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Drugs and alcohol – The Swedish monopolies

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Contents

Summary

The Swedish pharmacy monopoly was established 1970. The purpose of the monopoly was to adapt to the medical, technical and economical development. The Hanner case started 2005, when the Stockholm district court requested a preliminary ruling concerning the Swedish pharmacy monopoly. Krister Hanner was charged with marketing non-prescription medicinal preparations, against the Law on medicinal preparations. Hanner questioned the Swedish regulation's compliance with the EU legislation and so did the ECJ. A few years before the Hanner case, the Landskrona district court referred questions to the ECJ concerning the State monopoly on the retail of alcoholic beverages. Franzén was charged with violation of Alkohollagen – the Law on Alcohol, because he had sold wine.

The ECJ stated in the cases that Article 37.1 TFEU shall be applied on State monopolies of a commercial character. The selection system of a sales monopoly shall be founded on criterions that are independent from the origin of the products and give an opportunity to insight, motivations of decisions and an independent monitoring procedure. In the Hanner case you can see that the *risk* of discrimination is enough to make a national legislation inconsistent with EU rules.

The Swedish government wanted to sell Apoteket AB in order to give the consumers more possibilities in the market and to put the market into competition. The Government was optimistic because of positive facts on the liberalisation of other markets in Sweden. However, the report from the Swedish National Audit Office presented a work that could have been done in a better way. The pharmacy monopoly as it was 2005 was not EU consistent, but the ruling from the ECJ did not mean the end for the state owned pharmacy as such. Had Sweden changed its regulations according to the ECJ's comments, the transparency would have increased and the risks of discrimination would have decreased considerably.

Sammanfattning

Det svenska apoteksmonopolet etablerades 1970. Syftet med monopolet var att anpassa apoteksmarknaden till medicinsk, teknisk och ekonomisk utveckling. Målet Hanner påbörjades 2005, när Stockholms tingsrätt begärde förhandsavgörande angående det svenska apoteksmonopolet. Krister Hanner var åtalad för att ha sålt icke receptbelagda rökavvänjnings produkter. Detta stred mot Läkemedelslagen. Hanner ifrågasatte den svenska lagens överensstämmelse med EU-rätten, vilket också EU-domstolen gjorde. Några år innan Hanner-fallet begärde Landskrona tingsrätt ett förhandsavgörande beträffande Systembolagets monopol. Franzén hette mannen som var åtalad för brott mot Alkohollagen eftersom han hade sålt vin, vilket ju Systembolaget har ensamrätt på.

EU-domstolen konstaterade i de båda fallen att artikel 37.1 TFEU var tillämplig på statliga handelsmonopol. Monopolets urvalssystem skall vara utformat med kriterier som är oberoende av produkternas ursprung och ge möjlighet till inblick i systemet, motiverade beslut och en oberoende instans dit man kan överklaga. I Hanner-fallet kunde man att se att bara en *risk* för diskriminering var oförenlig med EU-rätten.

Regeringen ville sälja Apoteket AB för att utöka konsumenternas inflytande på marknaden och konkurrenssätta apoteksmarknaden. Regeringen var optimistisk eftersom tidigare konkurrenssättning av andra marknader verkade ha gett positive effekt. Rapporten från Riksrevisionen visade dock att avregleringen hade kunnat gå till på ett bättre sätt. Apoteksmonpolet så som det såg ut 2005 var inte förenligt med EU-rätten, men domen innebar inte att Apoteksmonopolet nödvändigtvis behövde upphöra. Om Sverige helt enkelt hade ändrat reglerna efter EU-domstolens dom så hade transparensen ökat och riskerna för diskriminering hade minskat avsevärt.

Abbreviations

ECJ	The European Court of Justice
EU	The European Union
Läkemedelslagen	Lag (1996:1152) om handel med läkemedel m.m.
Prop.	Proposition
SOU	Statens offentliga utredningar
TFEU	Treaty on the Functioning of the European Union

1 Introduction

The legislation on state monopolies is an interesting area in the European Union since it is connected to the free movement, the freedom of establishment and other parts of the EU foundation. Nevertheless, it is also one of the areas that are being regulated in major part by national laws.

During the past years, the European Union has adjudicated some cases concerning the State monopolies in the EU. In certain Member States a liberalisation of markets has been seen. The purpose is often to put the goods and services concerned into full competition, approve the consumers' accessibility and adjust to the EU regulation. This is however, a delicate political matter, seeing that there often are social interests and financial interests of the State involved.

Since 1970, the Swedish State owned the Swedish pharmacies. This changed when the Government sold the major part of the pharmacy monopoly three years ago. The rest remained a company owned by the State. When the Swedish Parliament, suggested an abolishment of the monopoly, it considered mainly two things – an improvement of the consumers' situation in the market and consistency with the EU rules concerning the free movement of goods. However, did the Government have to sell the pharmacy monopoly in order to fulfil the obligation towards the EU? Systembolaget, the Swedish monopoly on the retail of alcoholic beverages, is still a state owned monopoly, in compliance with a judgment by the European Court of Justice. This is possible because the Member States are obligated to ensure that there will be no discrimination because of the state monopolies, but the state monopolies are not per se forbidden.

1.1 Question and Purpose

The purpose of my essay is to discuss the abolishment of the Swedish pharmacy monopoly and describe the legal position of the State monopolies in the European Union:

- What is the ECJ's view on State monopolies, in which cases are State monopolies allowed and when are they not?
- Are there any problems with ECJ's judgments – judicial and political?
- Why did the Government decided to sell the pharmacies and how did the selling turn out?
- Did the Swedish Government have to sell the Pharmacy monopoly according to EU rules? How could it have remained a monopoly without being a breach of the EU legislation?

1.2 Method and materials

I have used the traditional dogmatic method and also applied a critical view during my work with this essay, i.e. I have used the legal material of the EU – the Treaty on the Functioning of the European Union and the two decisions Hanner and Franzén from the ECJ. I have read many articles regarding the subject, but I am only referring to one in my essay. This is due to the questions I want to answer and the limitation of pages and time. The government bill concerning the suggestion to sell the pharmacy monopoly has been very useful, as well as the report concerning selling of other monopolies and the report examining the selling of the pharmacies. The article by Fritz on the Franzén judgment has been useful in explaining the view on Systembolaget before Sweden became a member of the European Union.

1.3 Delimitations

In my essay, I will explain the former Swedish pharmacy monopoly and the still existing monopoly on the retail of alcoholic beverages. These monopolies will be looked at from an EU perspective, not so much from a national legal perspective. Other Swedish monopolies are excluded from the discussion, except concerning what you could learn from them in order to reregulate the pharmacy market.

1.4 Outline

In chapter two I will explain the Swedish pharmacy monopoly, how it was worked out before the Hanner judgment, the circumstances of the case and what happened after the judgment. I will also discuss liberalisation of other markets in Sweden because that has been an important consideration for the Government while changing the system of the pharmacies. The Swedish monopoly on the retail of alcoholic beverages shall I describe in chapter three. In chapter four, I will discuss the EU rules on State monopolies, and other EU rules that might be of interest. In chapter five, I will analyse the Swedish monopolies and the EU rules.

2 The abolishment of the Swedish pharmacy monopoly

2.1 The monopoly before the reform

The Swedish State and Apotekarsocieteten – the Society of Pharmacists, decided 1969 to regulate the Swedish pharmacy market and establish a monopoly. The Swedish pharmacy monopoly was established 1970. The purpose of the monopoly was to adapt to the medical, technical and economical development and even in the future being able to provide a sufficient supply of medicinal preparations. Apoteksbolaget AB – the pharmacy company, would also contribute to enhanced information on medicinal preparations, unrestrained from the interests of the producers. The state owned Apoteksbolaget AB by two thirds and Apotekarsocieteten owned one third. The owner conditions remained unchanged until 1981, when Apotekarsocieteten sold their shares. In 1995 the Swedish Parliament decided that all the shares were to be owned by the State. Apoteksbolaget AB changed the name to Apoteket AB in 1998.[1]

In 2005, the Stockholm district court requested a preliminary ruling concerning the Swedish pharmacy monopoly's accordance with the EU legislation. The reason was that the Swedish authorities prosecuted Krister Hanner in his capacity as managing director of the company Bringwell International AB. This company sold non-prescription medicinal preparations, which was inconsistent with the Swedish rules on medicinal preparations.[2] According to Article 4 in the former Law on medicinal preparations (Läkemedelslagen), only the State or a legal person over which the State had dominant influence could be engaged in retail trade in non-prescription and prescription medicinal preparations. Article 5 in the Law on

[1] Prop. 2008/09:145, p. 53-54.
[2] C-438/02 Hanner, para. 16.

medicinal preparations stated that medicinal preparations were only allowed on the Swedish market after being approved by the competent Swedish authority or the authority of another Member State. Thus, other operators than those in Article 4 could sell medicinal preparations, provided that they had a licence from the competent Swedish authority. According to Article 6, the distribution of the medicinal preparations should be engaged rationally and in a way to secure the need of effective medicinal preparations.

Apoteket AB was provided medicinal preparations either directly by manufacturers in Sweden or by two wholesalers – Kronans droghandel and Tamro. The wholesalers carried out deliveries to Apoteket, practically without selling on their own.[3]

At the time of the trial Apoteket had 800 pharmacies at its disposal, all owned and run by Apoteket. Apoteket decided the localisation of the pharmacies in cooperation with municipalities and health authorities. Apoteket used and supervised approximately 970 pharmaceutical agents in sparsely populated areas. These were entrepreneurs, often local provision merchants, who provided prescription medicinal preparations. At some places, consumers could buy certain non-prescription medicinal preparations. Apoteket owned the supplies of the medicinal preparations and the regional manager of Apoteket chose the assortment in consultation with the local health services. Consumers could also order non-prescription medicinal preparations over the telephone.[4]

According to the 1996 contract between the Swedish State and Apoteket, the latter was required to organize a nationwide system to distribute medicinal preparations, adjusted to local conditions and fulfil the demands in the Law on medicinal preparations, e.g. Article 6. Apoteket was also obligated to guard the interests of the consumers while deciding the localisation and configuration of the sales outlets, have the requested

[3] Hanner, para. 13.
[4] Hanner, para. 14.

supplies and be ready to deliver. It should also provide for all medicinal preparations, both prescription and non-prescription. Apoteket should ensure that medicinal preparations would be sold by the lowest price possible. The selling prices should be uniform all over the country and Apoteket were to work on an ongoing rationalisation and render the organization more effective. It should also give neutral information to their clients.[5]

2.2 The ECJ judgment in the Hanner case

Krister Hanner was charged with marketing Nicorette patches and chewing gum, non-prescriptions for the treatment of nicotine dependence, against the Law on medicinal preparations. These products for facilitate smoking cessation were considered non-prescription preparations and were therefore not allowed to be sold by anyone except Apoteket or its pharmaceutical agents. Hanner claimed that the state owned monopoly was inconsistent with the (present) Articles 34, 37 and 49 TFEU.[6] The questions for the ECJ from the Stockholm district court were whether these articles and the principle of proportionality were an obstacle to the Swedish legislation on medicinal preparations. The Stockholm district court also asked if the judgment was effected by the fact that only the State or a legal person over which the State had dominant influence could be engaged in retail trade in non- prescription and prescription medicinal preparations.[7]

The ECJ stated that it is evident from the first subparagraph that Article 37.1 TFEU (the then in force Article 31 EC) shall be applied on State monopolies of a commercial character. The article is applicable on "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

[5] Hanner, para. 15.
[6] Hanner, para. 16-17.
[7] Hanner, para. 18.

Member States."[8] The sales regime in question is a State monopoly according to Article 37.1 since Apoteket carries on a retail trade of which it has a sole right according to the Law on medicinal preparations. Article 37.1 does not demand abolishment of State monopolies but dictates that the monopolies shall be adjusted in a way that no discrimination concerning procurement and marketing conditions exists between the citizens of the Member States.[9] The purpose of this article is namely to unite the demands that are followed by the establishment and functioning of the common market with the possibility for the Member States to maintain some commercial monopolies in order to achieve certain goals of the public's interest. The intention of the article is to remove all obstacles to the free movement of goods, though with exception to the limitation of the trade that is a necessary consequence of an existing monopoly. Monopolies, which treat the trade with goods from other Member States unfairly, are forbidden.[10]

The selection system of a sales monopoly shall be founded on criterions that are independent from the origin of the products and give an opportunity to insight through laying down demands on motivations of decisions and an independent monitoring procedure. Neither shall the retail network of the monopoly limit the consumers' access to medicinal preparations. The monopoly's marketing and information on the products shall also be impartial and indifferent to the origin of the products and have the purpose of making new products known to the consumers.[11]

ECJ made it clear that the monopoly of Apoteket was problematic since the 1996 contract did not regulate a purchasing plan or a system of procurement. The producers did not get to know the reasons for the rejection of their products and the contract did not give an opportunity to appeal the decision to an independent supervisory authority. On the contrary, Apoteket

[8] Hanner, para. 32.
[9] Hanner, para. 33-34.
[10] Hanner, para. 35-36.
[11] Hanner, para. 39-41.

seemed to freely being able to choose the assortment. Consequently, the 1996 contract did not rule out discrimination. Nor did the Swedish Government refer to a different measure that would compensate the lack of structural guaranties. Thus, Apoteket had the possibility to treat medicinal preparations from other member States differently than the Swedish produced medicinal preparations. In consequence, the monopoly was incompatible with Article 37.1 TFEU.[12] The ECJ did not find it necessary to examine whether Apoteket did "*in practise* place medicinal preparations from other Member States at a disadvantage" [emphasis added],[13] apparently, because there was a discrimination *in law*.

ECJ also looked at Article 106 TFEU (previously Article 86 EC) since it regards companies that operate services of general economic interest. According to ECJ's case law this article could be referred to by the Member State in order to grant exclusive rights, which were inconsistent to Article 37.1., to companies. This is possible if the fulfilment of the special tasks that the company has been assigned to cannot be ascertained in another way and if the development of the trade is not affected in a way incompatible with the interests of the Community. ECJ did though elucidate that the organization of Apoteket was not consistent with Article 106 because of the lack of a selection system that ruled out discrimination. The monopoly operated by Apoteket was consequently inconsistent with Article 37.1 and therefore ECJ had no reason to examine the other questions from the Stockholm district court.[14]

[12] Hanner, para. 42-44.
[13] Hanner, para. 45.
[14] Hanner, para. 47-50.

2.3 The purposes of selling the pharmacies

The Swedish Government decided on 21 December 2006 to examine whether it was possible for other performers than Apoteket to engage in retail trade in non-prescription and prescription medicinal preparations. This inquiry led to a proposal of amendments of several laws, one of them was the earlier mentioned Law on medicinal preparations.[15]

In the government bill Prop. 2008/09:145 concerning the reregulation of the pharmacy market, the liberalisation of other markets in Sweden was discussed. The markets of telecommunication, electricity, domestic aviation, railways, postal services and taxi were completely or partly exposed to competition during the 1990s.[16] The government bill said that mostly positive effects were seen from the liberalisation of other markets, e.g. concerning the consumers' perspective and the national economy.[17] The government bill referred to a report where the long-term effects of e.g. the economic life, the consumers and the labour market were discussed.[18] The conclusion of the report was that the liberalisation had both negative and positive effects. The prices, compared with the general price trend, had increased for all services except for telecommunication. Employment had decreased in all markets besides the taxi market, where it had increased. Incomes in relation to trade and industry in general had decreased, except for the electricity market.[19] Another negative effect of the liberalisation was deficiencies in the consumer protection in the telecommunications and electricity market.[20] On the other hand, productivity had increased in postal services, aviation, railways and telecommunication and the accessibility had increased in the sectors of taxi, railways and telecommunication. Another

[15] Prop. 2008/09:145, p. 52.
[16] Prop. 2008/09:145, p. 60.
[17] Prop. 2008/09:145, p. 76.
[18] SOU 2005:4.
[19] SOU 2005:4, p. 48.
[20] SOU 2005:4, p. 71.

positive effect was that the market concentration had decreased in all markets, naturally one of the purposes with the liberalisation.[21] The report emphasised though that many components affect the markets,[22] and that all visual effects probably were not a cause only by the liberalisation. The changes on the market also depend on the specialities of the sector, e.g. it is almost impossible to know if the price changes in electricity would have been similar or not had the liberalisation not taken place.[23] It is also difficult to understand how much the liberalisation has affected the telecommunications since the technique had developed a lot during the years and the internationalization had affected the market.[24]

The report discussed what to learn from the liberalisation. For one thing, liberalisation did not mean that the markets should be unregulated; on the contrary, the markets needed a rather vast regulation to work satisfyingly. The report also pointed out that liberalisation of markets involved both revenue and costs and that it influences not only the parts of the economy that are directly affected, but other parts as well. Other consequences to consider was the obvious importance of that the State owned the largest companies in these markets and that the position of the consumers could change.[25] For example, consumer support was discussed, especially in the telecommunication and electricity market.[26] According to the Commission that evaluated the liberalisation of these markets, "strong, separate and independent regulatory authorities are often a condition for a successful liberalisation."[27]

In the government bill, the information from the report was taken into consideration. The government bill pointed out that the conditions for using the infrastructure had to be regulated in order to make a functioning

[21] SOU 2005:4, p. 48.
[22] SOU 2005: 4, p. 73.
[23] SOU 2005:4, p. 51.
[24] SOU 2005:4, p. 59 .
[25] SOU 2005:4, p. 73.
[26] SOU 2005:4, p. 72.
[27] SOU 2005:4, p. 63.

competition possible. Therefore it could be seen at an early stage in the reform of the pharmacy market, that it was necessary to separate the infrastructure. The company Apotekens Service AB was given the responsibility to keep the infrastructure available to all performers, in conditions that are competitive neutral.[28]

In 2008 Apoteket AB lost a part of their sole right to engage in retail trade in non-prescription and prescription medicinal preparations, since the sales of non-prescription nicotine medicinal preparations had been put into full competition.[29] This led partly to an increased number of permissions for retail trade. Both bigger and very small companies obtained such a permission. When the retail trade is put into full competition, the conditions for retail sale are also altered. The government bill estimated that new performers in the pharmacy market would probably use their own transport and logistics systems, or even other distributors that those being active in the market at the time. That would imply that even this area would experience a competition situation.[30]

According to the government bill, the liberalisation in other European countries had led to better service, e.g. better opening hours and developed advice service. However, increased price pressure and liberalisation in rules concerning ownership had not been noted to a greater extent. Comparisons with other countries that had carried out a liberalisation of the pharmacy market showed that in Norway three chains had approximately 80 % of the market and in Iceland two chains had approximately 90 %. Both Norway and Iceland had a considerable increase of the number of pharmacies, though mostly in the town areas.[31]

The reform endeavoured to give the consumers an increased accessibility to medicinal preparations, better service and better advice service. One of the

[28] Prop. 2008/09:145, p. 76.
[29] Prop. 2008/09:145, p. 77.
[30] Prop. 2008/09:145, p. 78.
[31] Prop. 2008/09:145, p. 79.

purposes was also to lower the medicinal preparations costs, to the consumers' and the public's advantage. The reform should make use of the allowance to the pharmacies to improve the use of medicinal preparations in combination with the efforts within the health and medical service. One requirement was that the demands on competence and security in supply of medicinal preparations would remain.[32]

2.4 The Selling of the pharmacies

Before the selling of the pharmacies, pharmacies were grouped in clusters. Apoteket Omstrukturering AB (which will be mentioned as Omstrukturering AB), a company owned by the state, sold eight clusters to four private players in the market. Omstrukturering AB also had the assignment to found a company with maximum 200 pharmacies that would have private entrepreneurs as joint owners. After the selling of the clusters, Omstrukturering AB were transformed into a holding company with two subsidiary companies – Apoteksgruppen i Sverige AB and Apoteksgruppen i Sverige Förvaltning AB. At the same time Omstrukturering AB changed its name to Apoteksgruppen i Sverige Holding AB (which will be mentioned as Holding AB). The State owns all the shares in this company.[33] In 2012, pharmacies were separated from Apoteket AB to be sold.[34]

2.5 The audit in the selling of the pharmacies

The Swedish National Audit Office presented a report concerning the selling of the pharmacies to the Swedish Parliament on 17 April 2012. The purpose of the report was to investigate whether the State had fulfilled their

[32] Prop. 2008/09:145, p. 80.
[33] Riksrevisionen, p. 11.
[34] Riksrevisionen, p. 12.

undertaking on the pharmacy market, which requires regulation, government ownership, subsidizing and supervision.[35] The report would examine if the selling had been made in an effective and businesslike manner[36] and if it had been expediently accounted for.[37]

The ownership directive of Apoteket Omstrukturering AB does not show that the company has a specifically assignment from the Government to judge the buyers of the pharmacies on short-term or long-term perspectives, which is being criticized. Such an assignment could have identified risks and possibilities with fulfilling the purposes of selling the pharmacies. It would also have given a hint of how the possibilities and risks could have been handled, considering the State's relation to the players in the market. Analysing the risks of the market more carefully would have been purposive since the Government could have examined and considered measures to counteract the risks and support the purposes of selling the pharmacies (increased accessibility, better service and lower costs on medicinal preparations).[38]

Another aspect that was criticized was that while planning the selling it was unclear how central authorities would precise rules and conditions on time. That probably affected the interest of the market. The Government did not either clarify what kind of preparations Apoteket AB were allowed to make. When Omstrukturering AB formally became the parent company of Apoteket AB, it started a complicated process to limit Apoteket's acquisition and cooperation strategies. However, it was difficult to direct Apoteket and its board, which was not purposive to the preparations and carrying through of the selling process.[39]

Holding AB had an information advantage since the company had the same management as it had while it was called Omstrukturering AB and sold

[35] Riksrevisionen, p. 11.
[36] Riksrevisionen, p. 12.
[37] Riksrevisionen, p. 54.
[38] Riksrevisionen, p. 55-56.
[39] Riksrevisionen, p. 56-57.

clusters of pharmacies. This meant Holding AB had knowledge of the four new cluster buyers that the other players in the market could not have in the same way. This meant Apoteksgruppen i Sverige AB held a unique position since it was a part of the holding company's group. The consequences were that an asymmetry of information was created in the market – thus no effective competition or equal conditions.[40]

Another problem was that the Government did not give enough information in the 2012 budget government bill and the official letter 2011 on undertakings with government ownership. The Swedish National Audit Office did not approve of the Government's accountancy, but considered it scanty, indistinct and non-purposive. The accountancy does not either clearly show the relations between the State, Holding AB and Apoteksgruppen i Sverige AB. Both the Swedish Competition Authority and the Swedish National Audit Office pointed out that the Government needed to give information on the market share of Apoteket AB. The State's indirect control of both the former company Apoteket AB and the still existing company Apoteksgruppen i Sverige AB should be taken into consideration.[41] Apoteket AB was the legal seller of the cluster of pharmacies, therefore its accountancy is a part of the inspection.[42]

The Swedish National Audit Office saw problems with transparency and ambiguities and recommended the Government to approve their accountancy, map the State's share of the pharmacy market, inquire the information advantage and articulate a plan for the development of Holding AB.[43]

[40] Riksrevisionen, p. 57-58.
[41] Riksrevisionen, p. 58-60.
[42] Riksrevisionen, p. 12.
[43] Riksrevisionen, p. 60-61.

3 The Swedish monopoly on the retail of alcoholic beverages

3.1 Changes while becoming a Member State

On 1 July 1991, the Swedish Government applied for membership in the European Union. On 1 January 1994, the EEA agreement came into force.[44] The EEA agreement practically stated the same demands considering State monopolies of a commercial character as the TFEU does today.[45] In the discussion concerning the Swedish monopoly on the retail alcohol sales – Systembolaget, Sweden meant that there was no discrimination of foreign manufacturers or wholesalers. The monopoly was said to have been motivated from a health and welfare perspective. The European Commission was not a contracting party, but convinced the Swedish Government that the monopoly on import, export, manufacturing and wholesale of alcoholic beverages was incompatible with the EU regulation. The Commission was of the opinion that if the discriminating effects were removed, it had no reason, on its own initiative, to take measures against this monopoly. This made the Swedish Government change its position and declared that it willingly would wind up the monopoly on import, export, manufacturing and wholesales. The Swedish Parliament confirmed this standpoint on 20 April 1994, when it approved of the government bill concerning guidelines for a new system.[46]

[44] Fritz, p. 75.
[45] Fritz, p. 77.
[46] Fritz, p. 78-80.

3.2 The ECJ judgment in the Franzén case

A few years before the Hanner case, 1995, the Landskrona district court referred questions to the ECJ concerning the State monopoly on the retail of alcoholic beverages. Harry Franzén was charged with violation of Alkohollagen – the Law on Alcohol, because he had sold wine bought at Systembolaget or imported from Denmark.[47] The district court asked the ECJ if Systembolaget was consistent with Article 30 Treaty of Rome – which is equivalent to Article 34 TFEU, and if Systembolaget was an infringement of Article 37 Treaty of Rome – Article 37 TFEU.[48]

According to the Law on Alcohol, only companies who had a production license and a wholesale license were allowed to produce alcoholic beverages. A production license involves a wholesale license on similar products. Alcoholic beverages containing an alcoholic strength by volume over 2,25 % could be imported only by those who had one of these licenses. The Alcohol Inspectorate issued the licenses on the basis of applications with enclosed documents which were requested according to the instructions of the Alcohol Inspectorate. The applicants submitted a payment of a fixed charge, 25 000 SEK, together with the application. The sum was not repaid if the application was rejected. The Alcohol Inspectorate was obliged to make an objective, non-discriminating decision based on the applications, taking into account the personal and economical situation of the applicant, together with other circumstances of importance, e.g. professional knowledge. The applicants were not obliged to have storage capacity in Sweden if they delivered the goods directly to buyers located in Sweden. The applicants had to provide a bank guarantee and a yearly fee, 10 000-323 750 SEK, depending on the product and quantity.[49]

[47] C-189/95 Franzén, para. 2 and 27.
[48] Franzén, para. 29.
[49] Franzén, para. 4-12.

The ECJ handled Articles 34 and 37 TFEU separately. Firstly it established that the purpose of Article 37 TFEU is to maintain the fundamental principle free movement of goods, e.g. through requiring abolishment of quantitative restrictions.[50] It also stated that Article 37 does not prohibit monopolies, but demands adjustment to the common market.[51] Mr. Franzén asserted that Systembolaget's assortment was chosen through restrictive and arbitrary conditions and that these were impossible to control.[52] The ECJ did not consider the methods of Systembolaget to be discriminating, nor did they treat imported products unfairly.[53] Systembolaget's purchase plan was based on consumer demand and in consultation with the consumer, producer and importer organization. Systembolaget's offer calls were for all companies, irrespective of their origin, who had a license for wholesale or production. Systembolaget selected the offers only on commercial or quality criteria. It was true, which Franzén pointed out, that Systmbolaget only kept the products in their basic assortment if the sales reached a certain market share and quantity, but this did not lead to unfair treatment and the demands were justified. The traders also had other ways to market their products if they were not approved, e.g. their products could be marketed on a trial basis during a period. Finally, the traders had the right to know the reasons for The Alcohol Inspectorate's decision and they had the possibility to appeal to an independent board, Alkoholsortimentsnämnden.[54] Article 37 TFEU was not neglected by Systembolaget.[55] The monopoly's sales network was not compromising the consumers' possibilities to have access to alcoholic beverages, domestic or imported.[56] The promotion of alcoholic beverages was applied in the same way regardless of the origin of the products, nor was that a problem.[57]

[50] Franzén, para. 37.
[51] Franzén, para. 38.
[52] Franzén, para. 43.
[53] Franzén, para. 52.
[54] Franzén, para. 44-51.
[55] Franzén, para. 80.
[56] Franzén, para. 54.
[57] Franzén, para. 64.

Article 34 TFEU on the other hand, requested more than Systembolaget could fulfil. The traders had to submit a large payment along with its application which was not repaid if the application was rejected. Those who had a licence had to annually pay a supervision fee, 10 000-323 750 SEK, depending on what kind of beverages the sales concerned, produced quantity and sold quantity. The traders were also obligated to have storage capacity in Sweden. Consequently, the Swedish regulation was inconsistent with Article 34.[58] The Swedish Government referred to Article 36 TFEU (also Article 36 in the Treaty of Rome) and argued that the Swedish regulation was founded on the interest of protecting the health of humans. However, the Government had not shown that the measures taken with the fees etc. were in proportion to the purpose. Accordingly, Articles 34 and 36 TFEU precluded the Swedish regulation concerning licences to import alcoholic beverages.[59]

[58] Franzén, para. 70-71 and 73.
[59] Franzén, para. 74-77.

4 The EU rules on State monopolies

4.1 Article 37 TFEU

Article 37 states:

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 principles laid down in paragraph 1 or which restricts the scope of the articles dealing with the prohibition of customs duties and quantitative restrictions between Member States.
3. If a State monopoly of a commercial character has rules which are designed to make it easier to dispose of agricultural products or obtain for them the best return, steps should be taken in applying the rules contained in this Article to ensure equivalent safeguards for the employment and standard of living of the producers concerned.

According to the ECJ, this Article is specifically applicable on the exclusive rights of a commercial monopoly owned by the state.[60] Also in the Hanner case, the ECJ established that Article 37 TFEU is applicable on state

[60] Franzén, para. 35.

monopolies.[61] Apoteket was a state monopoly of a commercial character since it was engaged in retail sale of medicinal preparations.[62]

As mentioned above, it is established that the purpose of Article 37 is to maintain the fundamental principle free movement of goods. The free movement is supported by that quantitative restrictions and measures with similar effects are prohibited. The purpose of abolishment of quantitative restrictions is to maintain normal conditions of competition between the Member States in cases where a product is sold by a State monopoly of commercial character. However, this Article does not demand abolishment of monopolies, but dictates that the monopolies shall be adjusted in a way that does not discriminate the citizens of the Member States as regards procurement and marketing conditions. The purpose of the Article is to unite the demands required by the establishment and functioning of the common market with the Member States' possibility to maintain some monopolies of a commercial character, that have the purpose of accomplishing the pursuit of public interest. The intention is to eliminate obstacles to the free movement of goods with the exception of limitations that are a necessary consequence of the monopoly's existence.[63] This was also repeated in the Hanner judgment.[64] Non-discrimination means that products derived from other Member States may not be "put at a disadvantage, in law or in fact".[65] The ECJ referred as well to this statement in the Hanner case.[66]

In the Franzén case, the ECJ stated that it was uncontested that Systembolaget aimed at pursuing a public interest while protecting the public health.[67] The ECJ also established that the criteria and selection methods that used by Systembolaget were neither discriminating nor putting

[61] Hanner, para. 32.
[62] Hanner, para. 33.
[63] Franzén, para. 37-39.
[64] Hanner, para. 33-35.
[65] Franzén, para. 40.
[66] Hanner, para. 36.
[67] Franzén, para. 41.

imported products at a disadvantage.[68] The retail network of Systembolaget had flaws but did not largely influence the selling of imported products negatively.[69] Consequently, Systembolaget was in that part compatible with Article 37.[70]

In the Hanner judgment, ECJ examined whether the organization of the pharmacy monopoly *risked* to put medicinal preparations from other countries at disadvantage.[71] Concerning the requirements of a state monopoly, the ECJ again stated the need of independent criteria, but emphasised the demands on transparency, motivating decisions, an independent monitoring procedure, and accessibility for the consumers.[72] The 1996 agreement between the State and Apoteket AB did not exclude discrimination since id had no regulations on either a purchase plan, or a system of calls for tenders. The Law on medicinal preparations did not give an opportunity to see the reasons for rejection or appeal the decision to an independent supervisory authority. Apoteket seemed to freely being able to chose their assortment. The Swedish government did not refer to another measure that would compensate the lack of structural guaranties.[73] These circumstances were enough for the ECJ to rule out the organization and functioning of Apoteket as disadvantageous for medicinal preparations from other Member States. Discrimination were thus not excluded and the monopoly was inconsistent with Article 37.1 TFEU. The ECJ did not find it necessary to examine whether Apoteket in fact put a medicinal preparation from another state at disadvantage.[74]

4.2 Article 34 TFEU

Article 34 states that:

[68] Franzén, para. 52.
[69] Franzén, para. 57.
[70] Franzén, para. 66.
[71] Hanner, para. 38.
[72] Hanner, para. 39-40.
[73] Hanner, para. 42-43.
[74] Hanner, para. 44-45.

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

Article 34 is applicable on situations that do not concern the operation of a monopoly, but have a bearing upon it.[75] The ECJ has in earlier case-law established that "all trading rules which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade constitute measures having an effect equivalent to quantitative restrictions".[76] According to the ECJ, Systembolaget had such an effect. The licensing system was an obstacle to imported alcoholic beverages because of the high demands on storage and the higher costs.[77] Thus, the Swedish legislation was in this part incompatible with Article 34.[78]

4.3 Article 36 TFEU

According to article 36:

> The provisions of Articles 34 and 35 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 or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

The ECJ established in the Franzén case that measures inconsistent with Article 34 TFEU could be justified by Article 36. However, according to ECJ's case-law, the measures need to be in proportion to the purpose, and this purpose shall not be fulfilled by measures less restrictive of trade within

[75] Franzén, para. 36.
[76] Franzén, para. 69.
[77] Franzén, para. 71.
[78] Franzén, para. 73.

the Community.[79] The Swedish Government referred to Article 36 TFEU in the Franzén case and maintained the Swedish legislation's foundation – the protection of the health of humans.[80] The protection of the human health was indeed such an interest granted by Article 36, but the Swedish Government had not proved that the licensing system was proportionate to that purpose or that the purpose could not be fulfilled by measures limiting the trade to a less extent.[81] Consequently, The Swedish licensing system was incompatible with Articles 34 and 36 TFEU.[82]

4.4 Article 106 TFEU

Article 106 states:

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.
2. 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 the Treaties, 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 Union.
3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

The ECJ reminded that a Member State, according to case-law, can refer to Article 106.2 TFEU (previously Article 86.2 EC) to motivate a company

[79] Franzén, para. 75.
[80] Franzén, para. 74.
[81] Franzén, para. 76.
[82] Franzén, para. 77.

having exclusive rights, inconsistent with Article 37.1 TFEU. This is possible if the company is entrusted with services of general economic interest, the tasks can be achieved only through granting these rights and during the circumstances that the development of the market is not affected in such a manner as to being inconsistent with the interests of the Community.[83]

However, the sales regime in the Hanner case was not considered being founded on Article 106.2. The reason for that was the lack of a selection system excluding all sorts of discrimination.[84]

[83] Hanner, para. 47.
[84] Hanner, para. 48.

5 Analysis

When the Swedish pharmacy monopoly was established 1970, the purpose of the monopoly was to adapt to the medical, technical and economical development. Those purposes should always be important, independent on who owns the pharmacy. The Swedish National Audit Office has a very good point when it states that the owners of the pharmacies need to strive to fulfil the goals and the purpose of the business. The shortage of transparency is problematic, both on a national and on a European level. The purposes as they are being presented in the Government bill are indeed expected, and honourable in an EU perspective, but the Government has an obligation to fulfil its duties. While reading the report on liberalisation of the other markets, the Government must have understood that there would be difficulties and that the markets are not easily controlled with all its players and effects from other markets, e.g. within the EU.

The pharmacy monopoly will probably not arise again. Nevertheless, there still are problems that need to be solved in the pharmacy market. The inconsistency with EU regulations could probably have been cured by another regulation than the one that was chosen by the Government. The pharmacy monopoly could probably have been adjusted in way resembling to the adjustment of Systembolaget, or it could have used a procurement procedure when buying medicinal preparations. In such a way, the best medicinal preparations to the best price would have reached the consumers.

Only by looking at the two cases Franzén and Hanner, you can see the development of EU case-law. The organization of Systembolaget, which Sweden had adjusted in order to be approved as a member of the EU, became a bit of a model to the pharmacy monopoly when the ECJ tried the Hanner case. The EU case-law is in many ways built in principles, which is important to remember. The free movement on goods can be restricted in order to consider public interests, but it must be *proportionate*. The

principle on transparency is also important when it comes to state monopolies. Since the EU is such a huge institution, with many members and many wills, it is inestimable that the Member State can understand what is happening in the EU and that the citizens can understand what the States are doing in order to follow the EU regulation. Still the ECJ has a complicated task in balancing between the interests of the Union and the approval of the Member States. Maybe that approval was a little part of the Franzén judgment. It is not completely impossible that the ECJ was sympathetically minded towards the organization of Systembolaget since Sweden actually had made efforts to please the Commission.

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