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# Swedish State Monopolies
## and their Compatibility with EC Law

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# Contents

# Summary

The principal rule of the common market is that goods and services are able to move freely across the borders of Member States. State monopolies in control of supply and demand are, therefore, only under exceptional circumstances compatible with the conditions of the common market.

The compatibility of Swedish State monopolies with EC law is a controversial matter. The case-law of the ECJ lets us know what the requirements are for maintaining such State monopolies. In the *Franzén* judgment, the ECJ clarified under what conditions a State monopoly on the retail of alcoholic beverages is acceptable. The Swedish rules relating to the existence and operation of the monopoly had, however, on the Commission's advice, already been adjusted to the conditions of the common market.

In its judgment, the Court paid special notice to the fact that there was an objective product plan for the beverages offered by Systembolaget, that beverages were selected on foreseeable and objective criteria, and that traders whose products were rejected, had a right to be told the reasons for the decision taken by the monopoly as well as given an opportunity to challenge such a decision before an independent board. In view of these circumstances, the ECJ held that the criteria and selection methods used by Systembolaget were neither discriminatory nor apt to put imported products at a disadvantage.

Having regard to the judgment in *Franzén*, one could expect that the monopoly on medicinal products, Apoteket, would also be adjusted to the conditions of the common market. Such measures had, however, not been taken prior to the assessment of the ECJ in *Hanner.* On the contrary, there was no purchasing plan and no system of 'calls for tenders' within the framework of which producers whose products were not selected would be entitled to be informed of the reasons for the selection decision, as there had been in *Franzén.* The economic operators were not given the opportunity to contest such a decision, as there was no independent supervisory authority to turn to.

The judgment in *Hanner* is indeed a further development of *Franzen.* The ECJ compared Apoteket to Systembolaget and required the equivalent structural adjustments to be made.

As regards gambling, the question of whether the Swedish State monopoly is compatible with EC law has not been referred to the ECJ, whereas the exclusive rights of other Member States have been examined by the ECJ. The requirements of the ECJ in these judgments are requirements which apply to the Swedish monopoly as well, which is why these judgments are

of relevance in establishing whether the Swedish exclusive rights are compatible with EC law.

There are no procedural and administrative requirements that are equivalent to those in *Franzén* and *Hanner*. The Court has, nonetheless, clarified that there are a few grounds which may not be relied upon to justify a restriction on the freedom to provide services. The Court has, for instance, held in *Gambelli* that in so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public pursue, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify measures such as those at issue in the main proceedings.

Following the judgment in *Gambelli*, numerous international private gambling companies got the courage to challenge various State monopolies on gambling, not least in Sweden. A number of judicial proceedings were initiated as a consequence of that judgment. The Swedish Supreme Administrative Court has in two judgments of October 26 2004, found that the Swedish State monopoly is compatible with EC law.

# Abbreviations

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| EC | European Community |
| ECJ | European Court of Justice |
| ERT | Europarättslig tidskrift |
| NJ | Ny Juridik |

# 1 Introduction

## 1.1 Purpose and Delimitation

The compatibility of Swedish State monopolies with EC law is indeed a highly controversial matter. Contradictory interpretations of EC law concerning the Swedish State monopolies on alcoholic beverages, medicinal products and gambling have caused great confusion among people who are not particularly familiar with EC law and also, among people who are. Evidently, no clear answers to the matter at issue are to be found in the case-law of the ECJ.

This thesis does not provide an answer to the question of whether these State monopolies are in fact compatible with EC law, since it is the task of the ECJ only to provide such answers. Instead, by examining the reasoning of the ECJ, I have searched for consistencies and systematically mentioned requirements. Thus, by focusing primarily on these three State monopolies, the purpose of this thesis is to more generally try to clarify what the requirements of the ECJ are for maintaining such State monopolies.

I have narrowed my study down as regards the State monopolies on alcoholic beverages and medicinal products to only concern the facts of the case at the time of the main proceedings. Therefore, regarding the monopoly on alcoholic beverages, I will disregard other aspects of the monopoly, such as private import of alcoholic beverages by independent agents and the Swedish legislation on the advertising of alcoholic beverages.

## 1.2 Method and Material

A traditional legal method has been used in this thesis, as well as both a descriptive and an analytical approach. The most essential sources used are sources of primary law; the EC Treaty and case-law of the ECJ. When presenting the relevant provisions of the EC Treaty on free movement of goods, freedom of establishment and freedom to provide services, I have to some extent used text book material. Various articles from different law journals are the principal sources used in analysing the judgments of the ECJ.

Since this thesis concerns primarily Swedish State monopolies, when dealing with the free movement of goods, *Franzén* and *Hanner*[1] are the most significant cases in this particular field. I have, therefore, made a thorough presentation of these two cases, analysing the judgments of the ECJ almost in detail, as well as the opinions of the Advocate Generals.

[1] Case C-189/95 *Franzén* [1997] ECR I-5909 and Case C-438/02 *Hanner* [2005] ECR I-4551.

Additional case-law of the Court is presented only in so far as it is of relevance for *Franzén* and *Hanner*.

As regards the monopoly on gambling, since the question of whether the Swedish State monopoly is compatible with EC law has not been referred to the ECJ, a somewhat different method has been used. The most relevant judgments of the ECJ concerning national legislation of other Member States are presented in brief, so as to conclude what the ECJ has considered to be the principal requirements for maintaining a State monopoly on gambling. These are followed by a description of the situation in Sweden, including two judgments of the Swedish Supreme Administrative Court (Regeringsrätten), which illustrate how the case-law of the ECJ has been interpreted and applied in Sweden.

Thereafter, a comparison of the three State monopolies is made for the purpose of detecting similarities and differences, which may be of significance for the compatibility with EC law.

## 1.3 Disposition

This thesis has two fundamental parts, which relate to the free movement of goods and to the freedom to provide services, respectively. An introductory presentation of the internal market is given, before the relevant provisions on the free movement of goods are presented. The thesis deals next with *Franzén*, giving a thorough presentation of the facts of the case, the Advocate General's opinion, the judgment of the ECJ and additionally, a presentation of the three judgments in *Commission v. Netherlands, Commission v. Italy* and *Commission v. France*[2], which were delivered by the Court on the same day. This is followed by a similar presentation of *Hanner*, including also a brief summary of what has so far been concluded as regards State monopolies relating to the free movement of goods.

After that, this thesis deals with freedom of establishment and freedom to provide services. The most relevant provisions of the EC Treaty are presented, as well as the most significant judgments of the ECJ concerning gambling, the situation in Sweden, and finally, two judgments of the Swedish Supreme Administrative Court.

Lastly, a comparison of the three State monopolies is made before the conclusion is presented.

[2] Case C-157/94 *Commission v. Netherlands* [1997] ECR I-5699; Case C-158/94 [1997] *Commission v. Italy* [1997] ECR I-5789; and Case C-159/94 *Commission v. France* [1997] ECR I-5815.

## 1.4 The Internal Market

The principal rule of the common market is that goods and services are able to move freely across the borders of Member States. The rule aims at enabling economic operators within the Community to exchange goods and services with one another under the same conditions of competition. State monopolies in control of supply and demand are, therefore, only under exceptional circumstances compatible with the conditions of the common market.[3]

Occasionally, the ECJ has to consider whether such restrictions on trade are compatible with Community law. Whenever the ECJ accepts a State monopoly, it accepts a permanent exception to the rules of the internal market. For that reason, a State monopoly is never accepted unconditionally. The case-law of the Court lets us know under what conditions a State monopoly is acceptable on the common market.[4]

[3] J. Hettne, *EU, monopolen och försvaret av den rådande ordningen.* (ERT 2004:4), page 589.
[4] J. Hettne, *Apoteksdomens konsekvenser – inre marknaden i fara?* (NJ 2005:3), page 42-44.

# 2 Free movement of goods

The free movement of goods is dealt with in Articles 28 to 31 EC. Particular care is required when reading case law based on the old numbering of the Treaty provisions.[5] When dealing with State monopolies of goods, Article 28 EC must be taken into consideration. Article 28 EC provides:

*Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.*

It is settled case-law of the Court that all trading rules which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.[6] Measures contrary to Article 28 EC may, nonetheless, be justified on the basis of Article 30 EC, which reads as follows:

*The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic, archaeological value; or the protection of industrial and commercial property. Such prohibitions and restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.*

Article 30 EC has been strictly construed by the Court. The national rule, which discriminates against imports, has to come within one of the listed categories before the Court can accept that it can be saved by Article 30 EC.[7] It must also, according to established case-law, be proportionate to the aim pursued and not attainable by measures less restrictive of intra-Community trade.[8] The burden of proof under Article 30 EC rests with the Member State seeking to rely on it.[9]

The ECJ determines whether a State monopoly is compatible with the EC Treaty when an action is brought against a Member State by the Commission, or if a national court asks the ECJ for a preliminary ruling. The ECJ pays little attention to the political arguments, and thus, makes a strictly legal assessment of the facts.[10] Justifications on the ground of protecting health and life of humans, animals or plants, are closely

[5] P. Craig and G. de Búrca, *EU Law,* page 613.
[6] Case 8/74 *Procureur du Roi v. Dassonville* [1974] ECR 837, paragraph 5.
[7] P. Craig and G. de Búrca, *EU Law,* page 626.
[8] Case 120/78 *REWE-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649, paragraph 7.
[9] P. Craig and G. de Búrca, *EU Law,* page 626.
[10] J. Hettne, *Har Sverige spelat bort sina monopol? EU och svenska lagstiftningsstrategier* (NJ 2004:4), page 7-8.

scrutinized by the Court, which will determine whether the protection of public health is the actual purpose behind the Member State's action, or whether the purpose is actually to protect domestic producers. The Court will also thoroughly examine the clarity of the arguments regarding public health, in order to determine whether they make sense on the facts.[11]

Article 31 EC, which deals specifically with State monopolies, provides as follows:

1. *Member States shall adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States. The provisions of this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others.*
2. *Member States shall refrain from introducing any new measure which is contrary to the principle laid down in paragraph 1 or which restricts the scope of the articles dealing with the prohibitions of customs duties and quantitative restrictions between Member States. (...)*

Article 31 EC deals only with State monopolies of goods. The rules on State monopolies of services, which will be elaborated on below are, however, very similar.[12]

Article 86.2 EC may sometimes be relied upon to justify the grant by a Member State, to an undertaking entrusted with the operation of services of general economic interest, of exclusive rights, which are contrary to Article 31 EC.[13] Article 86.2 EC, which is actually a rule on competition, provides as follows:

*Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.*

[11] P. Craig and G. de Búrca, *EU Law,* page 631-632.
[12] J. Hettne, NJ 2004:4, page 7.
[13] See e.g. Case C-157/94 *Commission v. Netherlands* [1997] ECR I-5699, paragraph 32; Case C-158/94 *Commission v. Italy* [1997] ECR I-5789, paragraph 43; and Case C-159/94 *Commission v. France* [1997] ECR I-5815, paragraph 49.

# 3 Case C-189/95 *Franzén*

In the *Franzén* judgment, the ECJ clarifies under what conditions a State monopoly on the retail of alcoholic beverages is acceptable on the common market. The Swedish rules relating to the existence and operation of the monopoly had, however, on the Commission's advice, already been adjusted to the conditions of the common market. The changes of the Swedish alcohol laws, which were made prior to Sweden entering the EU, are illustrative of what can generally be required of States using measures that constitute a restriction on trade between Member States, although those measures can be justified on grounds such as protection of health and life.

After a dialogue had taken place between the Commission and the Swedish government, in which the Commission had pointed out the incompatibility of the monopolies on import, export, wholesale and production of alcoholic beverages, the Swedish government decided to abolish these monopolies, preserving only the monopoly on retail. The Swedish government agreed, moreover, to set the frameworks for the Swedish system in such a way as to ensure that the monopoly on retail could co-exist with private operators on the market. Furthermore, the organization of the monopoly had to be acceptable on the common market.

For this purpose, the Commission required, inter alia, that there be an objective product plan for the beverages offered by Systembolaget. The beverages were, in addition, to be selected on foreseeable and objective criteria, and traders whose products were rejected, were to be told the reasons for the decision taken by the monopoly as well as given an opportunity to challenge such a decision before an independent board (Alkoholsortimentsnämnden).[14]

## 3.1 Facts of the Case

The adjustments were soon to be put to the test in the *Franzén* case, in which criminal proceedings were brought against Harry Franzén for infringement of the Alkohollag (1994:1738) of 16 December 1994 (Swedish Law on Alcohol),[15] according to which, among other things, the intentional or inadvertent sale of alcoholic beverages without a licence was subject to criminal penalties.[16]

Mr Franzén was prosecuted before the Landskrona tingsrätt (District Court, Landskrona) for intentionally on 1 January 1995 selling without a licence wine purchased from Systembolaget or imported from Denmark. He

[14] J. Hettne, ERT 2004:4, page 589-591.
[15] Case C-189/95 *Franzén* [1997] ECR I-5909, paragraph 2.
[16] Ibid, paragraph 19.

claimed though, in his defence, that he could not be convicted of any offence since the Law on Alcohol was contrary to Article 30 and 37 (now Article 28 and 31) of the EC Treaty. [17]

The Law on Alcohol regulated production and trade in alcoholic beverages in Sweden. The aim of the Law was to limit the consumption of alcoholic beverages, in particular those of high alcoholic strength, in order to reduce the harmful effects, which their consumption has on human health.[18] Under the Law, the production of alcoholic beverages was subject to the holding of a 'production licence' whilst wholesale trade in spirits, wine and strong beer was subject to the holding of a 'wholesale licence'. The Law, however, allowed persons holding a production licence to engage in wholesale trade in the products covered by the licence. The Law also made the importation of wine, strong beer or spirit drinks into Sweden subject to the possession of a production licence or a wholesale licence.

Licences were issued by the Alkoholinspektion (Alcohol Inspectorate), which were obliged to carry out an objective and impartial assessment of the application. Submission of an application was subject to the payment of a fixed charge, which was not reimbursed if an application for a licence was rejected.[19] The Law on Alcohol had made a State company, specially constituted for this purpose, responsible for the retail of wine, strong beer and spirits. The company designated for this purpose is Systembolaget, a company entirely owned by the Swedish State. The activities, operation and inspection procedures of Systembolaget are laid down in an agreement made with the State.[20]

Uncertain how it should respond to the argument that the Law on Alcohol was contrary to EC law, the Landskrona tingsrätt decided to stay proceedings and refer to the Court for a preliminary ruling under Article 177 (now Article 234) EC three questions on the interpretation of Articles 30 and 37 (now Articles 28 and 31) EC.

By its first two questions, the national court was essentially asking whether a State monopoly such as that of Systembolaget, i.e. a monopoly on the retail of alcoholic beverages, was contrary to Articles 30 and 37 (now Articles 28 and 31) EC and, if the monopoly was found contrary to Article 37 (now Article 31) EC, whether it must be abolished or if an adjustment was possible. If the monopoly were to be found contrary to Articles 30 and 37 (now Articles 28 and 31) EC, this would preclude the national provisions governing the monopoly in question, namely the Law on Alcohol.[21]

[17] Case C-189/95 *Franzén* [1997] ECR I-5909, paragraph 27-28.
[18] Ibid, paragraph 3.
[19] Ibid, paragraph 5-9.
[20] Ibid, paragraph 15-16.
[21] Ibid, paragraph 29-30.

## 3.2 The Advocate General's Opinion

Advocate General Elmer did not in his reasoning make a distinction between the requirements of Article 30 (now Article 28) EC concerning free movement of goods, and of those laid down in Article 37 (now Article 31) EC on State monopolies of a commercial character. He was of the opinion that State monopolies of a commercial character are prohibited in so far as they, in law or in fact, prevent or impede entrance to the market for goods from other Member States, or have the effect of nationals of Member States being discriminated regarding the conditions under which goods are procured and marketed.[22]

The Advocate General paid no notice to the structural changes which had been made, but examined only the actual effects of the retail monopoly on the common market.[23] He was very critical of the Swedish system, in particular of the fact that all of the 384 shops which existed at the time, were owned and run by Systembolaget, which had the exclusive right to make decisions about procurement and marketing. A system as centralized had previously never been accepted by the ECJ. He also directed some of his criticism at the licensing system, which he meant, in practice, led to companies established in other Member States not applying for a licence, and thus, making the system work in favour of Swedish licence holders.

Although he did not contest that the Swedish system aimed at protecting public health against the harm caused by alcohol, and therefore came within one of the listed categories of Article 36 (now Article 30), he found it not proportionate to the aim pursued and also, attainable by measures less restrictive of intra-Community trade. As an example of a less restrictive system, he suggested a system of a few independent shops which independently would make procurements, and which therefore would be less restrictive of the free movement of goods. The shops could have specific opening hours, be prohibited from selling to persons under a certain age, and their marketing strategies could be governed by the State.[24]

## 3.3 The Judgment of the ECJ

The ECJ, however, came to a different conclusion than the Advocate General. The ECJ acknowledged the adjustments that had been made, even though they were structural, i.e. of procedural and administrative nature.[25] The ECJ, as opposed to Advocate General Elmer, did not analyse the State monopoly in question as a whole, but as two separate systems.[26] Having regard to the case-law of the Court, the ECJ found it necessary to examine

[22] J. Hettne, ERT 2004:4, page 592.
[23] J. Hettne, *Apoteksdomen – monopolet på fallrepet?* (ERT 2005:3), page 563.
[24] J. Hettne, ERT 2004:4, page 591-592.
[25] J. Hettne, ERT 2005:3, page 563.
[26] J. Hettne, ERT 2004:4, page 593.

the rules relating to the existence and operation of the monopoly, such as the product selection system, the monopoly's sales network and the promotion of alcoholic beverages, solely in the light of Article 37 (now Article 31) EC, which applies specifically to the exercise, by a domestic commercial monopoly, of its exclusive rights.[27]

Moreover, the ECJ found it clear from the reasoning in the order for reference and the observations submitted to the Court that the questions raised by the national court did not only concern the domestic provisions relating to the existence and operation of the monopoly, but also, more generally, the provisions which, although not governing the operation of the monopoly, nonetheless had a direct bearing upon it, such as the rules relating to production and wholesale licences.[28] The effect on intra-Community trade of those other provisions of the domestic legislation, which are separable from the operation of the monopoly, although they have a bearing upon it, was, on the other hand, examined with reference to Article 30 (now Article 28) EC.[29]

## 3.4 The Rules relating to the Existence and Operation of the Monopoly

The Court first recalled that the ECJ several times in its case-law has held that it is clear, not only from the wording of Article 37 (now Article 31) EC, but also from the position which it occupies in the general scheme of the Treaty that the article is intended to ensure compliance with the fundamental principle that goods should be able to move freely throughout the common market. The article requires, in particular, quantitative restrictions and measures having equivalent effect in trade between Member States to be abolished, thus ensuring the maintenance of normal conditions of competition between the economies of Member States in the event that a given product is subject, in one or other of those states, to a national monopoly of a commercial character.[30]

The Court has, nonetheless, on several occasions stated that Article 37 (now Article 31) EC does not require a national monopoly having a commercial character to be abolished, but simply requires that it be adjusted in such a way as to ensure that no discrimination regarding the conditions under

[27] Case C-189/95 *Franzén* [1997] ECR I-5909, paragraph 35. The Court makes a reference to the judgments in Case 91/75 *Hauptzollamt Göttingen v. Miritz* [1976] ECR 217, paragraph 5; Case 120/78 *Cassis de Dijon* [1979] ECR 649, paragraph 7; and Case 91/78 *Hansen v. Hauptzollamt Flensburg* [1979] ECR 935, paragraphs 9 and 10.
[28] Ibid, paragraph 34.
[29] Ibid, paragraph 36. The Court makes a reference to the judgments in Case 91/75 *Miritz* [1976] ECR 217, paragraph 5; Case 120/78 *Cassis de Dijon* [1979] ECR 649, paragraph 7; and Case 86/78 *Peureux v. Services Fiscaux de la Haute-Saône et du Territoire de Belfort* [1979] ECR 897, paragraph 35.
[30] Ibid, paragraph 37. See e.g. Case 59/75 *Pubblico Ministero v. Manghera and Others* [1976] ECR 91, paragraph 9; Case 91/78 *Hansen* [1979] ECR 935, paragraph 8.

which goods are procured and marketed exists between nationals of Member States.[31]

Furthermore, the Court stated that the purpose of Article 37 (now Article 31) EC is to give Member States the possibility to maintain certain monopolies of a commercial character as instruments for the pursuit of *public interest aims* with the requirement of the establishment and functioning of the common market. Its aim is to eliminate all obstacles to the free movement of goods other than those restrictions on trade which are inherent in the existence of the monopolies in question.

The ECJ concluded that it was not contested that, in aiming to protect public health against the harm caused by alcohol, a domestic monopoly on the retail of alcoholic beverages, such as that conferred on Systembolaget, pursues a public interest aim. The question was, however, whether the organization and operation of the monopoly was arranged so as to exclude any discrimination between nationals of Member States regarding conditions of supply and outlets, so that trade in goods from other Member States was not put at a disadvantage, in law or in fact, in relation to that in domestic goods, and so that competition between the economies of the Member States was not distorted.[32]

The ECJ therefore examined, in the light of Article 37 (now Article 31) EC, the Swedish system, starting with the product selection system and paying special notice to the following circumstances:
-There was an objective product plan for which beverages were to be maintained by Systembolaget.
-The beverages were selected on the basis of foreseeable and objective criteria (commercial and qualitative).
-Traders whose offers were not selected by Systembolaget had the opportunity to apply for the monopoly to market their products on a trial basis for a given period.
-Traders were entitled to be told the reasons for decisions taken by the monopoly regarding the selection of beverages and also had a right to challenge such a decision before an independent board (Alkoholsortimentsnämnden).[33]

In view of these circumstances, the ECJ held that the criteria and selection methods used by Systembolaget were neither discriminatory nor apt to put imported products at a disadvantage.[34]

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[31] Case C-189/95 *Franzén* [1997] ECR I-5909, paragraph, 38. See also Case 59/75 *Manghera* [1976] ECR 91, paragraph 5; Case 91/78 *Hansen* [1979] ECR 935, paragraph 8; Case 78/82 *Commission v. Italy* [1983] ECR 1955, paragraph 11; and Case C-387/93 *Banchero* [1995] ECR I-4663, paragraph 27.
[32] Ibid, paragraph 39-41.
[33] J. Hettne, ERT 2004:4, page 593.
[34] Case C-189/95 *Franzén* [1997] ECR I-5909, paragraph 52.

As regards the monopoly's sales network, the ECJ held that while it is true that Systembolaget had only a limited number of shops and did not offer the full range of beverages available, this circumstance did not mean that alcoholic beverages from other Member States were put at a disadvantage compared to those produced domestically.[35]

Finally, as to the promotion of alcoholic beverages, the Court held that the method of promotion used by the monopoly applied independently of the origin of the products and was not in itself apt to put beverages imported from other Member States at a disadvantage.[36] In conclusion, the Court stated that the retail monopoly in question was arranged in a way which meets the conditions for being compatible with Article 37 (now Article 31) EC.[37]

## 3.5 The Other Provisions of National Legislation bearing upon the Operation of the Monopoly

When the Court examined, in relation to Article 30 (now Article 28) EC, other provisions of the national legislation which, although not, strictly speaking, regulating the functioning of the monopoly, nevertheless had a direct bearing upon it,[38] it concluded that the licensing system as regards wholesale and production constituted an obstacle to the importation of alcoholic beverages from other Member States in that it imposed additional costs on such beverages, such as intermediary costs, payment of charges and fees for the grant of a licence, and costs arising from the obligation to maintain storage capacity in Sweden.[39]

The Court therefore found domestic legislation such as that in question contrary to Article 30 (now Article 28) EC,[40] and not justifiable on the basis of Article 36 (now Article 30) EC, since although the protection of human health against harmful effects of alcohol, on which the Swedish government relied, was undisputedly one of the grounds which may justify derogation from Article 30 (now Article 28) EC, the Swedish government had not established that the licensing system set up by the Law on Alcohol was proportionate to the public health aim pursued or that this aim could not have been attained by measures less restrictive of intra-Community trade.[41]

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[35] J. Hettne, ERT 2004:4, page 594.
[36] Case C-189/95 *Franzén* [1997] ECR I-5909, paragraph 64.
[37] Ibid, paragraph 66.
[38] Ibid, paragraph 67.
[39] Ibid, paragraph 71.
[40] Ibid, paragraph 73.
[41] Ibid, paragraph 76. See also the judgment in Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior and Publivía v. Departemento de Sanidad y Seguridad Social de la Generalitat de CataluÃna* [1991] ECR I-4151, paragraph 13.

It was therefore held by the Court that Articles 30 and 37 (now Articles 28 and 31) EC preclude domestic provisions allowing only traders holding a production licence or a wholesale licence to import alcoholic beverages on conditions such as those laid down by Swedish legislation.[42]

## 3.6 Case C-157/94 Commission v. Netherlands, Case C-158/94 Commission v. Italy and Case C-159/94 Commission v. France

The Court delivered three other preliminary rulings on the same day as the *Franzén* judgment. These concerned the exclusive rights to import and export gas and electricity. In all three of these judgments, the Court made, as opposed to the judgment in *Franzén,* an overall examination of the conformity of the exclusive rights with Articles 30 and 37 (now Articles 28 and 31) EC.

Starting first with an assessment of Article 37 (now Article 31) EC, in all three of these rulings the Court confirmed what was said in the *Manghera* judgment, namely that exclusive import rights give rise to discrimination prohibited by Article 37 (now Article 31) EC against exporters established in other Member States and that such rights directly affect the conditions under which goods are marketed only as regards operators or sellers in other Member States.[43]

In two of the judgments, the Court further held that exclusive export rights inherently give rise to discrimination against importers established in other Member States since that exclusivity affects only the conditions under which goods are procured by operators or consumers in other Member States.[44]

The Court also recalled what was held in *Manghera*, that the objective of Article 37 (now Article 31) EC would not be attained if, in a Member State where a commercial monopoly exists, the free movement of goods from other Member States comparable to those with which the national monopoly is concerned were not ensured.[45]

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[42] Case C-189/95 *Franzén,* [1997] ECR I-5909, paragraph 77.

[43] Case 59/75 *Manghera* [1976] ECR 91, paragraph 12. See also Case C-347/88 *Commission v. Greece* [1990] ECR I-4747, paragraph 44; Case C-157/94 *Commission v. Netherlands* [1997] ECR I-5699, paragraph 15; Case C-159/94 *Commission v. France* [1997] ECR I-5815, paragraph 33; Case C-158/94 *Commission v. Italy* [1997] ECR I-5789, paragraph 23.

[44] Case C-159/94 *Commission v. France* [1997] ECR I-5815, paragraph 34; Case C-158/94 *Commission v. Italy* [1997] ECR I-5789, paragraph 24.

[45] Case 59/75 *Manghera* [1976] ECR 91, paragraphs 9 and 10; Case C-159/94 *Commission v. France* [1997] ECR I-5815, paragraph 39; Case C-157/94 *Commission v. Netherlands* [1997] ECR I-5699, paragraph 22.

The Court finally concluded, in all three judgments, that the existence of exclusive import rights in a Member State deprives economic operators in other Member States of the opportunity to offer their products to consumers of their choice in the Member State concerned.[46]

The concept of discrimination used by the ECJ may seem to differ here from that used in *Franzén.* In *Franzén,* the Court stated that Article 37 (now Article 31) EC requires that the organization and operation of the monopoly be arranged so as to exclude any discrimination between nationals of Member States as regards conditions of supply and outlets, so that trade in goods from other Member States is not put at a disadvantage, in law or in fact, in relation to that in domestic goods. Thus, in *Franzén* the ECJ mentioned only goods, whereas it in these three judgments also mentioned operators on the market.[47]

Since the maintenance of the exclusive import and export rights at issue were found contrary to Article 37 (now Article 31) EC in all three judgments, the Court found it unnecessary to consider whether they were also contrary to Article 30 (now Article 28) EC. [48]

The Court did not, as in *Franzén,* state that the purpose of Article 37 (now Article 31) EC is to reconcile the possibility for Member States to maintain certain monopolies of a commercial character as instruments for the pursuit of *public interest aims* with the requirements of the establishment and the functioning of the common market.[49] Instead, the Court found it necessary to verify whether the exclusive rights at issue might be justified under Article 90.2 (now Article 86.2) EC.[50] The Court examined the necessity of the exclusive import and export rights and found in all three judgments that the Court was not in a position, in these proceedings, to consider whether, by maintaining exclusive import and export rights, the Member States concerned had in fact gone further than was necessary to enable the establishments to perform, under economically acceptable conditions, the tasks of general economic interest assigned to them.[51]

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[46] Case 157/94 *Commission v. Netherlands* [1997] ECR I-5699, paragraph 23; Case C-158/94 *Commission v. Italy* [1997] ECR I-5789, paragraph 32; and Case C-159/94 *Commission v. France* [1997] ECR I-5815, paragraph 40.
[47] See Case C-189/95 *Franzén* [1997] ECR I-5909, paragraph 40.
[48] Case C-157/94 *Commission v. Netherlands* [1997] ECR I-5699, paragraph 24; Case C-158/94 *Commission v. Italy* [1997] ECR I-5789, paragraph 33; and Case C-159/94 *Commission v. France* [1997] ECR I-5815, paragraph 41.
[49] See Case C-189/95 *Franzén* [1997] ECR I-5909, paragraph 39.
[50] Case C-157/94 *Commission v. Netherlands* [1997] ECR I-5699, paragraph 25; Case C-158/94 *Commission v. Italy* [1997] ECR I-5789, paragraph 34; and Case C-159/94 *Commission v. France* [1997] ECR I-5815, paragraph 42.
[51] Case C-157/94 *Commission v. Netherlands* [1997] ECR I-5699, paragraph 64; Case C-158/94 *Commission v. Italy* [1997] ECR I-5789, paragraph 60; and Case C-159/94 *Commission v. France* [1997] ECR I-5815, paragraph 107.

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In view of the *Franzén* judgment, one could expect that the monopoly on medicinal preparations would also be adjusted to the conditions of the common market. Such measures had, however, not been taken prior to the assessment of the ECJ. On the contrary, there was no purchasing plan and no system of 'calls for tenders' within the framework of which producers whose products were not selected would be entitled to be informed of the reasons for the selection decision, as there had been in *Franzén*. The economic operators were not given the opportunity to contest such a decision, as there was no independent supervisory authority to turn to.

A system as centralized as Apoteket evidently had restrictions on trade between Member States. The question was, however, from what point of view the ECJ would examine the Swedish system. The Court could either examine the actual effects of the monopoly, as Advocate General Elmer did, or it could, similar to what was held in the *Franzén* judgment, be satisfied by examining only the structure of the monopoly, i.e. the procedural and administrative aspects of it.[52]

## 4.1 Facts of the Case

Krister Hanner, general manager of Bringwell International AB, was prosecuted in Stockholms tingsrätt (District Court, Stockholm) for breach of the Swedish rules reserving retail sales of medicinal preparations to Apoteket. He was accused of having marketed, between 30 May and 27 July 2001, 12 packages of Nicorette Plåster (patches), and of Nicorette Tuggummi (chewing gum). Those products are regarded as non-prescription medicinal preparations within the meaning of the Lag (1996:1152) om handel med läkemedel m.m. (Law No 1152 of 1996 on trade in medicinal preparations).[53]

Under Article 11 of the same law, infringement of Article 4 thereof was punishable by a fine or imprisonment of a maximum of two years.[54] Article 4 provides that retail trade in non-prescription and prescription medicinal preparations can be engaged in only by the State or by legal persons over which the State has a dominant influence. The government determines which legal person is entitled to carry on such trade and lays down detailed rules applicable to such trade.[55] The Swedish government has entrusted retail trade in medicinal preparations to Apoteket, which was concerned by the main proceedings.[56]

[52] J. Hettne, ERT 2005:3, page 563-564.
[53] Case C-438/02 *Hanner* [2005] ECR I-4551, paragraph 16.
[54] Ibid, paragraph 6.
[55] Ibid, paragraph 3.
[56] Ibid, paragraph 11.

In his defence, Mr Hanner argued that those rules establish a State monopoly contrary to Articles 28 (free movement of goods), 31 (State monopolies) and 43 (freedom of establishment) EC, and that his action therefore did not constitute a crime. Stockholms tingsrätt decided to stay proceedings and submit the following questions to the Court for a preliminary ruling:

1. There is an independent system at national level for testing and approval of medicinal products intended to maintain good quality for medicinal products and prevent damaging effects of medicinal products. Certain medicinal products also require a prescription from a registered doctor. In such circumstances does Article 31 EC preclude national legislation which provides that retail trade in medicinal products may only be carried on by the State or by legal persons in which the State has a determining influence, the objective of which is to meet the need for safe and effective medicinal products?
2. Does Article 28 EC preclude legislation such as that described in Question 1, in the light of the information in that question?
3. Does Article 43 EC preclude legislation such as that described in Question 1, in the light of the information in that question?
4. Does the principle of proportionality preclude legislation such as that described in Question 1, on examination of Questions 1-3?
5. Would the answer to Questions 1 to 4 be different if "non-prescription" medicinal products were entirely or partly exempted from the requirement under national legislation that retail trade in medicinal products be carried on only by the State or by legal persons in which the State has a determining influence?[57]

The arguments of Mr Hanner and the Commission, in support of the monopoly being contrary to Article 31 EC, can be summarized as follows:

- The monopoly is discriminatory; imported products from other Member States are put at a disadvantage.
- The monopoly is not proportional to the aim pursued.
- Some of the products sold exclusively at Apoteket constitute no actual risk for the public health.
- Läkemedelsverket (the competent authority for the control of medicines) defines medicinal products too broadly. Products which are sold freely in other Member States are sold only at Apoteket in Sweden.
- In practice, Apoteket buys medicinal products only from two wholesalers (Kronan and Tamro).
- There are no criteria or selection methods for medicinal products which are a part of Apoteket's product range. The system is unpredictable.[58]

[57] Case C-438/02 *Hanner* [2005] ECR I-4551, paragraph 17-18.
[58] J. Hettne, ERT 2004:4, page 599-600.

## 4.2 The Advocate General's Opinion

The circumstances of this case do not differ much from the circumstances in *Franzén*, which supposedly, is why Advocate General Léger's opinion is very similar to Advocate General Elmer's opinion in *Franzén*.[59] Advocate General Léger examined only the actual effects of the monopoly, not the procedural and administrative nature of it. He failed the Swedish system with a reasoning which reminded strongly of Advocate General Elmer's in *Franzén*, and which was mainly comprised of criticism directed at the judgment in *Franzén*.[60]

The Advocate General initially stated that this case essentially concerned the question of whether an exclusive retailing right is compatible with Article 31.1 EC. If not, he found it necessary to ask whether the maintenance of such an exclusive right can be justified on the basis of derogating provisions of the EC Treaty and, in particular, of Article 86.2 EC. One of the difficulties with this issue, he stated, arose from the fact that the case-law of the Court contained contradictory answers on those various points.[61]

Starting first with an analysis of Article 31 EC, the Advocate General pointed out that Article 31 EC does not require the abolition of State monopolies of a commercial character. It requires only the adjustment of such monopolies so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States. Furthermore, he pointed out that the Court has held that the obligation of adjustment laid down by Article 31 EC could require Member States to abolish certain exclusive rights.[62] Consequently, in *Manghera and Others*,[63] the Court has held that an exclusive right to import products inherently involves discrimination prohibited by Article 31 EC and that Member States are, therefore, obliged to abolish such rights. Similarly, the Court has held that exclusive rights to export products are inherently contrary to Article 31 EC and must be abolished.[64]

The present case, however, concerned not exclusive rights to import or export products, but an exclusive retailing right. The Court had already had occasion to rule on the question of whether an exclusive retailing right can be considered compatible with Article 31 EC in *Franzén*, where it held that the monopoly at issue in that case was consistent with Article 31 EC in so far as the provisions relating to its existence and

[59] J. Hettne, ERT 2004:4, page 600.
[60] J. Hettne, ERT 2005:3, page 564.
[61] Opinion of Advocate General Léger in Case C-438/02 *Hanner* [2005] ECR I-4551, paragraph 2-3.
[62] Ibid, paragraph 40-41.
[63] See Case 59/75 *Manghera* [1976] ECR 91, paragraph 12.
[64] Opinion of Advocate General Léger in Case C-438/02 *Hanner* [2005] ECR I-4551, paragraph 42.

operation were neither discriminatory nor liable to put products imported from other Member States at a disadvantage.

Taking the view that the solution identified by that judgment was an incorrect interpretation of the provisions of the EC Treaty, the Advocate General proposed that the Court should not apply the *Franzén* judgment.[65] The judgment raised, according to Léger, the three following sets of difficulties.[66]

## 4.3 A 'Piecemeal' Approach to the Monopoly

Advocate General Léger wanted most of all an overall examination of the effects of a monopoly on trade between Member States, as opposed to a consideration of each of the various rules for the operation of the monopoly (the product selection system, the sales network, the promotion of products) in isolation and an examination, in each case, of whether those rules were discriminatory or liable to put imported products at a disadvantage, as in the *Franzén* judgment. An overall examination, unlike the latter approach, takes account of restrictions on the free movement of goods resulting from the cumulative effect of the various rules for the operation of the monopoly. It was by taking as his basis an overall analysis of Systembolaget's monopoly that Advocate General Elmer had concluded that that monopoly was capable of seriously hindering intra-Community trade.[67]

## 4.4 The Concept of Discrimination in Article 31 EC

Furthermore, he believed that the Court had adopted a restrictive interpretation of the concept of discrimination in Article 31 EC in the *Franzén* judgment. Article 31 EC does, according to the Advocate General, not only prohibit discrimination against *products* from other Member States. That provision primarily prohibits discrimination between *nationals* of Member States regarding the conditions under which goods are procured and marketed. Article 31 EC thus aims to guarantee that traders established in other Member States have the opportunity to offer their products to customers of their choice in the Member State where the monopoly exists. Conversely, it aims to enable consumers in the Member State where the monopoly exists to obtain supplies from traders of their choice in other Member States.

[65] Opinion of Advocate General Léger in Case C-438/02 *Hanner* [2005] ECR I-4551, paragraph 43-45.
[66] Ibid, paragraph 56.
[67] Ibid, paragraph 60-61.

Accordingly, Article 31 EC is not aimed only at protecting the free movement of goods as such. It aims primarily to protect the traders who participate in that free movement.

That particular understanding of 'discrimination', he stated, goes further than the concept of discrimination between products. The abolition of discrimination between *products* does not necessarily require the abolition of exclusive rights. In order for the monopoly to be compatible with that requirement, it is sufficient that it apply identical (not discriminatory) treatment to domestic and foreign products. On the other hand, the removal of discrimination between *nationals* of Member States may involve the abolition of exclusive rights, since the act of reserving the right to pursue an economic activity for a national trader may be such as to affect directly traders established in the other Member States with regard to the conditions under which they procure and market goods. The Court has in its previous case-law adopted this particular understanding of 'discrimination', thus requiring the abolition of exclusive rights without even considering whether the monopoly in question ensured identical treatment for domestic and imported products.[68]

However, in *Franzén,* the Court departed from that case-law and essentially limited its analysis to the question of discrimination between *products* of Member States. We have seen that the Court ascertained, for each rule of operation of the monopoly (the product selection system, the sales network and the promotion of products), that the provisions in question were applied irrespective of the products' origin and that they were not liable to put products imported from other Member States at a disadvantage. According to the Advocate General, the Court therefore based its examination on a restrictive interpretation of 'discrimination' within the meaning of Article 31 EC.[69] In that regard, the Advocate General stated, it might have been thought that the *Franzén* judgment represented a reversal of precedent and thus declared a change in the interpretation of Article 31 EC. That assumption is, nonetheless, contradicted by the fact that on the very day of the delivery of the *Franzén* judgment, the Court delivered the judgments in Case C-157/94 *Commission v. Netherlands,* Case C-158/94 *Commission v. Italy* and C-158/94 *Commission v. France,* in which the Court applied the traditional interpretation of discrimination.[70]

The Advocate General recalled that in these judgments, the Court required the abolition of the exclusive rights at issue, since the Court found that although the monopolies in question ensured identical (non-

[68] Opinion of Advocate General Léger in Case C-438/02 *Hanner* [2005] ECR I-4551, paragraph 62-64.
[69] Ibid, paragraph 65-66.
[70] Ibid, paragraph 67. See judgments in Case C-157/94 *Commission v. Netherlands* [1997] ECR I-5699; Case C-158/94 *Commission v. Italy* [1997] ECR I-5789; and Case C-159/94 *Commission v. France* [1997] ECR I-5815.

discriminatory) treatment for domestic products and imported products, the very existence of exclusive rights to import and export gas and electricity gave rise to discrimination prohibited by Article 31 EC against *operators* established in other Member States.[71]

## 4.5 Justification of Measures contrary to Article 31 EC

The Advocate General also implied that the ECJ incorrectly opened up another possibility of justification by creating some sort of 'rule of reason' within Article 31 EC in the *Franzén* judgment, which made it possible to maintain a State monopoly of a commercial character as instruments for the *pursuit of public interest aims* with the requirements of the establishment and functioning of the common market. Furthermore, the Court had incorrectly stated that Article 31 EC aims at the elimination of obstacles to the free movement of goods, *save*, however, *for restrictions on trade which are inherent in the existence of the monopolies in question.*

The Court found, moreover, that the monopoly conferred on Systembolaget actually pursued a public interest aim since it aimed to protect public health against the harm caused by alcohol. The Court then satisfied itself that the provisions relating to the organization and operation of the monopoly did not involve restrictive effects on the free movement of goods or that, in any event, such effects did not go beyond what was inherent in the existence or management of a State monopoly of a commercial character.[72]

These principles, however, have no basis in Article 31 EC, according to Advocate General Léger. First of all, Article 31 EC does not require a Member State, which wishes to maintain a national monopoly, to demonstrate that the monopoly pursues a public interest aim. According to its wording, that provision only requires Member States to adjust their State monopolies so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States. Second of all, once the Member States have made such an adjustment, Article 31 EC allows them to maintain their monopolies without imposing any further conditions.

The question of whether the monopoly pursues a public interest aim is actually a question which relates to the *justification* for the exclusive right where it proves to be contrary to Article 31 EC. Furthermore, Article 31 EC does not contain any provision or exception for restrictions on the free movement of goods, which are inherent in the

[71] Opinion of Advocate General Léger in Case C-483/02 *Hanner* [2005] ECR I-4551, paragraph 68.
[72] Ibid, paragraph 73-75.

existence of a State monopoly or proportionate to the aim pursued by that monopoly. Exceptions to the principle laid down by Article 31 EC must be based on the derogating provisions of the Treaty, namely Article 30 EC and / or Article 86.2 EC.

In view of the foregoing, the Advocate General proposed that the Court should not apply the *Franzén* judgment in this case. Instead, he suggested that the Court should apply its traditional case-law as most recently confirmed by the judgments in Case C-157/94 *Commission v. Netherlands*, Case C-158/94 *Commission v. Italy* and Case C-159/94 *Commission v. France*.[73]

## 4.6 The Circumstances of the Main Proceedings

After the Advocate General had proposed that the interpretation adopted by the judgment in *Franzén* should not be applied, it remained to be considered whether Apoteket's exclusive retailing right gave rise to discrimination prohibited by Article 31 EC.[74] The Advocate General considered, in the light of the concept of discrimination which relates not only to goods having access to the market, but also to traders and consumers, whether an exclusive retailing right such as the right conferred on Apoteket was also inherently contrary to Article 31 EC.[75]

He stated that an exclusive retailing right displays the same characteristics as an exclusive importing right. An entity, such as Apoteket, which holds a monopoly on the retail sale of a product, constitutes not only the sole seller of that product in the Member State concerned, but also the sole *purchaser* of that product in that State. Producers and wholesalers are, in the final analysis, able to turn to only one trader (Apoteket) in order to ensure the sale of their products to consumers.[76] Since an exclusive retailing right displays, from the point of view of its effects on intra-Community trade, the same characteristics as an exclusive right of importation, an exclusive retailing right is therefore also inherently contrary to Article 31 EC.[77]

The Advocate General took the view that an exclusive retailing right also gives rise to discrimination both against traders established in other Member States and against consumers in the Member States concerned.[78] The economic reality is that traders established in other

[73] Opinion of Advocate General Léger in Case C-438/02 *Hanner* [2005] ECR I-4551, paragraph 77-81.
[74] Ibid, paragraph 82.
[75] Ibid, paragraph 95-96.
[76] Ibid, paragraph 100-101.
[77] Ibid, paragraph 105.
[78] Ibid, paragraph 110.

Member States will agree to export their products to Sweden only if they have the *certainty* that Apoteket will market those products. In the same way, traders established in Sweden will agree to import products from other Member States only if they have the *certainty* that those products will be purchased by Apoteket. From an economic point of view, therefore, the liberalisation of imports and wholesaling is of benefit to traders only if it is accompanied by a liberalisation of retailing. From the point of view of the free movement of goods, a State retail monopoly produces the same effects as a State import monopoly. In the light of those factors, he therefore concluded that an exclusive retailing right is inherently contrary to Article 31 EC. He therefore proposed that the Court should answer the first question referred to the effect that Article 31 EC precludes the maintenance of an exclusive retailing right such as that conferred on Apoteket by the Swedish authorities.[79]

## 4.7 Justification for the Monopoly at Issue

The Advocate General stated, thereafter, that a measure contrary to Article 31 EC must be justified on the basis of Article 86.2 EC. He therefore considered whether the maintenance of Apoteket's exclusive retailing right could be justified on the basis of that article.[80]

Article 86.2 EC sets out a proportionality test. The wording makes it clear that undertakings entrusted with the operation of services of general economic interest are to be subject to the rules contained in the Treaty 'in so far as' the application of such rules does not obstruct the performance of their particular tasks. It follows that obstacles to the free movement of goods or restrictions on free competition are allowed only 'in so far as they are necessary in order to enable the undertaking entrusted with such a task of general interest to perform it'. The proportionality test therefore means verifying whether the undertaking's specific task could be performed with less restrictive measures.[81]

The objective of granting the right at issue was to contribute to the protection of public health by guaranteeing access for the Swedish population to medicinal products. The Swedish government had claimed that, considering Sweden's sparse population, the creation of the State monopoly on the retail of medicinal products was intended to guarantee an adequate supply of medicinal products on uniform terms throughout Sweden. Such a task constitutes, according to the Advocate General, a service of general interest for the purposes of Article 86.2 EC. [82]

[79] Opinion of Advocate General Léger in Case C-438/02 *Hanner* [2005] ECR I-4551, paragraph 113-115.
[80] Ibid, paragraph 133-134.
[81] Ibid, paragraph 141-142.
[82] Ibid, paragraph 148-150.

The Advocate General did not, on the other hand, think that the Swedish government had shown how the grant of an exclusive retailing right was necessary to enable Apoteket to perform its task, since it had not adduced any detailed evidence to demonstrate that, in the absence of the exclusive right at issue, sparsely populated areas would not be supplied with medicinal products or would be so under less favourable conditions. Similarly, the Swedish authorities had not adduced any detailed evidence to demonstrate that, assuming that they had to intervene to ensure that dispensaries were established in sparsely populated areas, the grant of an exclusive retailing right was the measure which was least restrictive from the point of view of intra-Community trade. The Advocate General found, on the contrary, certain material in the file that seemed to show that maintenance of the exclusive right at issue was not necessary to achieve the aim pursued. The material was as follows.[83]

In order to ensure the distribution of medicinal products in sparsely populated areas, Apoteket concluded contracts with external operators, pharmacy agents, who were already located in the areas concerned and who were chosen, not on the basis of criteria relating to population density, but on the basis of business considerations, that is to say, in places where they did not compete with full scale pharmacies. The pharmacy agents did not receive any training and were not authorised to provide the customers with advice.[84] In addition, Apoteket had begun to do business over the Internet and by telephone.[85]

As a less restrictive system, the Advocate General suggested a system of licences and intervention only in specific cases by concluding a public service contract with a private operator. That operator would thus have a public service obligation imposed on it and would be responsible, in return for a subsidy paid by the State, for the sale of medicines in the area concerned. Such a system would be appreciably less restrictive from the point of view of intra-Community trade since, unlike an exclusive retailing right, it would not prevent operators in other Member States from establishing themselves in the Member State concerned or from offering their products to customers of their choice in that country.[86]

He therefore held that the Swedish authorities had not justified the application of Article 86.2 EC and that the maintenance of the exclusive right to retail medicinal products was not necessary to enable Apoteket to perform its particular task and that, in any event, the maintenance of

[83] Opinion of Advocate General Léger in Case C-438/02 *Hanner* [2005] ECR I-4551, paragraph 156-158.
[84] Ibid, paragraph 160-161.
[85] Ibid, paragraph 163.
[86] Ibid, paragraph 169.

that right constituted a disproportionate measure in relation to the aim pursued.[87]

The Advocate General finally concluded that the answer would not be different if non-prescription medicines were to be excluded from the scope of Apoteket's monopoly. The foregoing considerations show that the reason which preclude acceptance of the necessity and proportionality of Apoteket's exclusive right apply both to prescription medicines and non-prescription medicines. Excluding non-prescription medicines from the scope of Apoteket's exclusive right would, accordingly, not make it compatible with Community law.[88]

## 4.8 The Judgment of the ECJ

Since the Advocate General had criticized the judgment in *Franzén* and examined only the actual effects of the monopoly, not the procedural and administrative aspects of it, it was of particular interest to see if the ECJ would adhere to its conclusion in the *Franzén* judgment and thereby contradict its Advocate General.[89]

The Advocate General wanted most of all an overall examination of the effects of the monopoly on intra-Community trade. Although the ECJ did not come to the same conclusion as its Advocate General, it seems as though the Court has taken some of his criticism into consideration. The Court does not divide its judgment into separate parts as in the *Franzén* judgment, but makes an overall examination.[90]

It can be said that Sweden put the ECJ in a difficult position by not adjusting the system, by itself, so that it would be compatible with Community Law. It is one thing for the Court to accept a system that has been adjusted to the common market, and a completely different task to find a similar solution when no such adjustments have been made. The judgment is indeed a further development of the *Franzén* judgment.[91]

P. Lindfelt and L. Hiljemark, whose law firm represented Krister Hanner, are of the opinion that it is important to remember the purpose of a preliminary ruling from the ECJ, when reading and interpreting the *Hanner* judgment. The task of the Court was neither to make a complete assessment of all parts of the monopoly, nor to examine their compatibility with all provisions of the EC Treaty which the Stockholms tingsrätt had referred to it. The task of the Court in a preliminary ruling is, on the other hand, to give the national court sufficient guidance on

[87] Opinion of Advocate General Léger in Case C-438/02 *Hanner* [2005] ECR I-4551, paragraph 173.
[88] Ibid, paragraph 174-175.
[89] J. Hettne, ERT 2005:3, page 564. See paragraph 42 and 43 of the judgment.
[90] Ibid, page 568.
[91] Ibid, page 562.

how the EC rules should be interpreted in order for it to be able to rule in the main proceedings. The ECJ therefore often confines its judgments and leaves for the national court to apply EC law on the facts of the case.

The purpose of the preliminary ruling in this specific case was, accordingly, to give the Stockholms tingsrätt sufficient guidance so that it could determine whether Krister Hanner was to be convicted for breach of the Swedish rules reserving retail sales of medicinal preparations to Apoteket. Of the five questions asked by the Stockholms tingsrätt, the ECJ was satisfied with providing an answer only to the first question regarding the compatibility with Article 31 EC. Since the monopoly was in breach of this article, the Court did not answer the other four questions referred to it. The reason for this is that it is not of relevance for the judgment of the national Court, if the monopoly is in breach of other provisions of the EC Treaty as well, when it has already been found to be in breach of Article 31 EC.[92]

## 4.9 Rule of Reason

The ECJ held, similar to what the Advocate General had observed, that the sales regime at issue constituted a State monopoly of a commercial character within the meaning of Article 31 EC.[93] In such a situation, the Court recalled that it is clear from settled case-law of the Court that, although Article 31 EC does not require total abolition of State monopolies of a commercial character, it requires them to be adjusted in such a way as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.[94]

Similar to what was pointed out in *Franzén*, the Court held that the purpose of Article 31.1 EC is in fact to reconcile the possibility for Member States to maintain certain monopolies of a commercial character as instruments for the pursuit of *public interest aims* with the requirements of the establishment and functioning of the common market.[95] The Court thus confirmed the interpretation of Article 31 EC which was made in *Franzén,* namely that an exclusive retailing right is permitted on the common market, if it is based on a public interest aim and is arranged in a non-discriminatory way,[96] although this is not in

[92] P. Lindfelt and L. Hiljemark, *Apoteksdomen – det rättsliga och politiska efterspelet* (ERT 2005:4), page 698-700.
[93] Case C-438/02 *Hanner* [2005] ECR I-4551, paragraph 33. The Court makes a reference to the Opinion of Advocate General Léger, paragraph 36 and 39.
[94] Ibid, paragraph 34. See also Case 59/75 *Manghera* [1976] ECR 91, paragraph 4 and 5; Case 91/78 *Hansen* [1979] ECR 935, paragraph 8; Case 78/82 *Commission v. Italy* [1983] ECR 1955, paragraph 11; Case C-387/93 *Banchero* [1995] ECR I-4663, paragraph 27; and Case C-189/95 *Franzén* [1997] ECR I-5909, paragraph 38.
[95] Ibid, paragraph 35. The Court makes a reference to Case C-189/95 *Franzén*, [1997] ECR I-5909, paragraph 39.
[96] J. Hettne, ERT 2005:3, page 567.

any way clear from the wording of Article 31.1 EC. The Court did not further touch upon this issue in the judgment, which gives the impression that it implicitly accepted that the Swedish State monopoly was in fact based on a public interest aim.[97]

The Court also held, as in *Franzén,* that Article 31.1 aims at the elimination of obstacles to the free movement of goods, save, however, for restrictions on trade which are inherent in the existence of the monopolies in question.[98]

## 4.10 Discrimination

Thus, as far as sales monopolies are concerned, the Court recalled that it has held that monopolies are not allowed if they are arranged in such a way as to put at a disadvantage, in law or in fact, trade in goods from other Member States as compared with trade in domestic goods.[99]

It is noteworthy to observe the difference in the ECJ's concept of 'discrimination', compared to the concept of 'discrimination' used by Advocate General Léger. As can be recalled, Advocate General Léger held that Article 31 EC has a wider scope than the provisions of the Treaty concerning the free movement of goods. According to him, that provision prohibits not only discrimination and obstacles with regard to *products* from other Member State. It primarily prohibits discrimination between *nationals* of Member States regarding the conditions under which goods are procured and marketed. Article 31 thus aims to guarantee that traders established in other Member States have the opportunity to offer their product to customers of their choice in the Member State concerned. Conversely, it aims to enable consumers in the Member State concerned to obtain supplies from traders of their choice in other Member States.[100]

The Court, on the other hand, only found it necessary to determine whether the sales regime at issue in the main proceedings was arranged in such a way as to exclude any discrimination against *goods* from other Member States. [101] The Court was to examine whether the organization and operation of the State monopoly risked putting medicinal preparations from other Member States at a disadvantage or whether that

[97] J. Hettne, ERT 2005:3, page 565.
[98] Case C-438/02 *Hanner* [2005] ECR I-4551*,* paragraph 35. The Court makes a reference to Case C-189/95 *Franzén*, [1997] ECR I-5909, paragraph 39.
[99] Ibid, paragraph 36. The Court makes a reference to Case C-189/95 *Franzén* [1997] ECR I-5909, paragraph 40.
[100] P. Lindfelt and L. Hiljemark, ERT 2005:4, page 700. See Opinion of Advocate General Léger, paragraph 87.
[101] Case C-438/02 *Hanner* [2005] ECR I-4551, paragraph 37.

monopoly did in practice place such medicinal preparations at a disadvantage.[102]

As regards the first of those two aspects, the Court recalled that it is clear from the judgment in *Franzén* that the selection system of a sales monopoly must be based on criteria which are independent of the origin of the products and must be transparent by providing both for an obligation to state reasons for decisions and for an independent monitoring procedure.[103] Furthermore, the retail network of such a monopoly must be organized in such a way that the number of sales outlets is not limited to the point of compromising consumers' procurement of supplies.[104] Finally, such a monopoly's marketing and advertising measures must be unbiased and independent of the origin of the products and must endeavour to make known new products to consumers.[105]

Since the monopoly on medicinal products had not at all been adjusted to the requirements of Community law in accordance with the case-law of the ECJ,[106] the Court was satisfied by concluding that the Swedish system did not contain provisions for neither a purchasing plan nor a system of 'calls for tenders' within the framework of which producers whose products were not selected would be entitled to be informed of the reasons for the selection decision. The Court also pointed out that it did not provide for any opportunity to contest such decisions before an independent supervisory authority. On the contrary, Apoteket seemed, in principle, to be entirely free to select a product range of its choice. Discrimination was therefore not ruled out.

The Court meant that this was a sufficient basis for finding that the way in which Apoteket operated and was organized, and more particularly its system of selecting medicinal preparations, was liable to place trade in medicinal preparations from other Member States at a disadvantage as compared with trade in Swedish medicinal preparations. Thus, the State monopoly was not arranged in such a way as to exclude any discrimination against medicinal preparations from other Member States. It therefore infringed Article 31.1 EC. The Court did not examine the retail network or the advertising measures.

Thus, having asserted that the organization and operation of the monopoly risked putting trade in goods from other Member States at a disadvantage, it was unnecessary to deal with the second aspect, namely

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[102] Case C-438/02 *Hanner* [2005] ECR I-4551, paragraph 38. The Court makes a reference to Case C-189/95 *Franzén* [1997] ECR I-5909, paragraph 40.
[103] Ibid, paragraph 39. The Court makes a reference to Case C-189/95 *Franzén* [1997] ECR I-5909, paragraphs 44 and 51.
[104] Ibid, paragraph 40. The Court makes a reference to Case C-387/93 *Banchero* [1995] ECR I-4663, paragraph 39 and Case C-189/95 *Franzén* [1997] ECR I-5909, paragraph 54.
[105] Ibid, paragraph 41. The Court makes a reference to Case C-189/95 *Franzén* [1997] ECR I-5909, paragraph 62.
[106] J. Hettne, ERT 2005:3, page 566.

the question of whether Apoteket did in practice place medicinal preparations from other Member States at a disadvantage.[107]

According to P. Lindfelt and L. Hiljemark, it cannot be concluded by the judgment of the Court, that the ECJ has restricted the concept of 'discrimination' to include discrimination of traders only. The fact that the ECJ did not examine whether Swedish consumers were discriminated, does not mean that the ECJ has precluded that such discrimination may in fact exist.

They mean that the ECJ has, on the contrary, by specifically mentioning the requirements of a satisfactory retail network and marketing and advertising measures in relation to the consumers, made it clear that even these parts can result in discrimination contrary to Article 31.1 EC. The ECJ has left for the national court to determine whether the Swedish system contains further flaws. By concluding that Apoteket's selection methods resulted in a risk of discrimination, no further examination of the retail network or the marketing and advertising measures, was necessary to conclude that the monopoly was incompatible with EC law.[108]

The ECJ evidently made a comparison of Apoteket and Systembolaget and thus required that the equivalent adjustments be made. This can be interpreted to the effect that were Apoteket to change the parts criticized by the Court, the Swedish monopoly would be arranged in such a way so that it, at least *prima facie* would be compatible with Article 31.1 EC. The Court stated that since the monopoly was not arranged in such a way so that discrimination was ruled out, it was unnecessary to examine whether Apoteket in practice placed medicinal preparations from other Member States at a disadvantage. If the system was correctly adjusted, in accordance with the judgment of the ECJ, it would therefore still only be *prima facie* legitimate. If it turns out that Apoteket, in spite of adjustments, *in practice* places medicinal preparations from other Member States at a disadvantage, the Swedish system can be found incompatible with Article 31.1 EC by the ECJ.[109]

## 4.11 Justification

The Swedish government claimed, however, that the sales regime at issue in the main proceedings could be justified.[110] The Court pointed out that it is clear from the case-law of the Court that Article 86.2 EC may be relied upon to justify the grant by a Member State, to an undertaking entrusted with the operation of services of general economic

[107] Case C-438/02 *Hanner* [2005] ECR I-4551, paragraph 42-45.
[108] P. Lindfelt and L. Hiljemark, ERT 2005:4, page 700-702. See paragraph 40 and 41 of the judgment.
[109] J. Hettne, ERT 2005:3, page 567-568. See paragraph 44 and 45 of the judgment.
[110] Case C-438/02 *Hanner* [2005] ECR I-4551, paragraph 46.

interest, of exclusive rights which are contrary to Article 31.1 EC, to the extent to which performance of the particular tasks assigned to it can be achieved only through the grant of such rights and provided that the development of trade is not affected to such an extent as would be contrary to the interests of the Community.[111] The Swedish system, however, could not be justified under Article 86.2 EC in the absence of a selection system that excludes any discrimination against medicinal preparations from other Member States.

Consequently, the answer to the first question was that Article 31.1 EC precludes a sales regime, which grants an exclusive retail right, and is arranged in the same way as the sales regime at issue in the main proceedings. In view of the answer given to the first question, the Court found it unnecessary to answer the other four questions.[112]

## 4.12 Summary

The judgment in *Hanner* confirms what was said in *Franzén,* and makes it clear that unlike the Advocate General, the Court does not find that the judgment in *Franzén* was a misinterpretation of EC law. Evidently, an exclusive retailing right is permitted on the common market, if it is based on a public interest aim and is arranged in a non-discriminatory way. In order to be non-discriminatory, certain requirements for guaranteeing equal treatment must be fulfilled. Moreover, only restrictions on trade, which are inherent in the existence of the monopolies in question, can be maintained.

The ECJ compared Apoteket to Systembolaget and required the equivalent structural adjustments to be made. The judgment in *Hanner* shows that if there is a purchasing plan and a system of 'calls for tenders' within the framework of which producers whose products are not selected are entitled to be appraised of the reasons for the selection decision as well as given an opportunity to contest such a decision before an independent supervisory authority, the monopoly is at least prima facie compatible with Article 31.1 EC. If the monopoly, in spite of those adjustments, lead to de facto discrimination, it is not permitted on the common market. [113]

[111] Case C-438/02 *Hanner* [2005] ECR I-4551, paragraph 47. The Court makes a reference to Case C-157/94 *Commission v. Netherlands* [1997] ECR I-5699, paragraph 32; Case C-158/94 *Commission v. Italy* [1997] ECR I-5789, paragraph 43; and Case C-159/94 *Commission v. France* [1997] ECR I-5815, paragraph 49.
[112] Ibid, paragraph 48-50.
[113] J. Hettne, NJ 2005:3, page 46-49

# 5 Right of Establishment and Freedom to Provide Services

Article 43 EC, on the freedom of establishment, provides as follows:

*Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.*

*Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital.*

The first paragraph of Article 48 EC provides:

*Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall…be treated in the same way as natural persons who are nationals of Member States.*

Article 46.1 EC, which is an exception to the rules, provides:

*The provisions of this chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.*

Article 49.1 EC provides:

*Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.*

Article 50 EC provides:

*Services shall be considered to be 'services' within the meaning of this Treaty where they are normally provided for remuneration, in so far as*

*they are not governed by the provisions relating to freedom of movement for goods, capital and persons.*

*'Services' shall in particular include:*

*(a) activities of an industrial character;*
*(b) activities of a commercial character;*
*(c) activities of craftsmen;*
*(d) activities of the professions.*

*Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing service may, in order to do so, temporarily pursue his activity in the State where the service is to be provided, under the same conditions as are imposed by that State on its own nationals.*

When an alleged restriction on the free movement of services is found to exist, the Member State can try to justify it either under the Treaty exceptions or under a broader category of Court-developed exceptions. Article 55 EC makes the three grounds of exception set out in Article 46 EC, which permit Member States to discriminate on grounds of public policy, security and health, applicable in the field of services.[114]

In the case of *Van Binsbergen,*[115] several conditions were laid down by the ECJ to be satisfied if a restriction on the freedom to provide services is to be compatible with Article 49 (ex Article 59) EC. First of all, the restriction must be adopted in pursuance of a legitimate public interest which is not incompatible with Community aims. The second condition is that the restriction must be one which is equally applicable to persons established within the state, and which must be applied without discrimination. The third condition for 'objective justification' is that the restriction imposed on the provider of services must be proportionate to the need to observe the legitimate rules in question. The proportionality test necessitates examining whether the rule is 'suitable' or 'appropriate' in achieving its aim, and whether that aim could not be satisfied by other, less restrictive means. This test of objective justification was also seen in the ruling of *Gebhard*[116] in relation to freedom of establishment.[117]

[114] P. Craig and G. De Búrca, *EU Law,* page 814-815.
[115] Case 33/74 *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299.
[116] Case C-55/94 *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.
[117] P. Craig and G. De Búrca, *EU Law,* page 816.

# 6 The most Significant Judgments of the ECJ as regards Gambling

The question of whether the Swedish monopoly on gambling is compatible with EC law has not been referred to the ECJ, whereas the exclusive rights of other Member States have been examined by the ECJ. The requirements of the ECJ in these judgments are requirements which apply to the Swedish monopoly as well, which is why these judgments are of relevance in establishing whether the Swedish exclusive rights are compatible with EC law.

## *6.1* Case C-275/92 *Schindler*

The ECJ has in its case-law been very tolerant when it comes to exclusive rights on gambling and lotteries. The judgments in *Schindler* and *Läärä* express the ECJ's previous more tolerant view. The first fundamental case concerning the market for lottery and gambling was *Schindler* from 1994, which concerned the UK lotteries legislation, according to which, lotteries were prohibited with certain exceptions. [118]

G. and J. Schindler, acting as agents on behalf of a German public lottery, seeked to promote that lottery by post and otherwise within the UK. They were charged with an office under the UK lotteries legislation. The case was referred to the ECJ, and several Member States argued that lotteries were not an 'economic activity' within the meaning of the Treaty, since they were traditionally prohibited or operated by public authorities in the public interest. The Court rejected this argument, ruling that lotteries were services provided for remuneration (the price of the lottery ticket), and that, although they were closely regulated in some Member States, they were not totally prohibited in any.[119]

Furthermore, the ECJ found that the importation of lottery advertisement and tickets into a Member State with a view to the participation by residents of that State in a lottery operated in another Member State relates to services,[120] but not goods, making the EC rules on free movement of services applicable, Article 59 (now Article 49) EC. The Court found these rules applicable even though lotteries were principally prohibited in the UK.

[118] U. Bernitz, *Nationella spelmonopol i ljuset av Gambelli*, (ERT 2004:3), page 453.
[119] P. Craig and G. de Búrca, *EU Law,* page 811-812.
[120] Case C-275/92 *HM Customs and Excise v. Schindler* [1994] ECR I-1039, paragraph 37.

The Court held that the UK legislation constituted a restriction for persons of other Member States who had established lottery business. The rules were, however, non-discriminatory, since they were equally applicable to nationals of the Member State concerned. Moreover, the Court found that the UK legislation was justified, in relation to Article 59 (now Article 49) EC, on public-policy grounds.[121]

The Court pointed out the moral, religious and cultural considerations which attach to lotteries, like other forms of gambling, in all the Member States. The general tendency of the national legislation is to restrict, or even prohibit, the practice of gambling and to prevent it from being a source of private profit. The Court also held that lotteries involve a high risk of crime and fraud, given the potentially high stakes and winnings, particularly when they are operated on a large scale. Furthermore, they are incitement to spend which may have damaging individual and social consequences. A final ground which, according to the Court, was not without relevance, although it cannot in itself be regarded as an objective justification, is that lotteries may make a significant contribution to the financing of benevolent or public interest activities such as social works, charitable works, sport or culture.

The Court held that those particular factors justify national authorities having a sufficient degree of latitude to determine what is required to protect the players and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in society, as regards the manner in which lotteries are operated, the size of the stakes, and the allocation of the profits of them. In those circumstances, it is for the Member State to assess not only whether it is necessary to restrict the activities of lotteries but also whether they should be prohibited, provided that those restrictions are not discriminatory.[122]

The ECJ found, accordingly, in *Schindler* that the rules of the EC Treaty on freedom to provide services did not preclude national rules such as the UK lotteries legislation. Various State monopolies on gambling seemed fully legitimate, in the light of the judgment in *Schindler*.[123]

## *6.2* Case C-124/97 *Läärä*

The *Läärä* case concerned the Finnish law on gaming, according to which games of chance may be organized, with the authorisation of the administrative authorities, only for the purpose of collecting funds for charity or for another non-profit making purpose provided for by law. Only one licence, valid for a specified period, could be issued to cover

[121] U. Bernitz, ERT 2004:3, page 453.
[122] Case C-275/92 *Schindler* [1994] ECR I-1039*,* paragraph 60-61.
[123] U. Bernitz, ERT 2004:3, page 454.

those activities. Such a licence was issued to the Association for the Management of Slot Machines, which paid over the net proceeds of its activities to the Ministry of Social Affairs and Health, which then distributed it amongst the organizations and foundations established to meet the aforesaid needs.[124]

Cotswold Microsoft Ltd, a company incorporated under English law, had entrusted Oy Transatlantic Software Ltd, a company incorporated under Finnish law, with the running in Finland of slot machines, which, in terms of the contract between the two companies, remained the property of Cotswold Microsoft Ltd.[125]

Criminal proceedings were brought against Mr Läärä, in his capacity as the chief executive of Oy Transatlantic Software Ltd, on a charge of having operated these machines in Finland without a licence. He denied the offence with which he was charged, in particular on the ground that the prospects of winning offered by the machines were not based exclusively on chance but also, to a large extent, on the skill of the player, with the result that those machines could not be regarded as gaming machines. He also argued that the Finnish legislation was, in any event, contrary to the Community rules governing the free movement of goods and services. The Court decided to stay proceedings and to refer the case to the ECJ for a preliminary ruling.

The ECJ initially stated that the national court was asking whether, in the light of the judgment in *Schindler,* Articles 30, 59 and 60 (now Articles 28, 49 and 50) EC were to be interpreted as not precluding national legislation such as that in force in Finland, which grants to a single public body exclusive rights to exploit the operation of slot machines, in view of the public interest grounds relied on in order to justify it.[126]

Although the judgment in *Schindler* related to the organization of lotteries, the Court found that those considerations are equally applicable to other comparable forms of gambling.[127]

In the present case, it was apparent from the information supplied by the national court that a game of chance was involved and that the machines at issue in the main proceedings offered, in return for a payment specifically intended to represent consideration for their use, the prospect of winning a sum of money. The relatively modest size of the stakes, on which the appellants in the main proceedings based their case, did not in any way preclude the possibility of earning considerable sums from the operation of such machines, particularly on account of the number of potential players and the tendency amongst most of them,

[124] Case C-124/97 *Läärä* [1999] ECR I-6067, paragraph 3-5.
[125] Ibid, paragraph 2 and 7.
[126] Ibid, paragraph 8-10.
[127] Ibid, paragraph 15.

given its short duration and its repetitive nature, to play the game over and over again.

In those circumstances, the Court found that games consisting of the use, in return for a money payment, of slot machines such as those at issue in the main proceedings must be regarded as gambling, which is comparable to the lotteries forming the subject of the *Schindler* judgment.[128]

As the Court held in *Schindler* in relation to the organization of lotteries, the provisions of the Treaty relating to freedom to provide services apply to activities which enable users, in return for payment, to participate in gaming. Consequently, such activities fall within the scope of Article 59 (now Article 49) EC of the Treaty, since at least one of the service providers was established in a Member State other than that in which the service was offered.

National legislation on slot machines, such as the Finnish legislation, prohibited any person other than the licensed public body from running the operation of the machines in question; it therefore involved no discrimination on grounds of nationality and applied without distinction to operators who might be interested in that activity, whether they were established in Finland or in another Member State. However, such legislation constituted an impediment to freedom to provide services in that it directly or indirectly prevented operators in other Member States from themselves making slot machines available to the public with a view to their use in return for payment.

It was therefore necessary to examine whether that obstacle to freedom to provide services could be permitted pursuant to the derogations expressly provided for by the Treaty, or whether it may be justified, in accordance with the case-law of the Court, by overriding reasons relating to the public interest.[129]

In that regard, Articles 55 and 56 (now Articles 45 and 46) EC, which are applicable pursuant to Article 66 (now Article 55) EC, permit restrictions which are justified by virtue of a connection, even on an occasional basis, with the exercise of official authority or on grounds of public policy, public security or public health. Furthermore, the Court held that it is clear from the case-law of the Court[130] that obstacles to freedom to provide services arising from national measures which are applicable without distinction are permissible only if those measures are justified by overriding reasons relating to the public interest, are such as to guarantee the achievement of the intended aim and do not go beyond what is necessary in order to achieve it.

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[128] Case C-124/97 *Läärä* [1999] ECR I-6067, paragraph 17-18.
[129] Ibid, paragraph 27-30.
[130] The Court makes a reference to Case C-288/89 *Collective Antennevoorziening Gouda* [1991] ECR I-4007, paragraph 13-15.

The Court found that the legislation at issue in the main proceedings responded to the concern to limit exploitation of the human passion for gambling, to avoid the risk of crime and fraud to which the activities concerned give rise and to authorise those activities only with a view to the collection of funds for charity or for other benevolent purposes.[131]

The Finnish legislation differed in particular from the legislation at issue in *Schindler* in that it did not prohibit the use of slot machines but reserved the running of them to a licensed public body. However, the power to determine the extent of the protection to be afforded by a Member State on its territory with regard to lotteries and other forms of gambling forms part of the national authorities' power of assessment, recognised by the Court in paragraph 61 of the *Schindler* judgment. It is for those authorities to assess whether it is necessary, in the context of the aim pursued, totally or partially to prohibit activities of that kind or merely to restrict them and, to that end, to establish control mechanisms, which may be more or less strict.[132]

The fact that the games at issue were not completely prohibited was not enough to show that the national legislation was not in reality intended to achieve the public interest objectives at which it was purportedly aimed, which must be considered as a whole. Limited authorisation of such games on an exclusive basis, which has the advantage of confining the desire to gamble and the exploitation of gambling within controlled channels, of preventing the risk of fraud or crime in the context of such exploitation, and of using the resulting profits for public interest purposes, likewise falls within the scope of those objectives.[133]

In conclusion, the Court found that in conferring exclusive rights on a single public body, the provisions of the Finnish legislation on the operation of the slot machines did not appear to be disproportionate, in so far as they affect freedom to provide services, to the objectives they pursue. The answer that was given to the national court was therefore that the Treaty provisions relating to freedom to provide services do not preclude national legislation such as the Finnish legislation which grants to a single public body exclusive rights to operate slot machines, in view of the public interest objectives which justify it.[134]

## *6.3* Case C-67/98 *Zenatti*

The judgment in *Zenatti* shows a turning point, although the judgment was delivered only a month after *Läärä*. Mr Zenatti ran a centre for the

[131] Case C-124/97 *Läärä* [1999] ECR I-6067, paragraph 31-32.
[132] Ibid, paragraph 34-35.
[133] Ibid, paragraph 37.
[134] Ibid, paragraph 42-43.

exchange of information on bets in Italy for a British company specialising in taking bets. Mr Zenatti was ordered by a public prosecutor to cease taking bets, and requested the Regional Administrative Court to review the legality of the prosecutor's decision. The national court decided to stay proceedings and ask the ECJ for a preliminary ruling. According to national law, the organization of betting was permitted only in respect of sporting events run by the national Olympic Committee and of horse races.

The ECJ found that betting on sporting events was equivalent to lotteries, why the ruling in *Schindler* could be applied, although the Court did point out that there were certain distinctions between the circumstances of the two cases, the most significant being that *Schindler* involved a total prohibition on the type of gambling, whereas the Italian law, on the other hand, permitted the organization of betting on sporting events in certain circumstances.

Similar to what was concluded in *Schindler*, the Court found that betting on sporting events is a service and that the legislation at issue was not discriminatory, although it did result in a disadvantage to foreign service providers. The Court further examined whether the restriction could be justified by overriding reasons relating to the public interest and found that this was for the Member State concerned to assess.

The ECJ stated that national rules which grant special or exclusive rights to certain undertakings to take bets on sporting events, and consequently restrict the freedom to provide bookmaking services are not incompatible with EC law if they are imposed as part of a consistent and proportionate national policy of curbing the harmful individual and social effects of betting. [135]

It was stated by the Court that the restrictions must in any event reflect a concern to bring about a genuine diminution of gambling opportunities, and the financing of social activities through a levy on the proceeds of authorised games must constitute only an incidental beneficial consequence and not the real justification for the restrictive policy adopted. [136]

The judgment is clearer than previous judgments, in pointing out that the actual purpose of the restriction must be to diminish gambling, and that the financing of social activities cannot be the primary objective. [137]

[135] U. Bernitz, ERT 2004:3, page 455.
[136] Case C-67/98 *Zenatti* [1999] ECR I-7289, paragraph 36.
[137] U. Bernitz, ERT 2004:3 page 456.

## *6.4* Case C-243/01 *Gambelli*

It can be said that *Gambelli* is a further development of *Zenatti*. The facts of *Gambelli* do not differ much from the facts of *Zenatti*. Mr Gambelli and 137 other persons belonged to a widespread and complex organization of Italian agencies linked by the Internet to the English bookmaker Stanley International Betting Ltd, established in Liverpool. They were accused of having collaborated in Italy with a bookmaker abroad in the activity of collecting bets, which was normally reserved by law to the State.[138]

Stanley was an English capital company registered in the United Kingdom, which carried on business as a bookmaker under a licence granted pursuant to the Betting, Gaming and Lotteries Act by the City of Liverpool. It was authorised to carry on its activity in the United Kingdom and abroad. It organized and managed bets under a UK licence, identifying the events, setting the stakes and assuming the economic risk. Stanley offered an extensive range of fixed sports bets on national, European and world sporting events. Individuals had the opportunity of participating from their own home, using various methods such as the Internet, fax or telephone, in the betting organized and marketed by it.[139]

Criminal proceedings were brought against Mr Gambelli and others, who were accused of having unlawfully organized clandestine bets and of being the proprietors of centres carrying on the activity of collecting and transmitting betting data, which constitutes an offence of fraud against the State.[140]

The national court questioned whether the principle of proportionality was being observed and also considered that it could not ignore the extent of the apparent discrepancy between national legislation severely restricting the acceptance of bets on sporting events by foreign Community undertakings on the one hand, and the considerable expansion of betting and gaming which the Italian State was pursuing at national level for the purpose of collecting taxation revenues, on the other hand. In those circumstances, the national court decided to stay proceedings and to refer the case to the ECJ for a preliminary ruling.[141]

Gambelli and others considered that by prohibiting Italian citizens from linking up with foreign companies in order to place bets and thus to receive the service offered by those companies by the Internet, by prohibiting Italian intermediaries from offering the bets managed by Stanley, by preventing Stanley from establishing itself in Italy with the

[138] Case C-243/01, *Gambelli* [2003] ECR I-13031, paragraph 10.
[139] Ibid, paragraph 12-13.
[140] Ibid, paragraph 2.
[141] Ibid, paragraph 23-24.

assistance of those intermediaries and thus offering its services in Italy from another Member State and, in sum, by creating and maintaining a monopoly in the betting and gaming sector, the legislation at issue in the main proceedings amounted to a restriction on both freedom of establishment and freedom to provide services.[142]

The Court found that national rules such as the Italian legislation on betting constitute a restriction on the freedom of establishment and on the freedom to provide services. In those circumstances, it was necessary to consider whether such restrictions are acceptable as exceptional measures expressly provided for in Article 45 and 46 EC, or justified, in accordance with the case-law of the Court, for reasons of overriding general interest.[143]

The Court stated that it is settled case-law that the diminution or reduction of tax revenue is not one of the grounds listed in Article 46 EC and does not constitute a matter of overriding general interest which may be relied on to justify a restriction on the freedom of establishment or the freedom to provide services.[144]

The Court also repeated what was said in *Zenatti,* namely that the restrictions must in any event reflect a concern to bring about a genuine diminution of gambling opportunities, and the financing of social activities through a levy on the proceeds of authorised games must constitute only an incidental beneficial consequence and not the real justification for the restrictive policy adopted.[145]

In any event, in order to be justified the restrictions on freedom of establishment and on freedom to provide services must satisfy the conditions laid down in the case-law of the Court.[146] The restrictions must be justified by imperative requirements in the general interest, be suitable for achieving the objective which they pursue and not go beyond what is necessary in order to attain it. They must in any event be applied without discrimination.[147]

After that, the Court made the statement which shows that its view on State monopolies on gambling is now more strict.[148] The Court held that in so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and betting to the

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[142] Case C-243/01 *Gambelli* [2003] ECR I-13031, paragraph 25.
[143] Ibid, paragraph 59-60.
[144] Ibid, paragraph 61. The Court makes a reference to Case C-264/96 *ICI v.Colmer* [1998] ECR I-4695, paragraph 28, and Case C-136/00 *Danner* [2002] ECR I-8147, paragraph 56.
[145] Ibid, paragraph 62. See also paragraph 36 of the judgment in Case C-67/98 *Zenatti* [1999] ECR I-7289.
[146] Ibid, paragraph 64. The Court makes a reference to Case C-19/92 *Kraus v. Land Baden-Württemberg* [1993] ECR I-1663, paragraph 32, and Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37.
[147] Ibid, paragraph 65.
[148] J. Hettne, ERT 2004:4, page 605.

financial benefit of the public pursue, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify measures such as those at issue in the main proceedings.[149]

Finally, the Court held that it is for the national court to determine whether such legislation, taking account of the detailed rules for its application, actually serves the aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those aims.[150]

[149] Case C-243/01 *Gambelli* [2003] ECR I-13031, paragraph 69.
[150] Ibid, paragraph 77.

# 7 The Swedish Monopoly on Gambling

In Sweden, the activity of arranging lotteries and gambling is mainly reserved for the State. National legislation and case-law confines the number of operators on the market, making it, in practice, a matter of a State monopoly.

The Swedish Lotterilag (1994:1000), which is the Swedish Lotteries Act of 1994, has a very wide definition of lotteries and is therefore of crucial importance. A permit to arrange lotteries must only be granted to Swedish legal entities that are non-profit associations, while companies owned by the State have more or less exclusive rights on gaming machines. The Kasinolag (1999:355), which is the Swedish Casino Act of 1999, regulates casinos closely. A licence can be granted only to a company which is fully owned by the Swedish State.

In accordance with Article 45 of the Swedish Lotteries Act, the Swedish government has entrusted two operators, Svenska Spel and AB Trav och Galopp, with exclusive rights to pools and Lotto. The market for gambling, in particular those parts controlled by Svenska Spel and AB Trav och Galopp, has expanded in recent years. New forms of gambling have been introduced, the size of possible bets and prizes has increased, and the marketing strategies seem to have the purpose of encouraging gambling.[151]

However, following the judgment in *Gambelli*, numerous international private gambling companies got the courage to challenge various State monopolies on gambling, not least in Sweden. A number of judicial proceedings were initiated as a consequence of that judgment.

The Supreme Administrative Court of Sweden (Regeringsrätten) has in two judgments of 26 October 2004[152] concluded that the Swedish Lotteries Act is compatible with EC Law. This does, however, not mean that the decision is final. In fact, an action was brought against Sweden by the Commission 13 October 2004, in which the Commission pointed out, inter alia, that Svenska Spel was expanding through aggressive marketing strategies and by introducing new forms of gambling. In view of this, the Commission questioned whether the Swedish restrictions of freedom to provide services could be justified by a public interest aim, since the main purpose of the Swedish legislation seemed to be financial, more specifically to increase revenues for the State.[153]

[151] U. Bernitz, ERT 2004:3, page 458-459.
[152] RÅ 2004 ref. 95; RÅ 2004 ref. 96.
[153] J. Hettne, ERT 2004:4, page 605-606.

Many have criticized the judgments of 26 October 2004. O. Wiklund and H. Bergman, who represented the international betting company Unibet in subsequent judicial proceedings against the Swedish State, take the view that the Supreme Administrative Court has made a clear misinterpretation of EC law. They are of the opinion that the Swedish legislation is incompatible with EC Law, since the actual purpose behind Svenska Spel and AB Trav och Galopp spending a lot of money on marketing and introducing new forms of gambling is to increase revenues for the State rather than to protect consumers against fraud by diminishing gambling opportunities.[154]

## 7.1 *Wermdö Krog* and *Bergsten*

The Swedish Supreme Administrative Court has, as mentioned above, in two judgments of October 26 2004, found that Article 38 of the Swedish Lotteries Act, is compatible with EC law. Under Article 38, it is not permitted, in commercial operation or otherwise for the purpose of profit, to promote participation in unlawful lotteries arranged within the country or in lotteries arranged outside the country. The promotion of participation in foreign lotteries has been prohibited and subject to criminal penalties for a long time period.

Apparently, the Swedish Supreme Administrative Court has found that the Swedish legislation on gambling was adopted in pursuance of a legitimate public interest aim, and that it therefore, diminishes gambling opportunities and does not encourage increased gambling.

The background of the judgments is two appealed orders under penalty of a fine from the lotteriinspektionen (National Gaming Board). Wermdö Krog was, according to the first one, obliged in 1998 to cease all arrangements of games for an English corporation. The Supreme Administrative Court found that the Swedish rules were compatible with EC rules and dismissed the appeal. The other case concerned a private person who was obliged, in the year of 2000, to remove a link to a foreign betting company from his own web page. The Court dismissed the appeal simply by referring to the judgment in *Wermdö Krog.*[155]

[154] O. Wiklund and H. Bergman, *Europeiseringstendenser och domstolskritik i svensk rätt - Regeringsrättens domar i spelmålen* (ERT 2005:4), page 727.
[155] N. Wahl, *Vad är oddsen för att det svenska spelmonopolet är förenligt med EG-rätten? – Regeringsrättens dom i Wermdö Krog* (ERT 2005:1), page 120-121.

## 7.2 The Judgment of the Swedish Supreme Administrative Court

The Supreme Administrative Court initially concluded in *Wermdö Krog* that the prohibition of the promotion of participation was contrary to freedom to provide services (Article 49 EC) and freedom of establishment (Article 43 EC), why the real question, according to the court, was to assess whether the impediment of these freedoms could be justified either under the Treaty exceptions (Article 45, 46 and 55 EC) or by overriding reasons relating to the public interest in accordance with the case-law of the ECJ.[156]

The Supreme Administrative Court found it unnecessary to refer the case to the ECJ for a preliminary ruling since, according to the court, the case-law of the ECJ in this particular field was so clear that no further guidance was necessary in order to rule in a case such as the present.

The court pointed out that, having regard to the case-law of the ECJ, as far as gambling is concerned, the national authorities must have a sufficient degree of latitude to determine what is required to protect the players and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in society, as regards the manner in which lotteries are operated, the size of the stakes, and the allocation of the profits they yield.[157]

Furthermore, in order for an impediment to be justified, the national rule must be non-discriminatory. The Supreme Administrative Court reached the conclusion that the national rules involved no discrimination on grounds of nationality and applied without distinction to operators established in Sweden or in other Member States.

The court also dealt with the question of whether the aim of the national rules was in fact to diminish gambling opportunities or whether the real purpose behind the rules was to collect State revenues, in which case, the impediment to freedom to provide services could not be justified. The court compared the circumstances to those in *Gambelli* and concluded that while it was true that the marketing strategies of the operators on the Swedish market incite and encourage consumers to participate in lotteries, games of chance and betting, for the Swedish system to be found incompatible with Community law, the marketing

[156] RÅ 2004 ref. 95. Regeringsrätten makes a reference to Case C-275/92 *Schindler* [1994] ECR I-1039; Case C-124/97 *Läärä* [1999] ECR I-6067; Case C-67/98 *Zenatti* [1999] ECR I-7289; and Case C-243/01 *Gambelli* [2003] ECR I-13031.
[157] RÅ 2004 ref. 95. See Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 61; Case C-124/97 *Läärä* [1999] ECR I-6067, paragraph 14 and 35; Case C-67/98 *Zenatti* [1999] ECR I-7289, paragraph 15 and 33; and Case C-243/01 *Gambelli* [2003] ECR I-13031, paragraph 63.

strategies must, in addition, have a mere financial purpose. [158] Moreover, in *Gambelli*, the authorities were responsible for the encouragement of such activities, whereas in Sweden, the two operators entrusted with exclusive rights, were behind the marketing strategies, not the Swedish authorities.[159] The court found that, although it could not disregard the fact that the collection of State revenues was a contributing factor to the national authorities' tolerant view on the marketing strategies, it could not be presumed that the financial aspect was in fact the sole or main purpose behind the national rules. Therefore, the rules were found justifiable and thereby, compatible with EC law.[160]

[158] RÅ 2004 ref. 95. A reference is made to Case C-243/01 *Gambelli* [2003] ECR I-3031, paragraph 69.
[159] N. Wahl, ERT 2005:1, page 126.
[160] RÅ 2004 ref. 95.

# 8 Comparison

The monopolies on alcoholic beverages, medicinal products and gambling are, naturally, not completely comparable. Alcoholic beverages and medicinal products are separate products, which need to be dealt with separately, while gambling is a service, and therefore by its very nature organized differently. One conclusion that can, nonetheless, be drawn from comparing the three monopolies, is that of the three monopolies, only the monopoly on alcoholic beverages had been adjusted to the EU, prior to Sweden becoming a member.

The monopoly on alcohol aims to protect public health against the harm caused by alcohol. It does so by deteriorating the availability and making the products more expensive, in order to prevent addiction and protect the health of the population. The monopoly on medicinal products, on the other hand, has the objective of meeting the need for safe and effective medicinal products. It does not have the aim of making products unavailable and expensive, but on the contrary, it aims at making safe medicinal products available throughout the country at uniform prices.[161] The aim of the monopoly on gambling is to diminish gambling opportunities. With only a few operators on the market, the service is made relatively unavailable.

As regards the selection system, in *Franzén* the products were selected on the basis of foreseeable and objective criteria. Systembolaget was to select, in accordance with the agreement made between Systembolaget and the Swedish State, beverages on the basis of their quality, their possible adverse effects on human health, customer demand and other business or ethical considerations.[162] Apoteket, on the other hand, did not have such foreseeable and objective criteria. Apoteket was to select safe and effective medicinal products at the lowest possible cost for consumers. Although Apoteket was obliged to supply all approved medicinal products on demand, only the products selected by Apoteket were made visible and known to consumers. When it comes to gambling, permits to arrange lotteries can only be granted to Swedish legal entities that are non-profit associations and have as their principal purpose the promotion of objects that are of public benefit. The value of the lottery prizes must correspond to at least 35 percent and not more than 50 percent of the value of the stakes, and the return must be used for the relevant object of public benefit.

Furthermore, only the monopoly on alcohol provided both for an obligation to state reasons for decisions and for an independent monitoring procedure. The monopoly on medicinal products provided neither. As to gambling, the more general requirements of administrative

[161] J. Hettne, NJ 2005:3, page 43-44.
[162] Case C-189/95 *Franzén* [1997] ECR I-5909, paragraph 21.

nature are applicable. Decisions can be challenged in an administrative court.[163]

Regarding the marketing strategies, the Lag med vissa bestämmelser om marknadsföring av alkoholdrycker (1978:763) (Law enacting certain measures governing the marketing of alcoholic beverages), whilst not laying down a general prohibition of advertising of alcoholic beverages, prohibited measures encouraging their consumption, such as insistent or high-pressure promotion techniques, doorstep selling and advertising on radio and television and in newspapers and periodicals. However, the promotion of alcoholic beverages was allowed in written material made available to the public at retail points, in particular those of Systembolaget, and in means of transport with a licence to serve alcohol. Nor did that law prohibit reference being made to alcoholic beverages in press articles, in particular in columns devoted to wine and drink appearing in daily newspapers and periodicals.[164] There were no implicit rules prohibiting the marketing of medicinal products. As to gambling, only Svenska Spel and AB Trav och Galopp are allowed to promote gambling.

Finally, as regards both the monopoly on alcoholic beverages and the monopoly on medicinal products, an application fee had to be paid for the grant of a licence, as well as an annual fee at retail. As regards gambling, there is also licence fee.[165]

[163] J. Hettne, ERT 2004:4, page 598.
[164] Case C-189/95 *Franzén* [1997] ECR I-5909*,* paragraph 20.
[165] J. Hettne, ERT 2004:4, page 599.

# 9 Conclusion

The changes made in Systembolaget before entering the EU are illustrative of what can generally be required of States using measures, which constitute a restriction on trade between Member States, but can be justified on grounds such as protection of health and life. In *Franzén* the ECJ clarifies under what conditions a State monopoly of a commercial character can be permitted on the common market. The Commission had pointed out the incompatibility of the monopolies on import, export, wholesale and production of alcoholic beverages, which is why the Swedish government abolished these exclusive rights, maintaining only the monopoly on retail. It was also agreed for the system to be arranged in such a way so that it would be acceptable on the common market.

In three other judgments, *Commission v. Netherlands*, *Commission v. Italy* and *Commission v. France*, which were delivered on the same day as *Franzén,* the Court has, as in its previous case-law, concluded that exclusive import rights give rise to discrimination prohibited by Article 31 EC against exporters established in other Member States and that such rights directly affect the conditions under which goods are marketed only as regards operators or sellers in other Member States. Exclusive export rights, on the other hand, give rise to discrimination against importers established in other Member States since that exclusivity affects only the conditions under which goods are procured by operators or consumers in other Member States.

Indeed, it may seem as though the Court has provided contradictory answers. Advocate General Léger is of the opinion that while the concept of discrimination relates only to goods in *Franzén,* it relates also to operators on the market in these three other judgments. Moreover, the Advocate General states that Article 31 EC aims to guarantee that traders established in other Member States have the opportunity to offer their products to customers of their choice in the Member States where the monopoly exists, and conversely, it aims to enable consumers in the Member State where the monopoly exists to obtain supplies from traders of their choice in other Member States.

The most significant difference here, according to the Advocate General, is that a concept of discrimination which relates only to products does not necessarily require the abolition of exclusive rights, while one which relates to nationals may involve abolition of exclusive rights. The Advocate General considers that the very existence of exclusive rights give rise to discrimination against operators.

It is true, as the Advocate General points out, that an exclusive retailing right shows some of the same characteristics as an exclusive import right

in so far as the entity constitutes not only the sole seller of that product in the Member State concerned, but also the sole purchaser of that product in that State. However, it is clear from the case-law of the Court that Article 31 EC does not require the total abolition of State monopolies, but only that they be adjusted so that they can be accepted on the common market.

The fact still remains that even if the three other judgments were delivered on the same day as *Franzén,* they concern exclusive import and export rights. These had been abolished in Sweden and an agreement had been made between Sweden and the Commission to maintain only the monopoly on retail. Although an exclusive retailing right may have some of the same characteristics as exclusive import and export rights, it seems as though the Court is not of the opinion that an exclusive retailing right is by its very nature discriminatory and must be abolished. This may have something to do with the fact that the Swedish monopoly had been approved by the Commission; it would be difficult for the ECJ to fail a monopoly after such efforts had been made to adjust the monopoly to the common market.

Furthermore, just because the Court did not examine whether Swedish consumers are discriminated does not mean that it has restricted the concept of discrimination. As has been said, the Court has in *Hanner* by specifically mentioning the requirements of a satisfactory retail network and marketing and advertising measures in relation to consumers, made it clear that even these parts can result in discrimination. The same thing is true in *Franzén* where the ECJ examined both the monopoly's sales network and the promotion of alcoholic beverages.

The ECJ has, evidently, found in *Franzén* that an exclusive retailing right is not inherently contrary to Article 31 EC. An exclusive right is, however, always a restriction on trade and an exception on the common market. Since the ECJ could not unconditionally permit a State monopoly such as Systembolaget, it had to find some requirements that had to be fulfilled in order for the monopoly to be compatible with EC law. As we have seen, those requirements are *an objective product plan*, *foreseeable and objective criteria*, the right to be *told the reasons* for a decision as well as given an *opportunity to challenge such a decision* before an independent supervisory authority. The ECJ used the same criteria for Apoteket, which gives the impression that it is now settled case-law of the Court that a monopoly on retail must fulfil these specific requirements.

As regards the justification, Advocate General Léger claims that the ECJ incorrectly created some kind of rule of reason within Article 31 EC, in stating that the purpose of Article 31 EC is to give a Member State the possibility to maintain certain monopolies of a commercial character as instruments for the *pursuit of public interest aims*, when this in fact

relates to the justification of the monopoly, which can only be justified by Article 30 and Article 86.2 EC.

However, although it is true that it is not in any way clear from the wording of Article 31 EC that certain monopolies of a commercial character can be maintained as instruments for the pursuit of public interest aims, it is not incorrect or even unusual for the Court to create such rules. In fact, the Court has adopted a similar approach when it comes to freedom to provide services. When an alleged restriction is found to exist, the Member State can justify it either under the Treaty exceptions or under a broader category of Court-developed exceptions, i.e. in accordance with the case-law of the Court, for reasons of *overriding general interest*. It seems as though a similar rule has been created here.

There are no equivalent procedural and administrative requirements that must be fulfilled as regards monopolies on gambling. The Court has, however, in the case of *Van Binsbergen* laid down several conditions to be satisfied if a restriction on the freedom to provide services is to be compatible with Article 49 EC. The conditions are that the restriction must be adopted in pursuance of a legitimate public interest, it must be applied without discrimination and the restriction imposed on the provider of services must be proportionate to the need to observe the legitimate rules in question.

There are also a few grounds which can neither fall within the scope of the exceptions in Article 46 EC, nor can they constitute a matter of overriding general interest which may be relied upon to justify a restriction on the freedom of establishment or the freedom to provide services. For instance, it is clearly settled case-law of the Court that the diminution or reduction of tax revenues is not a ground which can be relied upon in order to justify exclusive rights. Furthermore, the financing of social activities through a levy on the proceeds of authorised games must constitute only an incidental beneficial consequence and not the real justification for the restrictive policy adopted. And finally, public order concerns relating to the need to reduce opportunities for betting in order to justify measures cannot be invoked when the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public pursue.

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