fact that they may at the same time be classified as an aid [...]. It is therefore clear that in all cases where the arrangements for marketing a product such as spirits entail the intervention of a public monopoly acting pursuant to its exclusive right the specific provisions of Article [31] are applicable, even if the relationship between the monopoly and producers may be in the nature of an aid. [...].»

²⁵⁶ ERIKSSON, p. 55; PEHRSON/WAHL, p. 839.

²⁵⁷ Case C-387/93.

²⁵⁸ BUENDIA SIERRA, pp. 115-116; ERIKSSON, p. 56; PEHRSON/WAHL, p. 838; s. also Case E-6/96.

²⁵⁹ Cases C-157-160/94.

²⁶⁰ S. ERIKSSON, p. 56; SLOT, p. 1194.

²⁶¹ FRITZ, pp. 94-95.

character²⁶². This would mean that, after *Franzén*, only discriminatory monopolies are incompatible with the rules on the free movement of goods²⁶³. The EFTA Court's recent judgement on the Norwegian alcohol monopoly²⁶⁴ might be invoked in support of such a view. In this judgement, the operation of the monopoly was examined under Art. 16 EEA (which corresponds to Art. 31 EC), while Art. 11 EEA (which corresponds to Art. 28 EC) was applied to the rules not related to the monopoly. In my view, however, it is more likely that *Franzén* must be seen as a case based solely on its specific facts and circumstances and that Art. 28 EC therefore remains applicable to State monopolies. It may be presumed that the ECJ would have made an express statement if it had really felt the necessity to change its case-law on such an important field²⁶⁵. Moreover, the *Franzén*-case is totally at odds with the Court's previous case-law²⁶⁶ and even with the *Gas and Electricity Monopoly*-judgements²⁶⁷ handed down on the very same day.

One possible explanation for the judgement in *Franzén* is that the judges were deeply split in their opinions and that they did not want to take a decision against a Member State in such a sensitive political field without having a clear majority²⁶⁸. Another explanation would be that the facts of the case and the party relying on EC law were «the wrong kinds» in that the case did not concern the attempt of an importer or producer to penetrate the Swedish market²⁶⁹.

3.3. *Article 31 EC*

3.3.1. The concept of State monopolies of a commercial character

Art. 31 (1) EC requires the Member States to adjust any State monopolies of a commercial character in such a way that any discrimination between nationals of Member States as regards the conditions under which goods are procured and marketed is removed. Subparagraph 2 of the provision restricts the scope of Art. 31 EC to undertakings «through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably

²⁶² BUENDIA SIERRA, p. 220; ERIKSSON, p. 56; SLOT, p. 1194; PEHRSON/WAHL, p. 838.

²⁶³ ERIKSSON, p. 56; PEHRSON/WAHL, p. 840.

²⁶⁴ Case E-9/00.

²⁶⁵ In *Keck* (Joined Cases C-267/91 and C-268/91) the Court stated that it felt the necessity «[...] to re-examine and clarify its case-law on this matter» (para. 14 of the judgement) and that the Court's position was «[...] contrary to what has previously been decided [...]» (para. 16 of the judgement). S. also ERIKSSON, pp. 56-57; PEHRSON/WAHL, p. 843.

²⁶⁶ E.g. Case C-387/93 and Case C-347/88.

²⁶⁷ Cases C-157-160/94.

²⁶⁸ PEHRSON/WAHL, pp. 840-841.

²⁶⁹ ERIKSSON, p. 62.

influences imports or exports between Member States. [...]»²⁷⁰. Under Art. 31 (2) EC, the introduction of new monopolies which are incompatible with the conditions laid down in Art. 31 (1) EC is prohibited.

In other words, Art. 31 (1) EC applies to situations where there is

- a *monopoly*, which has been
- *created by a Member State* and through which that State can
- appreciably *influence the import or export of goods* between Member States²⁷¹.

In the economic sense, a (perfect) *monopoly* is defined as a situation where a single provider of goods or services has 100 per cent control of the market for the goods or services he provides²⁷². From a legal point of view, however, a total control of the market is not required²⁷³. It is sufficient that an undertaking to which exclusive rights have been granted has as its object transactions regarding a commercial product which can be subject of trade between Member States, and that this undertaking plays an effective part in such trade²⁷⁴.

A *State monopoly* is defined as an undertaking to which special or exclusive rights have been granted by an authoritative act²⁷⁵. It is of a *commercial character* if it relates to the trade in goods²⁷⁶. However, not all such monopolies fall within the scope of Art. 31 EC. Art. 31 (1) subparagraph 2 EC restricts the scope of Art. 31 EC to «situations in which a Member State can influence imports or exports through an undertaking²⁷⁷.» This ability may in particular result from exclusive rights for import, export, commercialization or production²⁷⁸.

3.3.2. Adjustment or abolition?

As was previously explained, Art. 31 (1) EC requires the adjustment of State monopolies of a commercial character²⁷⁹. The abolishment of such monopolies is, in principle, not required²⁸⁰. However, the wording of Art. 31 (1) EC implies that the obligation to adjust is not met if a

²⁷⁰ BUENDIA SIERRA, pp. 83-84; ERIKSSON, pp. 9-10; HEINEMANN, pp. 103-104.

²⁷¹ FAULL/NIKPAY, p. 305.

²⁷² ERIKSSON, p. 9; FAULL/NIKPAY, p. 21; GOYDER, p. 10; HEINEMANN, p. 3.

²⁷³ ERIKSSON, p. 9; SAVIA, p. 57.

²⁷⁴ Case 6/64; STEINER/WOODS, p. 192. S. also Case 322/81; Case 27/76.

²⁷⁵ BUENDIA SIERRA, p. 82; HEINEMANN, p. 103.

²⁷⁶ ERIKSSON, p. 10; HEINEMANN, p. 103.

²⁷⁷ FAULL/NIKPAY, p. 305.

²⁷⁸ Ibidem; BUENDIA SIERRA, pp. 118-125; SAVIA, pp. 62-67.

²⁷⁹ S. *supra*, IV. 3.3.1.

²⁸⁰ Case 59/75; Case 91/78; Case 78/82; BUENDIA SIERRA, p. 110; ERIKSSON, p. 27; HEINEMANN, p. 107; SAVIA, p. 58.

Member State merely ends its discriminatory behaviour in fact²⁸¹. What is required is the elimination of any *possibility* to discriminate²⁸². If a monopoly cannot be adjusted in such a way that discrimination is excluded, it will have to be abolished²⁸³.

3.3.3. Is Systembolaget a State monopoly of a commercial character?

Systembolaget has the exclusive right to carry out the retail sale of spirits, wine and beer with an alcohol content exceeding 3.5 per cent by volume²⁸⁴. It has as its object the trade in alcoholic beverages and plays an effective part in such trade. Systembolaget is therefore the holder of a *monopoly* in the legal sense²⁸⁵. This monopoly is a perfect one since Systembolaget is the only lawful supplier of goods on the markets for spirits, wine and strong beer²⁸⁶.

Systembolaget is a company fully owned by the Swedish State, to which the exclusive right to carry out the retail sale of certain goods has been granted by an authoritative act²⁸⁷. Systembolaget does not have the right to import or export spirits, wine and strong beer²⁸⁸, but can, due to its exclusive retail rights, nevertheless influence imports of alcoholic beverages into Sweden to an appreciable degree²⁸⁹. Systembolaget therefore constitutes a *State* monopoly of a *commercial character* within the meaning of Art. 31 EC.

3.3.4. The compatibility of Systembolaget's exclusive rights with Article 31 EC

When the ECJ in *Franzén*²⁹⁰ scrutinized the Swedish alcohol monopoly it came to the conclusion that the exclusive rights granted to Systembolaget were not contrary to Art. 31 EC. The fact that products were kept in the basic assortment only if their sales reached a certain level did, according to the ECJ, not in itself afford an advantage to domestic products. Neither did the Court find the

²⁸¹ Art. 31 (1) EC demands that State monopolies be adjusted «so as to ensure that no discrimination [...] exists between nationals of Member States.» S. BUENDIA SIERRA, p. 109.

²⁸² Case 59/75, para. 5. BUENDIA SIERRA, p. 109; ERIKSSON, p. 27, with further reference; HEINEMANN, p. 107; SAVIA, pp. 60-61.

²⁸³ BUENDIA SIERRA, pp. 109-110; ERIKSSON, p. 27; HEINEMANN, p. 107.

²⁸⁴ Ch. 5 art. 2 in connection with art. 1, para. 1 AL and art. 2 of the agreement between Systembolaget AB and the Swedish State (SFS 2001:852).

²⁸⁵ S. *supra*, IV. 3.3.1.

²⁸⁶ For a detailed analysis of the relevant markets s. *infra*, IV. 4.3.1.

²⁸⁷ S. *supra*, III. 6.3.1.

²⁸⁸ Ch. 5 art. 1, para. 2 AL. However, Systembolaget may import spirits, wine and strong beer at the request of customers, ch. 5 art. 1, para. 3 in connection with art. 5 AL.

²⁸⁹ Opinion of Advocate General Elmer in case C-189/95, paras. 86 and 94.

²⁹⁰ Case C-189/95.

selection procedure and the sales network of Systembolaget or the rules on the marketing of alcoholic beverages to be discriminative.

That the Court would arrive at the conclusion that the exclusive rights held by Systembolaget should be compatible with Art. 31 EC was by no means obvious. Both the previous case-law of the ECJ²⁹¹ and the arguments presented in the Opinion by Advocate General Elmer²⁹² had suggested another outcome of the case.

First of all, there are good reasons to argue that marketing monopolies should be prohibited *per se* for the same reasons as import monopolies²⁹³. An undertaking which holds a marketing monopoly, it is argued, can control the import of products just as effectively as if it held an import monopoly, since it would be meaningless to import a product which the undertaking refuses to market²⁹⁴. The same line of argumentation was, albeit unsuccessfully, used by Advocate General Elmer in the *Franzén*-case²⁹⁵. In fact, the ECJ confirmed in *La Crespelle*²⁹⁶ that even measures which are applied after the import stage may constitute an obstacle to imports. Moreover, it declared in *Greek Oil Monopoly*²⁹⁷ that a State monopoly on imports could not be distinguished from a monopoly on the refining of crude oil. In *Banchero*, finally, the Court upheld an Italian system which reserved the retail of tobacco products to authorized distributors for the reason that these distributors, of which there were 76,000, were free to choose the products that they wished to sell²⁹⁸. In doing so, it can be argued, the Court implicitly stated that a system which involves the central procurement of products by the sole retail distributor would infringe not only Art. 28 EC but also Art. 31 EC²⁹⁹. Why the Court did not follow the same approach in *Franzén* is not explained in the judgement.

Even if retail monopolies are not considered to be prohibited *per se*, Art. 31 EC can still require the abolishment of individual monopolies or certain exclusive rights. As was explained above, Art. 31 EC requires that State monopolies of a commercial character be adjusted in such a way that any possibility of discrimination is excluded³⁰⁰. Where such an adjustment is not possible, a monopoly must be abolished. When a monopoly is scrutinized it must therefore be

²⁹¹ Case C-347/88; Case C-387/93.

²⁹² Opinion of Advocate General Elmer in Case C-189/95.

²⁹³ BUENDIA SIERRA, p. 119; HEINEMANN, p. 108.

²⁹⁴ BUENDIA SIERRA, p. 119.

²⁹⁵ Opinion of Advocate General Elmer in Case C-189/95, paras. 93-94.

²⁹⁶ Case C-323/93.

²⁹⁷ Case C-347/88.

²⁹⁸ Case C-387/93, para. 30; Opinion of Advocate General Elmer in Case C-189/95, para. 82.

²⁹⁹ Ibidem; BUENDIA SIERRA, p. 119.

³⁰⁰ S.*supra*, IV. 3.3.2.

examined whether the national rules leave any room for discrimination. In *Franzén*, however, the Court did not carry out such an examination but merely analyzed whether the rules were *applied* in a discriminatory manner³⁰¹. Had the ECJ asked itself whether the Swedish rules excluded any possibility for discrimination, its conclusion might well have been a different one. Even though Systembolaget is obliged to select its products in a non-discriminatory way³⁰², it enjoys a large degree of discretion in its choice. This is particularly true for the initial examination, in which Systembolaget's buyers evaluate the price-quality ratio of offers received and assess previous experience with the production region and the type of product in question³⁰³. Following this examination, approximately two thirds of the offers are rejected³⁰⁴. Even the blind test, in which another 90 per cent of the remaining products are eliminated, is by no means objective³⁰⁵. In neither of these tests can the possibility of discrimination be excluded³⁰⁶.

As was explained above, traders whose offers have been rejected by Systembolaget can request that the products concerned be sold on trial³⁰⁷. This, however, does not appear to be a real option. In November 2001, more than 3,000 products were on the waiting list to be tested for trial sale, while only 228 products had been tested between January and mid-November 2001³⁰⁸. Even where Systembolaget decides to purchase a product or where it is included in the trial assortment, it is difficult to establish this product on the Swedish market. In order to be listed in the basic assortment, the product must reach a certain annual sales volume, which varies for every product segment³⁰⁹. This can be a rather high threshold considering that alcoholic beverages may not be directly advertised to consumers³¹⁰. These difficulties are reinforced by Systembolaget's new assortment policy, which has led to a considerable decrease of

³⁰¹ Case C-189/95, paras. 45-52.

³⁰² Art. 7 of the agreement between Systembolaget AB and the Swedish State (SFS 2001:852).

³⁰³ Opinion of Advocate General Elmer in Case C-189/95, para. 98.

³⁰⁴ E-mail of Kajsa Riddersporre, market and communications department at Systembolaget of May 8, 2002.

³⁰⁵ *Ibidem*; ERIKSSON, p. 51.

³⁰⁶ In fact, the Swedish competition authority has found the percentage of rejected offers to be significantly lower for domestic products than for products from other Member States; s. Report of the Swedish competition authority to the Commission on the situation of alcoholic beverages on the Swedish market of November 7, 1996, appendix 3 B.

³⁰⁷ *S. supra*, III. 6.3.2.3.3.

³⁰⁸ Report of the Swedish competition authority to the Commission of December 21, 2001 (Dnr 28/2001), p. 6.

³⁰⁹ E-mail from Kajsa Riddersporre, market and communications department at Systembolaget of May 8, 2002. The same sales volumes must also be reached if the product is to remain in the basic assortment.

³¹⁰ Ch. 4 art. 11 AL. However, low-alcoholic beer may be advertised in periodicals.

products available in the shops³¹¹. It is obvious that products that are shelved in the shops and can be taken home immediately are in a much better position than those that have to be ordered and picked up at a later date. Moreover, Systembolaget's staff apparently tends to encourage customers to purchase products that are stocked in the respective shops rather than to order similar products³¹². These measures have the cumulative effect of considerably impeding the successful positioning of new alcoholic beverages on the Swedish market. This in turn cements the position of already big-selling products which are well established on the market. Since most of the best-selling spirits and beers are of Swedish origin³¹³, these measures must in my view be considered discriminatory in fact.

Another aspect which involves an element of discrimination is the fact that only traders with a registered office in Sweden are allowed to submit tenders to Systembolaget³¹⁴. Even though this rule does not discriminate against goods but traders from other Member States, it is in my view incompatible with Art. 31 EC. In that Art. 31 EC prohibits any discrimination between nationals of Member States, it does not protect the free movement of goods as such but the traders of other Member States who participate therein³¹⁵.

Moreover, the fact that only low-alcoholic beer may be advertised in periodicals may involve an element of discrimination³¹⁶. Since beer may be freely sold in most European countries, breweries in other Member States will usually only brew beer with an alcohol content exceeding 3.5 per cent by volume or alcohol-free beer³¹⁷. Not surprisingly, the largest part of low-alcoholic beer available in Swedish shops is of Swedish origin. Even though only low-alcoholic beer may be advertised in periodicals it is obvious that consumers will relate such advertisements not only to low-alcoholic beer but also to 'strong beer'³¹⁸. It can therefore not be excluded that this rule involves at least a possibility of (indirect) discrimination against products or traders from other Member State³¹⁹.

³¹¹ S. *supra*, III. 6.3.2.3.4.

³¹² Report of the Swedish competition authority to the Commission of December 21, 2001 (Dnr 28/2001), p. 5.

³¹³ <http://www.systembolaget.se/svenska/stat/acctopp.htm> (2002/04/11, 13:05h). During January and February 2002, six of the ten best sold spirits and eight of the ten best sold 'strong beers' were of Swedish origin.

³¹⁴ S. *supra*, III. 6.3.2.3.3.

³¹⁵ Case C-347/88, para. 44; Opinion of Advocate General Elmer in Case C-189/95, para. 68.

³¹⁶ Ch. 4 art. 11 AL *e contrario*.

³¹⁷ ERIKSSON, p. 51.

³¹⁸ *Ibidem*.

³¹⁹ *Ibidem*.

The fact that Swedish products hold a very strong position on the retail market for alcoholic beverages may be seen as an indication that the Swedish rules do not only leave room for discrimination but are also applied in a discriminatory way. During January and February 2002, six of the ten best sold spirits and eight of the ten best sold 'strong beers' were of Swedish origin³²⁰. Moreover, the State-owned V&S Vin & Sprit AB is still by far the largest provider to Systembolaget. In the year 2001, V&S Vin & Sprit AB had a market share of 25.7 per cent in terms of the value of the goods bought by Systembolaget³²¹. On the other hand, it is clear that the mere fact that domestic products have a strong market position does not necessarily imply the existence of discrimination. A preference of domestic products and conservative buying habits of consumers may be equally credible explanations³²².

3.4. Articles 28 and 30 EC

3.4.1. Preliminary remarks

As was explained above, the ECJ did not examine the existence and operation of the Swedish retail monopoly for alcoholic beverages under Art. 28 EC in *Franzén*³²³. However, this case has in my view not changed the case-law of the Court concerning the relationship between Art. 28 and 31 EC but is to be seen as a case based solely on its facts and circumstances. In particular, it does not imply in my opinion that Art. 28 EC can no longer be applied to exclusive rights at all. The question whether or not the exclusive rights granted to Systembolaget are compatible with Art. 28 EC may therefore still be relevant and shall be examined in the following.

3.4.2. Quantitative restrictions and measures having an equivalent effect

Under Art. 28 EC, «[q]uantitative restrictions on imports and all measures having equivalent effect shall [...] be prohibited between Member States.» Quantitative restrictions within the meaning of Art. 28 EC are «measures which amount to a total or partial restraint» of imports³²⁴. Measures having equivalent effect to quantitative restrictions are, according to the well-known *Dassonville*-formula, «[a]ll trading rules enacted by Member States which are capable of

³²⁰ <http://www.systembolaget.se/svenska/stat/acctopp.htm> (2002/04/11, 13:05h).

³²¹ Systembolaget's sales statistics for 2001, p. 8. The second largest provider, the Swedish trading company Fondberg & Co. AB, reached a share of merely five per cent. The share of V&S on the market for spirits was 54.8 per cent and on the market for wine 19.7 per cent in terms of volume; s. *ibidem*.

³²² ERIKSSON, p. 52.

³²³ Case C-189/95; S. *supra*, IV. 2.3.

³²⁴ Case 2/73.

hindering, directly or indirectly, actually or potentially, intra-Community trade»³²⁵.

The potentially very wide field of application of Art. 28 EC was limited by the ECJ in the *Keck*-judgement³²⁶. The Court drew a distinction between rules concerning product requirements and rules limiting or prohibiting certain selling arrangements. While the rules relating to product requirements continued to fall under Art. 28 EC, the Court held that Art. 28 EC did not apply «national provisions restricting or prohibiting certain selling arrangements [...], provided that those provisions apply to all affected traders operating within the national territory and provided that they affect in the same manner, in law and in act, the marketing of domestic products and of those from other Member States», because such selling arrangements did not hinder intra-Community trade³²⁷. The term 'certain selling arrangements' has been held to cover a prohibition of advertising outside of pharmacies³²⁸, rules on shop opening hours and Sunday trading³²⁹, legislation reserving the sale of baby milk to pharmacies³³⁰, the exclusion of the distribution sector from televised advertising³³¹, provisions on the sale of products at extremely small profit margins³³² and legislation reserving the retail sale of manufactured tobacco products to authorized distributors³³³.

While *Keck* limited the field of application of Art. 28 EC, the earlier *Cassis de Dijon*-case³³⁴ restricted the interpretation of the *Dassonville*-formula by the introduction of a rule of reason³³⁵. In this judgement, the Court held that certain measures, even though within the *Dassonville*-formula, were not caught by Art. 28 EC, provided that there are no common rules and that the national provisions are indistinctly applicable, necessary in order to meet mandatory requirements and proportionate to the aim envisaged³³⁶. The judgement mentions the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer as examples for mandatory requirements³³⁷. Moreover, *Cassis de Dijon* established the principle

³²⁵ Case 8/74.

³²⁶ Joined Cases C-267 and 268/91; FAULL NIKPAY, p. 303; QUITZOW, p. 174.

³²⁷ Joined Cases C-267-268/91, para. 16; QUITZOW, p. 174; KAPTEYN/ VERLOREN VAN THEMAAT, p. 632.

³²⁸ Case C-292/92.

³²⁹ S. e.g. Joined Cases C-401-402/92; Joined Cases C-69/93 and C-258/93.

³³⁰ Case C-391/92.

³³¹ Case C-412/93; Joined Cases C34-36/95.

³³² Case C-63/94.

³³³ Case C-387/93.

³³⁴ Case 120/78.

³³⁵ HEINEMANN, pp. 88-89; HÖDL, pp. 88-90; KAPTEYN/VERLOREN VAN THEMAAT, p. 627.

³³⁶ HEINEMANN, pp. 88-89; STEINER/WOODS, pp. 157-158.

³³⁷ Case 120/78.

of mutual recognition, according to which products that have been lawfully produced and marketed in one Member State must in principle be allowed to circulate freely within the common market³³⁸.

3.4.3. Are Systembolaget's exclusive rights a 'certain selling arrangement'?

When examining the compatibility of Systembolaget's exclusive rights with Art. 28 EC, the first question to ask is whether or not these exclusive rights fall within the scope of that provision at all. In particular, it may be argued that the grant of exclusive retail sales rights to Systembolaget constitutes a 'certain selling arrangement' within the meaning of the *Keck*-judgement³³⁹.

As was explained above, the Swedish statutory system on the retail sale of alcohol must be considered discriminatory in fact since it precludes traders established in other Member States from offering their products to Systembolaget and reinforces the strong market position of domestic products³⁴⁰. Systembolaget's monopoly does not therefore constitute a 'certain selling arrangement' within the meaning of the *Keck* judgement.

Even if the Swedish rules were not found to be discriminatory, however, they would not escape the application of Art. 28 EC. To my mind, *Keck* cannot be interpreted as granting an automatic clearance to all non-discriminatory selling arrangements. In paras. 16 and 17 of the judgement, the Court stated that the reason for exempting certain selling arrangements from the application of Art. 28 EC was because they were not apt to hinder intra-Community trade. According to Advocate General Elmer, the Court thereby «merely established that the purpose of Article [28 EC] is to prohibit obstacles to the free movement of goods throughout the common market and thereby to ensure that the products of one Member State have access to the market in other Member States³⁴¹.» By using the term 'certain selling arrangements', the Court implied that not all selling arrangements that do not discriminate against products from other Member States can escape the prohibition of Art. 28 EC³⁴². Consequently, selling arrangements that, contrary to the presumption in *Keck*, do impede the access of products from other Member States to a national market and thereby hinder intra-Community trade are still caught by Art. 28 EC, even if they are not discriminatory³⁴³. Because Systembolaget purchases its products centrally and is the only channel through

³³⁸ ERIKSSON, p. 16; HÖDL, pp. 92-93; KAPTEYN/VERLOREN VAN THEMAAT, pp. 627-628; STEINER/WOODS, p. 159.

³³⁹ Joined Cases C-267-268/91.

³⁴⁰ S. *supra*, IV. 3.3.4.

³⁴¹ Opinion of Advocate General Elmer in Case C-189/95, para. 57.

³⁴² *Ibidem*, para. 58; ERIKSSON, p. 60.

³⁴³ *Ibidem*. S. also Case C-323/93.

which spirits, wine and 'strong beer' can be sold to consumers, it is in a position to decide which of these products shall have access to the Swedish retail market³⁴⁴. If a product cannot be sold through Systembolaget, it will not have access to that market at all³⁴⁵. The Swedish rules therefore impede the access of goods from other Member States to the Swedish market and thereby hinder intra-Community trade. They do not therefore constitute a 'certain selling arrangement' within the meaning of *Keck* and are caught by the prohibition of Art. 28 EC.

3.4.4. The compatibility of Systembolaget's exclusive rights with Article 28 EC

The overriding objective of the Swedish alcohol policy is to limit the consumption of alcoholic beverages³⁴⁶. The limitation of the accessibility of such beverages, in particular by the existence and operation of a retail monopoly, is one of the fundamental features of this policy³⁴⁷. Consequently, the limitation of alcohol sales is one of the main purposes of Systembolaget's monopoly³⁴⁸.

The primary means to limit the accessibility of alcoholic beverages is the the existence of only a very limited number of points of sale³⁴⁹. As described above, Systembolaget operates a total of only 417 shops throughout Sweden, which corresponds to one shop per 1,079 km² and 21,374 inhabitants³⁵⁰. High prices, restrictions on opening hours³⁵¹ and the prohibition of selling spirits, wine and 'strong beer' to persons under the age of 20³⁵² limit the accessibility of alcoholic beverages even further³⁵³. As a result of these limitations and other measures, sales of alcoholic beverages are relatively low in Sweden³⁵⁴.

Moreover, the fact that Systembolaget selects and purchases its products centrally leads to a substantive limitation of the number of

³⁴⁴ Opinion of Advocate General Elmer in Case C-189/95, para. 86. The serving of alcoholic beverages in restaurants and bars must be considered to be a separate market; s. footnote 408.

³⁴⁵ *Ibidem*.

³⁴⁶ Proposition 1998/99:134, p. 42; Proposition 1994/95:89, p. 40; ERIKSSON, pp. 2-3.

³⁴⁷ *Ibidem*. Other features of the Swedish alcohol policy are high taxation, information and opinion-forming and treatment; s. *ibidem*, p. 48.

³⁴⁸ Opinion of Advocate General Elmer in Case C-189/95, para. 74.

³⁴⁹ Proposition 1998/99:134, p. 32.

³⁵⁰ S. *supra*, III. 6.3.2.2.

³⁵¹ Art. 11 of the agreement between Systembolaget AB and the Swedish State (SFS 2001:852).

³⁵² Ch. 3 art. 8, para. 1 AL.

³⁵³ Proposition 1998/99:134, p. 32.

³⁵⁴ In the year 2001 the *per capita* sales of alcoholic beverages (converted into pure alcohol) were 4.9 litres in Sweden, 7.5 litres in Italy, 9.5 litres in Denmark, 10.5 litres in Germany and 10.5 litres in France; s. Systembolaget's sales statistics for 2001, p. 13.

alcoholic beverages that are available in the shops. This limitation has even been reinforced with the introduction of a new selection procedure³⁵⁵ and the conversion of over-the-counter shops into space craving self-service shops. An average-sized shop now only stocks half as many different products as before the introduction of these measures³⁵⁶. Systembolaget has defended these measures with arguments of profitability: from an economic point of view, it made sense only to keep the 'big sellers' in the shops³⁵⁷. In an interview with the Swedish newspaper Svenska Dagbladet the head of Systembolaget's purchasing department, Barbro Ström, compared the company's new policy with that of other retail chains: «All successful retailers control their assortment centrally. Do you think that a shop manager at Hennes & Mauritz can decide themselves what products they want to sell³⁵⁸?» Systembolaget also pointed out that its overall product range has not been affected by these measures; all products are still available to order³⁵⁹. These arguments can, however, not successfully be invoked as a defence for Systembolaget's new product policy. While the concentration on 'big sellers' is a legitimate measure on a free market, the situation is fundamentally different in the case of a monopoly. The refusal of one retailer to sell a particular product does not have the effect of barring the access to the market in a situation where there is free competition while it does have this effect on a monopoly market. As to the possibility to order off-mainstream products, this can in my view not be seen to be a real alternative to the availability of such products in the shops. Products stocked in a shop are much more easily accessible for customers than products that have to be ordered. Whenever there are alternative products immediately available in the shop, customers will generally not bother to order one particular product and to pick it up at a later date but will choose the immediately available product instead³⁶⁰.

In my view, each of these measures, the limitation of the points of sale, the centralization of purchases and Systembolaget's product policy, would be sufficient on its own to bring Swedish rules related to Systembolaget's monopoly within the *Dassonville*-formula³⁶¹. With respect to the latter two measures, this view has been confirmed by the ECJ in *Banchero*³⁶² and in *Terminal Equipment*.³⁶³ In *Banchero*,

³⁵⁵ S. *supra*, III. 6.3.2.3.4.

³⁵⁶ Ibidem; «Systembolaget bantar utbudet», Aftonbladet of 2001/08/05.

³⁵⁷ «Styrt sortiment ska ge lönsamhet», DN of 2001/08/07.

³⁵⁸ «Systemet kapar rejält i sortimentet», SvD of 2001/08/05.

³⁵⁹ «Systembolaget bantar utbudet», Aftonbladet of 2001/08/05. Between 1994 and 2001 the total number of products (including those listed in the 'by order'-assortment) has increased by almost 400 per cent; s. ibidem.

³⁶⁰ S. also *supra*, IV. 3.3.4.

³⁶¹ Case 8/74.

³⁶² Case C-387/93.

³⁶³ Case C-202/88.

the Court implicitly suggested that a centralization of the purchases for the retail market as it is exercised by Systembolaget would be caught by Art. 28 EC³⁶⁴. In *Terminal Equipment*, it declared a French marketing monopoly for telecommunications equipment incompatible with Art. 28 EC because it found that there was «no certainty that the holder of the monopoly can offer the entire range of models available on the market»³⁶⁵. This finding of the Court must be true *a fortiori* for alcoholic beverages, where the range of products that can be found on the market is much wider³⁶⁶.

3.4.5. Justification

Measures which fall within the *Dassonville*-formula³⁶⁷ can escape the prohibition of Art. 28 EC if they are justified under the rule of reason established in *Cassis de Dijon*³⁶⁸ or the exceptions laid down in Art. 30 EC. While the rule of reason can only be invoked with respect to indistinctly applicable measures, Art. 30 EC also applies to overtly discriminating measures³⁶⁹. Since the possibilities of justification under the rule of reason are wider than those under Art. 30 EC, only the former will generally have to be applied to indistinctly applicable measures³⁷⁰.

The Swedish rules on the retail sale of alcoholic beverages govern a field which is not regulated by Community legislation. They are indistinctly applicable and have as their objective the protection of public health. The rule of reason is therefore in principle applicable. However, they can by no means be considered to be proportionate to the aim envisaged. If the aim of these rules is to limit the detrimental effects of the consumption of alcoholic beverages on public health, it may be questioned whether they are at all appropriate to achieve this aim. In a recent proposal for an amendment of the legislation on alcohol, the Swedish government has acknowledged that only half of the spirits that are consumed in Sweden have been purchased at Systembolaget or in restaurants³⁷¹. The share of illegally produced or sold spirits was deemed to be approximately 35 per cent of the total consumption of spirits³⁷². These estimations were confirmed in a study carried out at the Centre for Social Research on Alcohol and Drugs at Stockholm University in 2002³⁷³.

³⁶⁴ Case C-387/93, para. 30; Opinion of Advocate General Elmer in Case C-189/95, para. 82; s. also *supra*, IV. 3.3.4.

³⁶⁵ Case C-202/88, paras. 35-36.

³⁶⁶ Opinion of Advocate General Elmer in Case C-189/95, para. 87.

³⁶⁷ Case 8/74.

³⁶⁸ Case 120/78.

³⁶⁹ KAPTEYN/VERLOREN VAN THEMAAT, p. 627.

³⁷⁰ STEINER/WOODS, p. 171.

³⁷¹ Proposition 1998/99:134, p. 143.

³⁷² *Ibidem*.

³⁷³ LEIFMAN/TROLLDAL, p. 13.

estimated the total *per capita*³⁷⁴ consumption of alcohol in 2001 to be 9.2 litres of pure alcohol, which is almost twice the amount of the official sales figures³⁷⁵. Moreover, a considerable percentage of the spirits consumed in Sweden are either smuggled or home-distilled³⁷⁶.

The effects of such illegally produced or sold spirits on public health must be considered to be at least potentially far more injurious than those of 'legal' spirits. Moreover, if the amount of 'illegal' spirits is taken into consideration, the total consumption of spirits in Sweden would equal or surpass the consumption of alcoholic beverages in other European countries where they are freely available in grocery shops³⁷⁷. Even if these measures were considered to be appropriate, however, they would still not be proportionate because their aim can be achieved by less restrictive means. In particular, it is not necessary to reserve the retail sales of alcoholic beverages to a State monopoly in order to limit the availability of alcoholic beverages and to ensure that such sales are carried out in a socially responsible manner³⁷⁸. It is hard to see why the same aim could not be achieved by a licence system, in which a limited number of privately owned shops would be authorized to sell alcoholic beverages subject to the same restrictions that today apply to Systembolaget, but which would be able to purchase their supplies independently³⁷⁹.

The application of Art. 30 EC to the Swedish rules would not lead to a different outcome. As every exception, Art. 30 EC is interpreted by the Court in a narrow manner³⁸⁰. In particular, the Court has held that a measure can only be justified under Art. 30 EC if it is necessary to achieve the envisaged aim and proportionate to its purpose³⁸¹. That the Swedish rules would not stand such a test of proportionality has been shown above.

³⁷⁴ Persons aged 15 and older.

³⁷⁵ LEIFMAN/TROLLDAL, p. 3.

³⁷⁶ LEIFMAN/TROLLDAL, p. 13.

³⁷⁷ According to LEIFMAN/TROLLDAL, the total *per capita* (persons aged 15 or older) consumption of alcohol in Sweden was 9.2 litres of pure alcohol in 2001; LEIFMAN/TROLLDAL, p. 13. In the same year, the legal *per capita* (persons aged 15 or older) sales of alcohol were 9.5 litres in Denmark, 10.5 litres in Germany and France and 7.5 litres in Italy; s. Systembolaget's sales statistics for 2001, p. 13.

³⁷⁸ Opinion of Advocate General Elmer in Case C-189/95, para. 116.

³⁷⁹ Ibidem; PEHRSON/WAHL, p. 841.

³⁸⁰ KAPTEYN/VERLOREN VAN THEMAAT, p. 653, with further references; STEINER/WOODS, p. 172.

³⁸¹ E.g. Case 104/75; Case 124/81; Case 42/82; Case 155/82; Case 261/85; KAPTEYN/VERLOREN VAN THEMAAT, p. 656; STEINER/WOODS, p. 172.

4. Community Rules on Competition

4.1. General remarks

The ECJ did not apply the Community rules on competition in *Franzén*³⁸². This is of course mainly due to the fact that the Swedish court did not ask for an interpretation of these rules in its reference to the ECJ³⁸³. However, it is clear that the competition rules are in principle applicable to the activities of Systembolaget. These activities will therefore be examined hereafter under Art. 82 and 86 EC. Art. 81 EC, which only plays a marginal role in relation to State monopolies³⁸⁴, will not be considered.

4.2. Articles 82 and 86 EC

Art. 82 EC prohibits the abuse of a dominant position held by one or more undertakings, insofar as such abuse is liable to have an effect on intra-Community trade and the dominant position is held in at least a substantial part of the common market. In principle, any behaviour that fulfills these criteria is caught by the prohibition in Art. 82 EC; a *de minimis* rule does not exist³⁸⁵. The Commission may, however, refrain from imposing a fine on the infringing undertaking if the element of abuse or the effect on intra-Community trade are only minimal³⁸⁶.

Art. 82 EC is addressed to undertakings, not to Member States. However, the ECJ has defined the concept of an undertaking as «any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed³⁸⁷.» This also encompasses publicly owned undertakings³⁸⁸. Whenever Member States are engaged in an economic activity, they are therefore obliged to observe the prohibition of Art. 82 EC³⁸⁹.

The applicability of Art. 82 EC to activities of Member States also follows from the general loyalty obligation of the Member States laid down in Art. 10 EC³⁹⁰. In *Inno/ATAB*, the Court held that Art. 10 EC in combination with Art. 3 (g), Art. 81 and Art. 82 EC prevented Member States from adopting measures that could deprive the competition

³⁸² Case C-189/95.

³⁸³ *Ibidem*, para. 29.

³⁸⁴ BUENDIA SIERRA, pp. 189-190; HEINEMANN, pp. 153-154.

³⁸⁵ IMMENGA/MESTMÄCKER, p. 723.

³⁸⁶ *Ibidem*.

³⁸⁷ Case C-41/90, para. 21; Case C-244/94, para. 14; Case C-35/95, para. 49; Case 55/96, para. 21.

³⁸⁸ FAULL/NIKPAY, p. 273; IMMENGA/MESTMÄCKER, p. 687.

³⁸⁹ IMMENGA/MESTMÄCKER, p. 687.

³⁹⁰ FAULL/NIKPAY, p. 274; HEINEMANN, p. 147; IMMENGA/MESTMÄCKER, pp. 1528-1529.

rules of their *effet utile*³⁹¹. Where such measures involve the existence or operation of public or privileged undertakings, this principle is specified in Art. 86 EC³⁹². Art. 86 (1) prohibits Member States from enacting or maintaining in force any measure related to such undertakings which is contrary to the Treaty rules, particularly to Art. 12 and 81 to 89 EC. This prohibition applies to all acts that prescribe, favour or make inevitable anti-competitive behaviour of undertakings or delegate the power to adopt such acts to private bodies³⁹³. The form in which these acts have been adopted is irrelevant; what matters is whether their function is «to regulate the market place from the perspective of the public interest»³⁹⁴. Art. 86 (2) EC contains a (relatively narrow) exemption for services of general economic interest and revenue-producing monopolies³⁹⁵. Art. 86 (3) EC finally lays down procedural rules for the application of Art. 86 (1) and (2) EC³⁹⁶.

4.3. *The compatibility of Systembolaget's exclusive rights with Articles 82 and 86 EC*

In order for a Member State to infringe Art. 86 (1) in conjunction with Art. 82, two main conditions must be met³⁹⁷: Firstly, there must be an abuse of a dominant position by an undertaking³⁹⁸. Secondly, the undertaking in question must be a public or privileged one and the abuse must have been prescribed, favoured or made inevitable by a measure enacted or maintained by the Member State or made possible through a delegation of powers to a private body by that State³⁹⁹.

4.3.1. Dominant position

Systembolaget is constituted as a limited company and thereby clearly qualifies as an entity⁴⁰⁰. It is engaged in the retail trade in alcoholic beverages and thereby pursues an economic activity⁴⁰¹. Systembolaget therefore constitutes an undertaking within the definition of the ECJ⁴⁰².

³⁹¹ Case 13/77, paras. 31-33; s. FAULL/NIKPAY, p. 275.

³⁹² GOYDER, pp. 531-532; HEINEMANN, pp. 50, 55 and 147; IMMENGA/MESTMÄCKER, p. 1528.

³⁹³ HEINEMANN, p. 148, with further references.

³⁹⁴ FAULL/NIKPAY, p. 287.

³⁹⁵ FAULL/NIKPAY, p. 312; GOYDER, p. 532.

³⁹⁶ FAULL/NIKPAY, p. 322; HEINEMANN, pp. 151-152.

³⁹⁷ HEINEMANN, p. 148.

³⁹⁸ *Ibidem*.

³⁹⁹ *Ibidem*, p. 149.

⁴⁰⁰ Ch. 5 art. 1, para. 1 AL and art. 1 of the agreement between Systembolaget AB and the Swedish State (SFS 2001:852).

⁴⁰¹ Ch. 5 art. 1, para. 1 AL in connection with art. 2 of the agreement between Systembolaget AB and the Swedish State (SFS 2001:852); Case 118/85, para. 7.

⁴⁰² S. *supra*, IV. 4.2.; Case C-41/90, para. 21; Case C-244/94, para. 14; Case C-35/95, para. 49; Case 55/96, para. 21.

Dominance has been defined by the ECJ as «a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers⁴⁰³.» In determining whether an undertaking holds a dominant position, it is therefore necessary to identify the relevant market and to assess the undertaking's position on that market⁴⁰⁴.

The main criterion when establishing the relevant product market is interchangeability or substitutability⁴⁰⁵. Whether two products are interchangeable is to be determined from the view of the customers and with respect to the products' characteristics, prices and intended use⁴⁰⁶. This is usually done by applying a so-called cross-elasticity test: If products A and B are intended for the same use and a permanent price increase of 5-10 per cent for product A would induce a significant percentage of consumers to shift to product B, the products are presumed to be interchangeable⁴⁰⁷.

Alcoholic beverages are sold to consumers through two different channels: retail trade in shops on the one hand and sales in restaurants and bars ('serving') on the other. The reasons for which alcoholic beverages are purchased differ considerably between these two ways of sale⁴⁰⁸. It is unlikely that a small increase of the prices for alcoholic beverages in shops would induce many consumers to buy these beverages in restaurants and bars instead. The retail market for alcoholic beverages sold in shops is therefore separate from the one for alcoholic beverages served in restaurants and bars. With regard to the Swedish alcohol monopoly, only the former is of interest.

The retail market for alcoholic beverages sold in shops must in turn be divided into several different product markets. Spirits must in my view clearly be considered not to be substitutable by other goods and are therefore not part of the same market as other alcoholic

⁴⁰³ Case 27/76.

⁴⁰⁴ FAULL/NIKPAY, pp. 124-125; HEINEMANN, p. 155.

⁴⁰⁵ Section 6 of Form CO with respect to Regulation (EEC) No. 4064/89 on the control of concentrations having a Community dimension; FAULL/NIKPAY, p. 45; IMMENGA/MESTMÄCKER, p. 696.

⁴⁰⁶ Ibidem.

⁴⁰⁷ Art. 17 of Commission Notice on the definition of relevant market for the purposes of Community competition law ([1997] OJ C 372/03, pp. 5-13); FAULL/NIKPAY, p. 46-47; IMMENGA/MESTMÄCKER, p. 696.

⁴⁰⁸ Alcoholic beverages purchased in shops are usually consumed at home, either alone or in smaller companies, often accompanied by food. The beverages are mostly consumed in order to enjoy their taste rather than for social reasons. With alcoholic beverages purchased in restaurants and (even more so) in bars, the social element tends to be much more important. Beverages are often consumed for social reasons rather than for their taste.

beverages. As to beer and wine, it may be noted that the ECJ has stated on several occasions that the existence of a competitive relationship between these two product categories cannot be excluded⁴⁰⁹. Moreover, in recent cases concerning the Norwegian retail monopoly for alcohol the EFTA court has affirmed that a competitive relationship between wine in its lightest and cheapest varieties, medium-strength beer and so-called alcopops existed to a sufficient extent in order for Art. 16 EEA (which corresponds to Art. 31 EC) to apply⁴¹⁰. The existence of a certain competitive relationship between two products does, however, not necessarily imply the interchangeability of these products. In order for Art. 16 EEA to apply, it is sufficient that two products are «to some extent capable of meeting the same consumer needs»⁴¹¹. A merely limited interchangeability of products is, however, not sufficient for two products to be part of the same product market⁴¹². If the cross-elasticity test⁴¹³ is applied, the question whether light wine, medium-strength beer and alcopops are interchangeable must be answered in the negative. It may be true that these beverages are to a certain degree purchased and consumed for the same purposes. Considering the significant differences in taste between any two of these product categories, however, I find it highly unlikely that many consumers would, for example, shift to beer or alcopops if the prices for light wine were raised by 5-10 per cent. Moreover, it must be borne in mind that the ECJ tends to define the relevant product market in a very narrow way⁴¹⁴. Accordingly, wine, even of the lightest and cheapest varieties, beer and alcopops cannot be considered to form part of the same product market. For the same reasons, there is in my view no interchangeability of low-alcoholic beer⁴¹⁵ and 'strong beer'⁴¹⁶.

With respect to alcoholic beverages sold in shops by way of retail, at least five different relevant product markets can be identified:

- spirits;
- wine;
- alcopops;
- beer with an alcohol content of more than 3.5 per cent by volume;
and
- beer with an alcohol content of up to 3.5 per cent by volume.

⁴⁰⁹ Case 170/78; Joined Cases 124/76 and 20/77; Case 152/78.

⁴¹⁰ Case E-1/97, para. 27; Case E-9/00, para. 39.

⁴¹¹ Case E-1/97, para. 26; Case E-9/00, para. 38.

⁴¹² S. Case 322/81; Case T-30/89; Case T-83/91.

⁴¹³ S. *supra*, IV. 4.3.1.

⁴¹⁴ S. e.g. Case 27/76.

⁴¹⁵ I.e. beer with an alcohol content of up to 3.5 per cent by volume.

⁴¹⁶ I.e. beer with an alcohol content exceeding 3.5 per cent by volume. S. also ERIKSSON, p. 12.

Since all products that form part of the first four markets may be sold by retail only by Systembolaget, there is no need to examine whether these markets can be further narrowed down in order to determine whether Systembolaget holds a dominant position on these markets.

The relevant geographical market is defined as the area «in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas⁴¹⁷.» Systembolaget has a monopoly for the retail sale of spirits, wine and 'strong beer' within the territory of Sweden. The structure of competition within that territory is therefore homogeneous. Norway and Finland have reserved the retail sale of the aforesaid products to other monopoly undertakings⁴¹⁸, while no such monopoly exists in Denmark. The relevant geographical market is therefore identical with the territory of Sweden.

As a statutory monopoly for the retail sale of spirits, wine and 'strong beer', Systembolaget holds by definition a dominant position on the relevant market as defined above⁴¹⁹. The ECJ has held on numerous occasions that the area of one Member State will generally constitute a substantial part of the common market within the meaning of Art. 82 EC⁴²⁰. Systembolaget must therefore be held to have a dominant position on the markets for spirits, wine and 'strong beer' within a substantial part of the common market.

4.3.2. Abuse

The existence of a dominant position does not in itself infringe Art. 82 EC⁴²¹. It is only if a dominant position is abused that the prohibition in Art. 82 EC will apply⁴²². The concept of abuse is not defined in Art. 82 EC; however, para. 2 of the Article contains a non-exhaustive list of behaviours which are considered abusive. With respect to monopolies, Art. 82, para. 2 (b) EC has been of particular relevance in the case-law of the Court⁴²³. This provision gives the limitation of «production, markets or technical development to the detriment of consumers» as an example of an abusive behaviour.

⁴¹⁷ Section 6 of Form CO with respect to Regulation (EEC) No. 4064/89 on the control of concentrations having a Community dimension.

⁴¹⁸ The range of products whose sale is reserved to the monopoly undertakings varies slightly between Finland, Norway and Sweden. S. *supra*, III. 11.

⁴¹⁹ FAULL/NIKPAY, p. 136.

⁴²⁰ Case 322/81; Case C-18/88; Case C-260/89; Case C-41/90.

⁴²¹ FAULL/NIKPAY, p. 146; IMMENGA/MESTMÄCKER, pp. 721-722.

⁴²² *Ibidem*.

⁴²³ HEINEMANN, p. 164.

In *Höfner*⁴²⁴, the Court had to determine whether a German statutory monopoly for employment procurement was compatible with Art. 82 EC. The monopoly undertaking had been unable to meet the demand for services related to the recruitment of executives⁴²⁵. Even though the undertaking was found to have endeavoured to the best of its ability⁴²⁶, the Court held that its manifest failure «to satisfy the demand prevailing on the market» constituted a limitation of services and therefore an abuse of a dominant position⁴²⁷. Accordingly, State monopolies must be organized so as to ensure that they are in a position to meet the demand for their products or services⁴²⁸. This principle was further developed in *Merci*, where the Court held that a monopoly undertaking was abusing its dominant position by failing to use modern technology for the provision of its services⁴²⁹. This seems to imply that a monopoly undertaking must not only satisfy the demand but perform its activities in such a way that the quality of the products or services in question meets the legitimate expectations of its customers⁴³⁰.

The main overriding objective of the Swedish alcohol monopoly is the limitation of the consumption of alcoholic beverages⁴³¹. The existence of only a small number of points of sale has together with other factors led to a considerable limitation of the accessibility and thereby to a relatively low level of sales of alcoholic beverages in Sweden⁴³². This low level of sales does, however, not necessarily imply an equally low demand. A monopoly undertaking is in a position to act largely independently of the needs of its consumers⁴³³. Sales and demand do therefore not necessarily correlate on a monopolized market. In the case of the Swedish retail monopoly for alcoholic beverages, there is in fact evidence to support the assumption that the actual demand for alcoholic beverages is considerably higher than Systembolaget's sales. First of all, the fact that the Swedish government repeatedly stresses the connection between a limited accessibility and a low level of sales leads to the natural presumption that the level of sales would be higher if alcoholic beverages were more easily accessible⁴³⁴. The fact that the sales of alcoholic beverages are only about half as high in Sweden as in Denmark also supports this

⁴²⁴ Case C-41/90.

⁴²⁵ Opinion of Advocate General Jacobs in Case C-41/90, paras. 44-45.

⁴²⁶ *Ibidem*, para. 45.

⁴²⁷ Case C-41/90, para. 31.

⁴²⁸ HEINEMANN, p. 165.

⁴²⁹ Case C-179/90, para. 19.

⁴³⁰ HEINEMANN, pp. 165-166.

⁴³¹ *S. supra*, IV. 3.4.4.

⁴³² *Ibidem*.

⁴³³ *S. supra*, IV. 4.3.

⁴³⁴ *Ibidem*; s. also the Opinion of Advocate General Elmer in Case C-189/95, para. 78.

presumption⁴³⁵. Finally, the Swedish government estimates that only 50 per cent of the spirits consumed in Sweden are actually purchased through Systembolaget or restaurants; the remaining half is either produced or sold illegally or imported from other countries⁴³⁶.

To my mind, these facts clearly show that Systembolaget only partially satisfies the demand for alcoholic beverages in Sweden. Moreover, it could be argued that the quality of Systembolaget's assortment does not meet the legitimate expectations of its customers due to the fact that only a very limited number of big-selling products is available in smaller shops. Accordingly, Systembolaget is not in a position to meet the demand for alcoholic beverages and therefore abuses its dominant position by limiting its services.

4.3.3. Effect on trade between Member States

An abuse of a dominant position is considered to affect intra-Community trade if it is liable to have an influence on the pattern of trade in goods or services between Member States⁴³⁷. Neither does this influence have to be a harmful or negative one nor is it necessary to establish that intra-Community trade is actually affected; a potential effect is sufficient⁴³⁸. As was shown above, the fact that Systembolaget only operates a very limited number of points of sale leads to a reduction of the sales of alcoholic beverages in Sweden. If the number of the shops corresponded to the actual demand, these sales are likely to be considerably higher. Consequently, suppliers of alcoholic beverages from other Member States would be able to sell more of their products on the Swedish market. The limitation of its services by Systembolaget therefore has an actual and direct effect on trade between Member States.

4.3.4. Public undertaking

Under Commission Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings, the term 'public undertaking' is defined as encompassing «[a]ny undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein or the rules which govern it⁴³⁹.» Even though this definition is only valid for the field of application of the transparency regulation, it can at least serve as a guideline for the

⁴³⁵ In 2001 the *per capita* consumption of alcohol was 4.9 litres of pure alcohol in Sweden and 9.5 litres in Denmark; s. Systembolaget's sales statistics for 2001, p. 13.

⁴³⁶ Proposition 1998/99:134, p. 143.

⁴³⁷ FAULL/NIKPAY, pp. 97 and 198.

⁴³⁸ FAULL/NIKPAY, p. 97.

⁴³⁹ Art. 2 of Commission Directive 80/723/EEC, OJ 1980 L 195, p. 35.

interpretation of the term ‘public undertaking’ within the meaning of Art. 86 (1) EC⁴⁴⁰.

In that the Swedish State fully owns Systembolaget and controls its activities both by virtue of its ownership and of legal provisions, Systembolaget is a public undertaking within the meaning of Art. 86 (1) EC.

4.3.5. Measure contrary to the Treaty rules

As was explained above, the measures prohibited by Art. 86 (1) EC include all acts that prescribe, favour or make inevitable anti-competitive behaviour of undertakings or delegate the power to adopt such acts to private bodies⁴⁴¹. In *Höfner*, the Court held that a Member State is in breach of Art. 86 (1) if, by the grant of an exclusive right, it has created a situation where the undertaking in question cannot avoid abusing its dominant position, merely by exercising its exclusive right⁴⁴². This was held to be the case where a Member State reserves an activity to an undertaking which is not in a position to satisfy the demand prevailing on the market⁴⁴³.

Systembolaget is unable to meet the demand for alcoholic beverages. First of all, it must be remembered that the main reason for the existence of Systembolaget is the desire of the Swedish government to limit the sales of alcoholic beverages⁴⁴⁴. The compliance with this desire is ensured by the 100 per cent ownership of Systembolaget by the Swedish State. The full satisfaction of (quantitative) consumer demand can therefore not even be one of Systembolaget’s aims. Even if it were, however, it would hardly be possible for one single undertaking to set up a sufficiently large network of shops to meet the quantitative demand for alcoholic beverages. Not only would such a project require enormous resources as to both staff and finances, but also is it necessary to consult the parish council and the police authority before the establishment of every shop; the opening of a new shop is therefore also a highly political question⁴⁴⁵.

Systembolaget is therefore in a position where, merely by exercising its exclusive right, it cannot avoid abusing its dominant position. The Swedish State has created this situation by the grant of the exclusive

⁴⁴⁰ ERIKSSON, p. 11; GOYDER, pp. 532-533; HEINEMANN, p. 78; SAVIA, pp. 217-218.

⁴⁴¹ *S. supra*, IV. 4.2.

⁴⁴² Case C-41/90, para. 29.

⁴⁴³ *Ibidem*, para. 31; FAULL/NIKPAY, p. 294.

⁴⁴⁴ *S. supra*, IV. 3.4.4.

⁴⁴⁵ Art. 10 of the contract between Systembolaget AB and the Swedish State (SFS 2001:852).

right and the imposition of restrictive rules on Systembolaget's operation and has thereby breached Art. 86 (1) EC.

4.3.6. Justification

A measure that falls within the prohibition of Art. 86 (1) EC may be exempted under Art. 86 (2) EC for reasons of public interest. The possibility of exemption applies to undertakings entrusted with the operation of services of general economic interest and to revenue-producing monopolies, but only insofar as the application of Community law would obstruct the performance of the tasks of such undertakings⁴⁴⁶. Moreover, the operation of such undertakings must not affect the development of trade to such an extent that it would be contrary to Community interests⁴⁴⁷.

The Court has so far avoided to provide a general definition of the concept of services of a general economic interest⁴⁴⁸. Clearly the concept encompasses economic activities whose operation is in the interest of the general public⁴⁴⁹. Moreover, it is generally agreed upon that it is not limited to services within the meaning of Art. 49 EC but also includes the production and distribution of goods⁴⁵⁰. As to the question of what services are to be regarded as being of a general interest, the Court has held that the interpretation of this term is not left to the Member States⁴⁵¹. Services that have been considered to be of a general interest by the Court or the Commission include public utility undertakings such as water authorities⁴⁵², post monopolies⁴⁵³, energy undertakings⁴⁵⁴ and employment procurement monopolies⁴⁵⁵. On the other hand, the Court has denied the existence of a general interest with respect to a monopoly for the trade in telecommunications equipment⁴⁵⁶ and to a monopoly for the operation of harbours⁴⁵⁷. In the light of this case-law, it appears that the Court is only willing to accept the existence of a general interest where the general public has a direct benefit from the activities in question in that these activities ensure the supply of essential goods or services⁴⁵⁸. A typical example for this would be the operation of a post monopoly which is obliged to deliver mail at a standard rate within the

⁴⁴⁶ Art. 86 (2), sentence 1 EC.

⁴⁴⁷ Art. 86 (2), sentence 2 EC.

⁴⁴⁸ SAVIA, p. 229.

⁴⁴⁹ IMMENGA/MESTMÄCKER, p. 1591; SAVIA, p. 230.

⁴⁵⁰ HEINEMANN, p. 176; IMMENGA/MESTMÄCKER, p. 1591; SAVIA, p. 228.

⁴⁵¹ Case 41/83, para. 30.

⁴⁵² Commission Decision 82/371.

⁴⁵³ Case C-320/91, para. 15.

⁴⁵⁴ Case C-393/92, para. 48.

⁴⁵⁵ Case C-41/90, para. 24.

⁴⁵⁶ Case C-18/88, para. 16.

⁴⁵⁷ Case C-179/90, para. 27.

⁴⁵⁸ Opinion on Advocate General van Gerven in Case C-179/90, para. 27. S. also IMMENGA/MESTMÄCKER, p. 1593.

entire territory of a State, even if such deliveries may in certain cases be uneconomic⁴⁵⁹.

Art. 86 (2) EC is also applicable to undertakings that have the character of a revenue-producing monopoly. A monopoly is revenue-producing if its purpose is to secure a specific source of income for the State (*mission fiscale*)⁴⁶⁰. An obligation to transfer its profits to the State is not sufficient⁴⁶¹. It is only where the exclusive right has been granted solely for fiscal reasons that an undertaking will be considered a revenue-producing monopoly⁴⁶².

To my mind, Systembolaget does not fall within either of these two categories of undertakings. Since its main purpose is not the generation of revenues but the limitation of the sales of alcoholic beverages, it does not have the character of a revenue-producing monopoly. Systembolaget is not entrusted with the operation of a service of general interest either. Alcoholic beverages cannot be objectively qualified as goods which are essential to the general public. Moreover, the overriding purpose of Systembolaget is not the best possible supply of alcoholic beverages (which could probably be done more effectively by a multitude of competing undertakings), but on the contrary the limitation of such supply.

The grant of the exclusive right to carry out retail sales of alcoholic beverages to Systembolaget by the Swedish State cannot therefore escape the prohibition of Art. 86 (1) EC.

⁴⁵⁹ Case C-320/91, para. 15.

⁴⁶⁰ HEINEMANN, pp. 180-181; IMMENGA/MESTMÄCKER, pp. 1588-1589; SAVIA, p. 232.

⁴⁶¹ HEINEMANN, p. 181; SAVIA, p. 232.

⁴⁶² HEINEMANN, p. 181; SAVIA, p. 233; IMMENGA/MESTMÄCKER, p. 1589.

V. The Swedish Alcohol Policy - Possible Alternatives

1. The Current Swedish Policy on Alcohol

Sweden has traditionally pursued a restrictive policy on alcohol⁴⁶³. The current policy is based on a balance between high taxation, restrictions, information and opinion-forming as well as treatment⁴⁶⁴. The overriding aim of this policy is to limit the total consumption of alcohol and thereby to reduce alcohol abuse and the harmful effects connected therewith⁴⁶⁵. The retail monopoly for alcoholic beverages exercised by Systembolaget is one of the centrepieces of this policy⁴⁶⁶. The existence of only a very limited number of shops leads to a considerable limitation of the availability and, eventually, to a reduction of the consumption of alcoholic beverages⁴⁶⁷.

At first sight, this policy appears to be fairly successful. In 1976, the year before the current policy was introduced, the *per capita*⁴⁶⁸ sale of alcoholic beverages was 7.7 litres of pure alcohol⁴⁶⁹ - by 2001 sales were down to 4.9 litres *per capita*, which is considerably below the figures of most other western European countries⁴⁷⁰. Moreover, Sweden has a relatively low mortality from alcohol-related diseases such as liver cirrhosis⁴⁷¹. A closer analysis, however, sheds a somewhat different light on the effectiveness of the Swedish alcohol policy. A study carried out by researchers at the Centre for Social Research on Alcohol and Drugs (SoRAD) at Stockholm University estimated the total *per capita*⁴⁷² consumption of alcohol in 2001 to be 9.2 litres of pure alcohol, which is almost twice the amount of the official sales figures⁴⁷³. Moreover, a considerable percentage of the

⁴⁶³ Proposition 1994/95:89, p. 48. S. also *supra*, II.

⁴⁶⁴ *Ibidem*.

⁴⁶⁵ Proposition 1998/99:134, p. 32.

⁴⁶⁶ Proposition 1998/99:134, pp. 32 and 83-84.

⁴⁶⁷ S. *supra*, IV. 3.4.4.

⁴⁶⁸ Persons aged 15 and older.

⁴⁶⁹ Proposition 1998/99:134, p. 42.

⁴⁷⁰ Systembolaget's sales report for 2001, p. 13.

⁴⁷¹ In 1996 the mortality rate for liver cirrhosis was 5.7 per 100,000 people in Sweden. In the same year, the rate was 14 for Denmark, 16.7 for France, 23.7 for Germany, 4.7 for Norway (figures for 1995) and 7.9 for the UK. S. WHO Statistics Annual, http://www3.who.int/whosis/menu.cfm?path=whosis,whsa,whsa_table1&language=english (2002/05/22, 11:41).

⁴⁷² Persons aged 15 and older.

⁴⁷³ LEIFMAN/TROLLDAL, p. 3.

spirits consumed in Sweden are either smuggled or home-distilled⁴⁷⁴. Apart from large consumers, such smuggled or home-distilled spirits appear to be particularly popular with adolescents, a group whose protection is one of the main goals of the Swedish policy⁴⁷⁵. In a survey from 1998, more than 50% of high school students in theoretical programmes and more than 70% of those in practical programmes stated that they had purchased or been invited to drink home-distilled spirits within the previous twelve months⁴⁷⁶.

Critics of the Swedish alcohol policy also raise doubts as to whether the accessibility and the total consumption of alcohol are really as closely connected as asserted by the Swedish government. In Québec, Ontario and New Zealand a drastic increase in the accessibility of alcoholic beverages had little or no effect on the total consumption, nor has the treplication of licenced restaurants in Sweden since 1980⁴⁷⁷. Moreover, the consumption of alcohol in Mediterranean countries such as Greece, Italy and Spain has decreased by 30 to 40 per cent between 1980 and the late 1990s, even though the accessibility of alcoholic beverages remained unaltered⁴⁷⁸. Critics also maintain that there is little connection between the level of prices and the overall consumption. A high level of prices, they maintain, either results in a high unregistered consumption (i.e. imported, smuggled or home-made beverages)⁴⁷⁹ or would merely induce consumers to switch to other, i.e. cheaper products⁴⁸⁰. Defenders of the high-pricing policy on the other hand assert that the number of alcohol-related diseases would not have decreased to the same extent if the high price levels had not lead to a reduction of the total consumption⁴⁸¹.

2. Possible alternatives

2.1. General Remarks

With its accession to the European Union on January 1, 1995, Sweden has become part of an integrated market. By 2004, Sweden will have to raise its limits for the personal importation of alcoholic beverages to EU standards, which means that up to 10 litres of spirits, 20 litres of intermediate products, 90 litres of wine and 110 litres of beer may be freely imported into Sweden from other Member

⁴⁷⁴ LEIFMAN/TROLLDAL, p. 13.

⁴⁷⁵ Proposition 1998/99:134, p. 131.

⁴⁷⁶ Proposition 1998/99:134, p. 50.

⁴⁷⁷ Proposition 1998/99:134, p. 33.

⁴⁷⁸ Ibidem.

⁴⁷⁹ Proposition 1998/99:134, p. 36.

⁴⁸⁰ ERIKSSON, p. 48.

⁴⁸¹ Proposition 1998/99:134, p. 36.

States⁴⁸². Moreover, the mobility of the Swedish population has dramatically increased over the past decades. Finally, and perhaps most importantly, there are serious doubts as to the compatibility of the Swedish alcohol policy with Community law. For these reasons it has become increasingly difficult for Sweden to maintain its restrictive policy on alcohol, which in many respects stands isolated within the European Union, with the exception of Finland⁴⁸³. In view of the continuing process of European integration and the ever-increasing mobility, external factors will have an even bigger influence on the alcohol consumption and drinking habits of Swedes in the future. It is therefore necessary to look for possible alternatives to the current Swedish alcohol policy which take these external factors into account.

2.2. *Necessity of State intervention*

First of all, it may of course be asked whether the State should at all have the duty or even the right to protect self-responsible individuals from their own acts. If an individual chooses to consume alcohol, tobacco or drugs, to take on excessive workloads or to sign overreaching contracts, is not this a decision that he should be allowed to make without the interference of the State? From a liberal point of view, the State should only limit the private autonomy of individuals where it is absolutely required. Insofar as an individual by his actions causes damage only to himself, it should not therefore be the duty of the State to protect him from the consequences of his own acts. However, it is important to remember that actions of individuals often have an effect not only on themselves but also on other people. The self-intoxication of a family father may cause greater harm to his wife and children than to himself. Moreover, the principle of private autonomy must clearly be limited with respect to individuals with only a limited ability to make self-responsible decisions. The protection of children, mentally handicapped people and people in need is one of the most important tasks of any social society.

The total absence of State activity in fields such as alcohol can therefore not be a practicable solution. While the State should not interfere with decisions of self-responsible individuals where such decisions only affect themselves, it must provide mechanisms to prevent adverse effects of such decisions on other people and to protect individuals who are in need of protection. Furthermore, it should help people to re-integrate into our society who are incapable of doing so out of their own forces, even if they have caused their distress by their own fault.

⁴⁸² S. *supra*, III. 4.2.

⁴⁸³ Proposition 1998/99:135, p. 83.

2.3. *Abolishment of the monopoly*

Apart from the complete absence of State intervention, a far-reaching liberalisation of the retail market for alcoholic beverages would be the most radical alternative to the current solution. The role of the State would be limited to preventive and re-integrative work, the protection of children and people in need, treatment and the setting up of a legal framework for the retailing of alcoholic beverages (age limits, marketing, sanitary requirements, etc.). Moreover, the State could still exercise a considerable amount of control over the prices for alcoholic beverages by means of taxation. Such a solution would not only be in line with EC law but also improve the supply of alcoholic beverages and the selection of products. Even off-mainstream products that would never find their way onto the shelves of Systembolaget, such as outstanding wines and rare single malts, could be established in niche-markets. On the other hand, the foreseeable dramatic improvement of accessibility is likely to lead to a certain increase of the total consumption of alcohol. In my view, however, it may be doubted whether this increase would be significant on the long run. In the last twenty years the number of licenced restaurants and bars in Sweden has increased by 200 per cent while the consumption of alcohol has remained stable⁴⁸⁴. Similar experiences have been made with the liberalisation of markets in other countries⁴⁸⁵.

However, such a far-reaching solution would in all likelihood not find a majority in the Swedish Parliament. Any attempts to liberalise the Swedish alcohol legislation have been highly disputed in the past. Even very moderate changes such as the extension of Systembolaget's opening hours or the possibility to pay alcoholic beverages with credit cards have been intensely debated⁴⁸⁶. A less radical alternative would therefore be to set up a system of independent outlets, which would have to obtain a licence from the State and would be subject to the same restrictions as Systembolaget is today⁴⁸⁷. Such a system would enable the State to control the accessibility of alcohol through the grant of licences, but still bring about a considerable improvement on the selection and supply side. Since these outlets would all be able to select their products independently, this system would not entail any particular obstacles to the free movement of goods⁴⁸⁸. It would also be compatible with the Community rules on competition since the products would be

⁴⁸⁴ Proposition 1998/99:134, p. 33.

⁴⁸⁵ Ibidem.

⁴⁸⁶ S. Proposition 1998/99:134 and Proposition 2000/01:97.

⁴⁸⁷ This solution is more or less identical with the one suggested by Advocate General Elmer in the *Franzén* case; s. Opinion of Advocate General Elmer in Case C-189/95, paras. 116-117.

⁴⁸⁸ Opinion of Advocate General Elmer in Case C-189/95, para. 116.

purchased and distributed not by a single operator but a multitude of independent undertakings.

2.4. *Transformation of the monopoly*

An even less far-reaching solution would be to maintain the retail monopoly, but to allow each of the shops to obtain their supplies independently. Popular products could still be purchased centrally in order to obtain better conditions, but shop managers would be free to decide which products they want to purchase. This solution would eliminate the existing conflicts with the Community rules on the free movement of goods. Moreover, it would bring a certain element of competition into the retail market for alcoholic beverages, even though the shops would still be operated by a single undertaking. However, if Systembolaget should be able to satisfy the demand of consumers (and thus to avoid abusing its dominant position), it would have to increase the number of its outlets dramatically. It may be doubted whether one single undertaking would be able to set up a sufficient number of outlets in a reasonably short period of time: while low-alcoholic beer can be bought in approximately 14,000 shops, other alcoholic beverages are only available in Systembolaget's 417 stores⁴⁸⁹. This solution would therefore in all likelihood not be compatible with the competition rules of the Treaty.

2.5. *Promotion of wine and beer*

A number of scientific studies support the assumption that wine and beer are much less harmful to health than spirits. In fact, a Danish study referred to in Advocate General Elmer's Opinion in the *Franzén* case came to the conclusion that a normal consumption of wine and beer did not have any adverse effects on health⁴⁹⁰. A light to moderate consumption of wine was even found to significantly reduce the risk of dying from all causes⁴⁹¹. The consumption of spirits, on the other hand, was found to increase the risk of death considerably⁴⁹². In addition to the measures suggested above, it would therefore be obvious to encourage consumers to drink wine and beer instead of spirits. This would also be in line with the aims of the Swedish alcohol policy⁴⁹³.

⁴⁸⁹ Statens Folkhälsoinstitut at http://212.209.152.178/komhand/folkol/_index.asp (2002/04/23, 09:53h); e-mail from Kajsa Riddersporre, market and communications department at Systembolaget of May 8, 2002.

⁴⁹⁰ GRØNBÆK ET AL., p. 2258; s. also Opinion of Advocate General Elmer in Case C-189/95, para. 113.

⁴⁹¹ Ibidem.

⁴⁹² Ibidem.

⁴⁹³ Proposition 1998/99:134, p. 31.

A shift from spirits to wine and beer could in particular be achieved by lowering the taxes on wine and beer while maintaining a high level of taxation for spirits. The price has been shown to be one of the decisive factors for the choice of alcoholic beverages: a high price for spirits will result in an increased consumption of wine and beer and a reduction of the consumption of spirits⁴⁹⁴. A further significant raise of the taxes on spirits on the other hand, could in my view be counterproductive, at least if the taxes on wine and beer were to remain on the same level, since this would lead to an increased consumption of smuggled or home-distilled alcohol⁴⁹⁵. Information campaigns and wine tastings could be an additional valuable tool to encourage consumers to change their drinking habits.

2.6. *Building up an alcohol culture*

The drinking habits of many Swedish consumers differ considerably from those in other countries. Especially in wine-drinking cultures such as the Mediterranean countries, alcohol tends to be consumed in order to enjoy its taste. Moreover, it is rather usual in many countries to consume alcohol on a regular basis, but in moderate amounts, e.g. to drink a glass of wine for lunch or dinner every day. Swedes in contrast typically only consume alcohol once or twice a week, but often to the degree of intoxication⁴⁹⁶. The main cause to drink is often not enjoyment but the intoxicating effect of alcoholic beverages.

One of the reason behind this drinking pattern might be the general notion prevailing in the Swedish society that the consumption of alcohol is *per se* a bad thing. Alcoholic beverages are generally rather associated with intoxication than with enjoyment and *savoir vivre*. The Swedish alcohol policy has not precisely contributed to a change of this view. The absence of any element of sensuality in Systembolaget's shops (the old over-the-counter shops have the atmosphere of pharmacies) even adds to the feeling that any alcohol consumption is inevitably an injurious act. Moreover, Systembolaget's new product policy, which has lead to a concentration on big-selling products, has done little to encourage its customers to consume products of a higher quality instead of mass goods. Amongst the products that have particularly been affected by this policy are quality wines. Of the 377 red wines that were available in the medium-sized shop at Kyrkgatan 92 in Östersund on April 4, 2002, only 37 were bottled wines in the price category over SEK 100.00⁴⁹⁷. The share of white wines in this category was even lower,

⁴⁹⁴ ERIKSSON, p. 48, with further reference.

⁴⁹⁵ *Ibidem*.

⁴⁹⁶ Proposition 1998/99:134, pp. 51-52.

⁴⁹⁷ Result of a search in Systembolaget's internet database at <http://www.systembolaget.se/svenska/varor/prislist/xindex.htm> (2002/04/04, 13:28h).

with only 11 out of 254 being bottled wines being priced over SEK 100.00⁴⁹⁸. Of the ten best selling wines in April 2002, none was even priced over SEK 60.00⁴⁹⁹. Moreover, all of them were available in so-called bag-in-box packages of three or even ten litres, which is not precisely an indication for outstanding quality.

In my view, the Swedish alcohol policy should aim at creating a more positive general notion of a light to moderate consumption of alcohol. Products which are generally not consumed for their intoxicating effect but for their taste, such as quality wines, should be associated with sensuality and lifestyle rather than intoxication. 'Drink to enjoy, not to get drunk' should be the message. If combined with information campaigns, a liberalisation of the retail market could in some ways contribute to a change of the Swedish drinking habits. In particular, it would allow the establishment of shops specialized in quality products, in which consumers would be able to choose and taste wine and other products in an atmosphere of *savoir vivre* and with the help of informed staff. Such shops exist in many European cities outside of Sweden. Other measures such as wine tastings could further help to improve the Swedes' knowledge about alcoholic beverages and induce them to drink more quality and less quantity.

⁴⁹⁸ Ibidem.

⁴⁹⁹ <http://www.systembolaget.se/svenska/stat/mantopp.htm> (2002/05/24, 13:21h).

VI. Conclusion

The compatibility of the Swedish alcohol monopoly remains a controversial issue. Even through the legality of the Swedish statutory rules was upheld by the ECJ in its *Franzén* judgement, the monopoly does not stand immune against further legal action. Firstly, *Franzén* must in my view be seen as a decision based solely on its particular facts. Not only did the Court deviate from its previous case-law regarding the applicability of Art. 28 EC on State monopolies of a commercial character without expressly stating so but also did the Court's approach differ fundamentally from the one it chose in the Energy Monopoly judgements, which were handed down on the very same day. Secondly, *Franzén* only dealt with questions regarding the free movement of goods. In particular, the Court did not make any statement as to the monopoly's compatibility with competition law. Thirdly, Systembolaget's new product policy, which has led to a considerable reduction of products available in the monopoly's shops, has significantly changed the factual circumstances on which *Franzén* was based.

In my view, Systembolaget's monopoly is contrary to EC law for the following reasons:

- By being the only lawful retailer of alcoholic beverages in Sweden, Systembolaget can in practice control the importation of such products just as effectively as an undertaking holding a (*per se* prohibited) import monopoly.
- Art. 31 EC requires the adjustment of monopolies in such a way that any possibility of discrimination is excluded. Contrary to this requirement, Systembolaget's selection criteria are highly discretionary. Moreover, traders established in other Member States are precluded from offering their products to Systembolaget.
- Systembolaget's product policy sets high hurdles for the establishment of new products on the market. The market position of already well-known products, many of which are Swedish, is thereby reinforced.
- The Swedish rules have both the aim and the effect to limit the sale of alcoholic beverages, in particular by limiting the number of points of sale. They must therefore be considered measures of an equivalent effect to quantitative restrictions within the meaning of Art. 28 EC. In that they are discriminatory in fact and hinder the access of products from other Member States to the Swedish market, these rules do not constitute a 'certain selling arrangement'. They cannot be justified under the rule of reason or under Art. 30 EC because their aims can be achieved by far less restrictive means.

- Systembolaget is not able to satisfy the quantitative and qualitative demand for alcoholic beverages in Sweden, nor is it Systembolaget's aim to do so. The Swedish rules leave Systembolaget in a situation where it cannot avoid infringing its dominant position. Systembolaget can neither be qualified as an undertaking entrusted with the operation of services of general economic interest nor as a revenue-producing monopoly. The exception of Art. 86 (2) EC does therefore not apply.

The incompatibility of Systembolaget's monopoly with EC law along with the increasing influence of other external factors suggests the need for a change of the Swedish policy on alcohol. The retail market for alcoholic beverages must therefore be liberalised, either by allowing such beverages to be freely sold or by introducing a system of independent licenced shops. Moreover, efforts should be made to change the drinking habits of the Swedish population. Consumers should be taught to appreciate quality products and to consume them for their taste, not their effect.

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