

The digital market for private importation of wine

The borderline between retail sales and private importation

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Abstract

This thesis aims to analyse the borderline between private importation and retail sales of alcohol on the EU internal market. This thesis shows that according to the case-law of the Court of Justice of the European Union, the definition of private import is a complex assessment that depends on several factors. Among other indicators, it depends on the shipping and logistics procedure. To be classified as a private import, it is required that the ownership passes outside Sweden's border (see case *Visnapuu*). However, in Sweden, a legal debate has recently taken place where the question has been whether it must be the customer who brings the wine into Sweden and not the company. Another question is if the customer and the private importer must be able to influence the delivery and choose their carrier. Complete offers where wine is sold, including shipping to Sweden, were prohibited by the Swedish Winefinder judgment, but the most recent *Vivino* judgment casts doubt on that judgment. Both cases are from the Swedish patents and the Patent and Market Court, and both cases have been appealed to the Patent and Market Court of Appeal. A tricky question has been that the company may only act as an "*independent intermediary*" according to the Alcohol Act in chapter four 4§ p.7. Therefore, it has been debated if it is crucial that the customer can control the transport and that the logistics are disconnected from the purchase of wine.

Furthermore, to be qualified as private importation and not retail selling, there must not be strong connections to Sweden. Therefore, it is not in compliance with the Swedish alcohol act to have a Swedish parent company with a subsidiary in the EU and use this subsidiary to fulfil the requisites for private imports if this creates retail sales in practice. If a company has its main parts of its operations in Sweden, the sales to Swedish customers cannot qualify as private importation. It is then considered as *established* in Sweden in violation of domestic law.

The definition is complex, and since the Court in Sweden has given two different rulings in similar cases, the development of private imports is in great change.

Foreword

I would like to give a big thank you to my supervisor Jörgen Hettne who contributed with invaluable guidance and commitment in this essay. Jörgen is not only an excellent supervisor but also a great inspiration in law. Furthermore, it has been a great honour to be a student at the Department of Business Law, and I have always felt great support from my department. Sofia Rosendahl, study counselor, is an important person in the team who has meant a lot to my choices in the academy. Thank you for your passion for the students.

And as this is my last thesis at the university, I would also like to mention the Lawyer Frida Treschow who has been a role model for me during all my years as a law student. Thank you, Frida - I appreciate all the opportunities you have given me, and you remain a great inspiration to me.

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Kristin Einarsson Haselhofer

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Abbreviations

EU	European Union
SOU	The government's official Reports in Sweden
SEK	The Swedish currency (KR)
PMD	Patents and Market Court in Sweden
PMÖD	Patents and Market Court of Appeal in Sweden
TFEU	Treaty on the Functioning of the European Union
CJEU	Court of Justice of the European Union

1. Introduction

1.1 Background

Thanks to digitalisation and smartphones, we can now purchase wine quicker and easier than buying a pair of shoes. A bottle of wine is just a click on a webpage away. The range and choice of alcohol are therefore greater than ever. This access is a massive difference for the Swedes as they used to be limited to the state-run alcoholic monopoly's (Systembolaget) opening hours and smaller collection.

Sweden has a long tradition of restrictive alcohol policy. When they entered the European Union in 1995, the European Commission accepted that Sweden would keep Systembolaget – the Swedish alcohol monopoly on retail sell – if they adjusted it to comply with EU law.¹

The EU:s single market is built on the *four freedoms*. These freedoms consist of the right to free movement for services, free movement of goods, free movement for persons, and the freedom for capital.² The free movement of goods is the central legal right for the possibility to sell wine in all member states (Article 34 TFEU).

If a member state wants to impede the free movement for goods, such as the selling of alcohol, it must base the restriction on a valid justification ground and without discrimination. In the Gebhard case, regarding the right to establishment in member states, the Court of Justice of the European Union (CJEU) made clear that national measures that restrict the four freedoms must fulfil the following requisites:³

¹ Hettne J, (2009), *Transforming Monopolies: EU-Adjustment or Social Changes?*, Springer Books, in: Lars Pehrson & Lars Oxelheim & Sverker Gustavsson (ed.), *How Unified Is the European Union?*, chapter 7, pages 99-116, Springer. Page 101.

² Weiss F & Kaupa C (2014), *European Union Internal Market Law*, first edition, Cambridge University Press. Page 1.

³ Case C-55/94, Judgment of the Court of 30 November 1995. Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano.

- Be applicable in a non-discriminatory manner.
- Appear to be motivated concerning the urgent public interest.
- Be able to ensure the objective pursued by the measure.
- Nor must they go beyond what is necessary to achieve that goal. That is to say, *being proportionate*.⁴

The exception for the *urgent public interest* is what Sweden currently is relying on for some of the restrictions on alcohol. With reference to article 36 TFEU, Sweden can limit the free movement and the sales of alcohol. The Swede's health is considered a more important value than the citizens' access to alcohol.

The retail monopoly (Systembolaget) is, however, assessed under Article 37 TFEU and not Articles 34 or 36 TFEU. After Sweden joined the EU in 1995, Swedish citizen Harry Franzén started selling alcohol in his supermarket. The case ended up in the CJEU to determine the monopoly's compatibility with EU law.⁵ During the past years, other aspects of the alcohol monopoly have, however, been challenged in several cases. The case of Rosengren from 2007 is the most important in this context as it started the legal right to private importation of wine into Sweden. The case changed Sweden's alcohol law and made it legal to make private importation of wine to Sweden.⁶

Some online competitors have thereafter challenged the monopoly in Sweden by offering wine purchases and services to the Swedes through their websites. One of these competitors is the company Winefinder. Winefinder provides a wide range of different wines, and they can deliver within a couple of days to its customers. Vivino is another company that offers a similar wine service to its customers. These e-commerce companies are using the exception for private importation to sell wine to citizens in Sweden. Systembolaget sued both companies for infringing the Swedish retail monopoly on alcohol and acting in violation of the domestic alcoholic law. In 2020 the Court found that Winefinder had acted in breach of the

⁴ Bernitz, U. (2015). *Svensk och europeisk marknadsrätt 1 Konkurrensrätten och marknadsekonomins rättsliga grundvalar*. (fourth edition.) Stockholm: Norstedts juridik. Page 25.

⁵ C-189/95, Judgment of the Court of 23 October 1997. Criminal proceedings against Harry Franzén.

⁶ C-170/04, Judgment of the Court (Grand Chamber) of 5 June 2007. Klas Rosengren and Others v Riksåklagaren.

Swedish alcoholic laws, and in 2021, the verdict fell against Vivino.⁷ These new cases challenge the historical interpretation of private importation and raise further questions.

1.2 Aim and research questions

This thesis seeks to analyse how the distinction between private importation and retail sales is made, especially regarding digital wine selling. To be able to buy alcohol from another supplier than Systembolaget, the exception for private importation can be used. But to which extent can this importation be made, when does it become retail trade? This thesis will answer the following research questions:

- What is the borderline between private importation and retail sales on the EU internal market?
- What conclusions can be drawn regarding the lawfulness of private import of wine to Sweden in the light of the Swedish cases of Winefinder and Vivino?

1.3 Scope and constraints

This thesis is focusing on EU law. Swedish laws and case law will to some extent be assessed due to the case study, but the aim is still EU law and the focus on the four freedoms on the internal market. Thus, the cases of Winefinder and Vivino will be a fundamental part of this thesis, but the main issue will be the lawfulness of wine selling under EU law no other aspects raised in these cases.

The somewhat related question of wine yard selling will be excluded from the analysis in this thesis. Also, the legal framework for marketing, which is often closely related to private import, will not be covered.

⁷ Case PMT 2881-19 Systembolaget vs Winefinder and PMT 2069-20 Systembolaget vs Vivino.

1.4 Method and material

For writing this thesis, the EU legal method and the dogmatic legal approach are used.

The legal sources within the EU are mainly the basic treaties, the EU Charter of Fundamental Rights, general principles of EU law, agreements concluded by the EU, binding and non-binding secondary law, Case law from the EU courts and opinions of the Advocate Generals. The EU courts' judgments are called "case law" and are binding for all member states. The Court often interprets the provisions in the light of its purpose. It means that the Court chooses the most favourable interpretation for the development of the law in the Union.⁸ The case law is highly valuable in the search for answers to how the EU law shall be interpreted and applied. Case law from the CJEU is higher in the hierarchy than case law of the General Court.⁹ The Advocate General's Opinion does not constitute a judgment, and it does not have the same value as a source of law as the Courts judgments.¹⁰

The EU law can be divided into two sections, the primary law, and the secondary law.¹¹ The primary law is higher in the hierarchy than the secondary law.¹² Primary law such as treaties will be the first choice of source in this thesis, but secondary law (binding regulations, directives, and decisions) and supplementary legal sources (mainly case law) will also appear.

The EU legal method provides many methods of interpretation. Among other comparative methods, systematic interpretation and teleological interpretation. The last-mentioned is the method of interpretation for which the CJEU is best known.

⁸ Hettne, J. & Otken Eriksson, I. (red.) (2011). *EU-rättslig metod: teori och genomslag i svensk rättstillämpning*. (2., omarb. uppl.) Stockholm: Norstedts juridik. Page 49.

⁹ Ibid page 56.

¹⁰ Ibid page 117.

¹¹ Ibid page 40.

¹² Ibid page 403.

The teleological interpretation promotes the purpose of the provision and fills gaps that would otherwise have arisen in EU law.¹³

The dogmatic legal approach means that the author will use traditional legal sources such as legislation, preparatory work, case law, and doctrine to find answers to the legal questions.¹⁴ The traditional legal dogmatic method can be described as a reconstruction of the legal system and is based on a search for answers in what constitutes the legal system, i.e., *the sources of law*. In addition to the reconstruction and what constitutes seeing the law *de lege lata*¹⁵, it is essential that those who use the dogmatic legal method do not feel limited by this but should be given increased opportunities to analyse and discuss based on the *lege ferenda* perspective.¹⁶

The EU legal method has relevance for the majority of the analysis in this thesis. Still, the Swedish law and the Swedish dogmatic legal method have a higher relevance for some points. This concerns mainly how the so-called Rosengren exception is inserted into the Swedish alcohol act and the relevance of Swedish preparatory work in relation to this exception.

¹³ Hettne J & I. Otken Eriksson (2011) *EU-rättslig metod, teori och genomslag i svensk rättstillämpning*, page 168.

¹⁴ Kleineman Jan. (2018) *Rättsdogmatisk metod, I: Nääv, Maria och Zamboni, Mauro, Juridisk metodlära*, Second edition, Studentlitteratur, Lund. Page. 21.

¹⁵ De lege lata is how the applicable law **is**. De lege ferenda is to discuss how the law **should** be formulated.

¹⁶ Jareborg Nils, *Rättsdogmatik som vetenskap* SvJT 2004 page 3.

The material used for this thesis will be articles from academia and professors who have expertise in EU law. Jörgen Hettne is the author of many articles and texts that discuss issues regarding Systembolaget and EU law. Such as *Transforming Monopolies: EU-Adjustment or Social Changes?* (2009), and *Näthandel med alkohol - lagligt eller olagligt?* (2017). These articles will be valuable in the search for legal answers. The article *Rosengren – “a Franzén light”?* By Martin Johansson will also be taken into consideration as a comment to the case law.

The books *The internal market as a legal concept* (2017) by Stephen Wetherill and *European Union Internal Market Law* (2014) by Friedl Weiss and Clemens Kaupa are moreover essential to explain the internal market.

Case law will be an essential legal source in the thesis. Case C-189/95, Franzén, Case C-170/04, Rosengren e.a and C-198/14, Visnapuu as well as the Swedish Case PMT 281-19 Winefinder vs Systembolaget and Case PMT 2069-20 Systembolaget vs Vivino. The Advocate Generals' opinions in the EU cases will also be used in the analysis.

As the author has done previous essays about this topic, some information will be collected from a previous legal text named *Is Systembolaget abusing its dominant position in order with article 102 TFEU?* Written in March 2021.

The intention is to use legal sources in English. Still, due to the focus on private importation and that the issue is mostly a Swedish and Finnish matter, some material will be Swedish.

1.5 The current state of research

In academia, Jörgen Hettne is the leading researcher in this field of law. He has written articles for several academic journals.¹⁷ He was also responsible for an investigation of the government in 2014 (SOU 2014:58). The literature examines the question of private import to some extent. Still, it is not fully covering all issues due to the new case law of Winefinder 2020, Vivino 2021, and the development of e-commerce.

A student thesis about private importation was written in 2006 with the title "The redefinition of private import of alcohol: With a focus on products purchased on the Internet and the Swedish legislation" made by Caroline Selander from Jönköping International Business School. But since this thesis is now over fifteen years old, and since new law and case law have appeared, the value of my thesis is still highly relevant, not least due to the recent cases and rapid development.

¹⁷ Among others, *Transforming Monopolies: EU-Adjustment or Social Changes?*, *Näthandel med alkohol - lagligt eller olagligt?*, *Alkotaxi och alkoholpolitik: E-handel och gårdsförsäljning i Finland*.

1.6 Structure

The first chapter includes a description of the legal questions, method, purpose, and the reader are introduced to the legal issue and the facts. Due to the specific aim and focus, it is necessary to give some background information about the internal market and EU law. This will be set out in chapter two.

Chapter three focuses on the legal aspects of the alcoholic market, what private import is, and how it works. The reader will be given a historical view of the development of private import from the Franzén case until today's legal status. A definition of retail sales based on the Alkotaxi case will also be made in chapter four. The first research question will be answered in these chapters.

The fifth chapter consists of a case law study on the Winefinder and Vivino cases. The second research question will be answered in this chapter.

The author presents an analysis and conclusions based on these previous chapters and concludes with her reflections in the sixth and final chapter.

2 The EU law and the internal market

2.1 The internal market

Since the European Union (EU) was founded in 1957 as an economic organisation named the European Economic Community (EEC), creating a well-functioning internal market has been its significant endeavour ever since.¹⁸ Article 3 (3) TEU states that the Union shall establish an internal market. Among other things, the internal market

"shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advances. It shall combat social exclusion and discrimination and promote social justice and protection, equality between women and men, solidarity between generations, and protection of the child's rights. It shall promote economic, social, and territorial cohesion and solidarity among the Member States. It shall respect its rich cultural and linguistic diversity and shall ensure that Europe's cultural heritage is safeguarded and enhanced."

The purpose of the internal market is broad and aims at several different interests, which should be kept in mind when investigating only one perspective of the market. The different aims can also lead to competing interpretations of the treaty freedom provisions.¹⁹

The internal market is defined by Article 26 (2) TFEU as "an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured under the provisions of the Treaties."²⁰ The aim is to maintain a single trading area of and for all 27 Member States. In economic terms, the EU is intended to be one single market, regardless of national borders.²¹

¹⁸ Weiss F & Kaupa C (2014), *European Union Internal Market Law*. Page 1.

¹⁹ Ibid page 2.

²⁰ Jacques Delors Professor of European Law Stephen Weatherill & Weatherill, S (2017), *The Internal Market as a legal concept*, Oxford University Press page 1.

²¹ Jacques D. & Weatherill, S (2017), *The Internal Market as a legal concept*. Page 3.

2.2 Principles of EU Law

The principles of EU law are essential for the interpretation of treaties and the development of case law. To understand EU law and to be able to answer this thesis research question, some principles need to be explained.

The iconic case C-120/78 Cassis de Dijon means that if one product is legal in a member state, it is also legal in the others.²² This case is also known as *the principle of mutual recognition*.²³

The case of Van Gend and Loos regards the scope of "direct effect." The CJEU concluded that the EU Treaties applied between the Member States and between individuals and a Member State.²⁴ This principle means that individuals can immediately invoke a European provision before a national or European court.²⁵

The principle of proportionality is a general principle of EU law. It means that *measures must not go beyond what is necessary to achieve the objectives*.²⁶ The principle of proportionality is typically considered in court judgments and used as a test to examine whether a measure is beyond the measures or not. It is applied to determine the compatibility with the treaty of national measures that interfere with fundamental freedoms.²⁷ The proportionality test is the most critical judicial tool to determine whether a member state's acting is lawful or unlawful.²⁸ Applying the proportionate principle in public health cases has followed a cautious approach and remains although strict.²⁹

²² Ibid page 24.

²³ Weiss F & Kaupa C, (2014) *European Union Internal Market Law*. Page 71.

²⁴ Ibid page 40.

²⁵ Case 26/62, Judgment of the Court of 5 February 1963. NV Algemene Transport- en Expeditie Van Gend en Loos v. Nederlandse Aministratie der Belastingen.

²⁶ Tridimas T. (2006). *The General Principles of EU Law*, (Oxford European Union Law Library) second edition, Oxford University Press. Page 175.

²⁷ Ibid page 193.

²⁸ Ibid page 207.

²⁹ Tridimas T, (2006) *The General principles of EU Law*. Page 225.

Another basic principle is the principle of equal treatment or *non-discrimination* between member states. The prohibition of discrimination on the grounds of nationality underpins the internal market.³⁰

2.3 Relevant legal rules

Article 34 TFEU states the main rule that no member state can have *quantitative restrictions* on imports and that all measures having equivalent effect shall be prohibited between the Member States. A member state cannot have restrictions on the internal market.

A clarification was made in the case of *Dassonville*. The Court held that all trade rules adopted by the Member States that directly or indirectly impede or may affect trade on the internal market are regarded as measures having equivalent effect to quantitative restrictions.³¹ This principle is called the *Dassonville formula*, and it is well known for having a broad scope.³² Under the *Dassonville* formula, it is not necessary to demonstrate that a measure, in fact, hinders some kind of cross-border trade. It just must have the potential to do so. Case law shows that no minimum impact or *de minimis* rule is necessary to trigger the applicability of article 34 (*see Van de Haar 1984 and Commission v. France – Gold 2004*).³³

Article 36 TFEU gives the member states the right to have measures with equivalent effect to quantitative restrictions as an exemption to Article 34. This article can only be used for general, non-economic reasons, such as public morality, public order, public security, and the protection of the health and life of humans. Such derogations from the general principle must be interpreted restrictively. National measures must not constitute discrimination or include and disguise the restriction of trade between them. Furthermore, the measures must directly impact the public interest to be protected and must not go beyond what is necessary to respect the principle of proportionality.

³⁰ Ibid page 60.

³¹ See Case 8/74 of 11 July 1974 and 15 November 2005 in Case C-320/03, para 63 to 67.

³² Weiss F & Kaupa C, (2014) *European Union Internal Market Law*, page 56.

³³ Ibid page 57.

Article 37 regulates state monopolies and their *specific function*. The article ensures that *no discrimination* regarding the conditions under which goods are procured and marketed exists between nationals of Member States. The purpose of Article 37 of the Treaty is to reconcile the requirements arising from establishing the common market and its functioning with the possibility for the Member States to maintain certain trade monopolies to achieve specific objectives of general interest. An example of this kind of monopoly is the Swedish alcoholic monopoly Systembolaget. The article aims to remove all obstacles to the free movement of goods, except for the restrictions on trade that constitute a *necessary consequence* of the existence of such monopolies.³⁴

To investigate and answer the research question, these articles must be kept in mind as they form the legal framework for how a member state and monopoly can act without violating EU law.

2.4 The definition of an establishment according to EU law

One of the key concepts for the distinction between private importation and retail sales is the establishment. The establishment is part of one of the four freedoms, free movement of persons (Article 49 TFEU).

The establishment is hence an important indicator to decide whether a company's business constitutes retail or distance selling and also if it is a legal or illegal business when it exists a retail monopoly on a national market. The criteria for establishment cannot be fulfilled if a wine company wants to use the exception for private importation.

EU law provides detailed guidance for assessing whether entrepreneurs should be classified as "established" according to EU law. The assessment shall consider both the principle of freedom of establishment in Article 49 TFEU and the extensive relevant case law from CJEU.

This applies particularly to cases concerning the boundary between the Swedish alcohol monopoly's legitimate mode of operation and impermissible restrictions on the free movement of goods and services. Therefore, the question of whether a

³⁴ See case C-189/95 Franzén para 4.

foreign wine seller is established in Sweden must be assessed based on EU legal rules and practice. These rules are intended to protect the right of free establishment and limit Member States' possibilities to refuse establishments in their territories or refuse recognition of establishments in the other Member States.

A key case in this context is *Centros*. The case concerned a British company's opportunity to establish a branch in Denmark.³⁵ After the Danish Companies Registration Office refused to register the branch, the case reached the CJEU. The Court did not see any problem with the company's formation and establishment in the United Kingdom to benefit from that Member State's less stringent share capital rules, even though that the business was directed towards Denmark. Thus, the British company was fully established in the United Kingdom for the simple reason that it was incorporated there. The Danish decision to refuse registration of the branch in Denmark conflicted therefore with the right to free establishment within the EU.

Following the *Centros* case, other cases have confirmed that a company is presumed to be established in the Member State in which it is registered. Regardless of the reasons for the establishment or where the company's customers are located. In order for an undertaking to be considered established in a Member State other than the Member State of registration, it is required that it has carried on actual economic activity (i.e., business) through a permanent establishment in the other Member State for an indefinite period.³⁶

It also follows from case law that a company may be established in one Member State and provide services in another Member State without being considered to be established in the other Member State. Only if a professional activity is carried on continuously in the other Member State, from a permanent place of business, is it a matter of establishment in that Member State.³⁷

³⁵ See C-212/97, Judgment of the Court of 9 March 1999. *Centros Ltd v Erhvervs- og Selskabsstyrelsen*.

³⁶ See C-196/04, Judgment of the Court (Grand Chamber) of 12 September 2006. *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue*. Para 54.

³⁷ Case C-215/01 Judgment of the Court (Fifth Chamber) of 11 December 2003. *Bruno Schnitzer*. Para. 28-29.

2.5 Summary

The internal market is defined by the aim to create a well-functioning internal market for the member states. The *four freedoms* consist of the right to free movement for services, free movement of goods, free movement of persons, and the freedom for capital. With support from the free movement of goods, wine can be purchased and sold between the member states.

There are several principles of EU law that the member states must respect. In particular, the principle of proportionality, the principle of mutual recognition, and non-discrimination. These principles are essential tools for the Court to determine whether a member state's measure is lawful or unlawful.

The Swedish monopoly on retail trade with alcohol must respect article 37 TFEU and ensure that no discrimination regarding the conditions under which goods are procured and marketed exists. As regards some issues, the state-run monopoly is also limited by article 34 TFEU which means that a member state cannot have *quantitative restrictions* on imports that directly or indirectly hinder cross-border trade, i.e., *the Dassonville formula*. But there are possibilities to restrict this prohibition due to article 36 TFEU. A member state can have quantitative restrictions, but the exemption can only be used for general, non-economic reasons, such as public morality, public order, or public security. In Sweden, public health is the reason that justifies the alcohol policy.

The definition of establishment is of high importance to assess whether a company's business violates the Swedish alcoholic market or not. Case law has confirmed that a company is presumed to be established in the Member State in which it is registered (see *Centros*). But if a company has professional activity continuously, from a permanent place of business, then the establishment can be fulfilled in another Member State.

3 Private importation of wine

3.1 Case C-189/95 Franzén

The Franzén case is an essential landmark for the Swedish monopoly's compatibility with EU law. It has been the most significant example for many years.

The background in the case is related to when Sweden entered the EU in 1995. Harry Franzén started selling alcohol in his supermarket in Skåne since Sweden had become a part of the European Union and as the EU law has a direct effect (*see case Van Gend and Loos*). Mr Franzén's idea was that Systembolaget was in violation of the EU law and that he, therefore, could sell alcohol in his supermarket.³⁸

The question was taken to the Swedish Court. The first instance then asked the Court of Justice of the European Union (hereinafter the Court or the "CJEU") for a preliminary ruling regarding alcohol sales and if the monopoly was legal under EU law.³⁹

The questions court had to decide on was the following:

- "1. Is a monopoly such as Systembolaget compatible with Article 34?
2. Does a monopoly such as Systembolaget contravene Article 37, and if so, should the monopoly be terminated, or is an adjustment possible?
3. If a monopoly such as Systembolaget were to be regarded as contrary to Article 37, is there an adjustment period, or would the company have been dissolved or adjusted on January 1st 1995? "

Mr Franzén claimed that Articles 34 and 37 of the Treaty constitute obstacles to the existence of Systembolaget.⁴⁰ According to him, these articles prevent a retail monopoly such as the one that currently exists in Sweden in several ways. Such as

³⁸ Jörgen Hettne, (2012) *Administrative Law as a Key to Market Integration? Constitutionalizing the EU Judicial system - Essays in Honor of Pernilla Lindh*. Pascal, C., Allan, R. & Nils, W. (Eds.). Hart Publishing Ltd, pp. 153-165. Chapter 11 page 146.

³⁹ Case C 189/95 Franzén para 1.

⁴⁰ Case C-189/95 Franzén para 32.

the possible risk for Systembolaget to favour the sale of domestic products. He referred, among others, to the case *Keck und Mithouard* C-268/91 and held that Systembolaget, in comparison, is not exposed to any competition and therefore does not qualify within the meaning of the case.⁴¹

However, the CJEU has repeatedly held that the relevant Article is Article 37 TFEU and that this article does not call for abolishing State trade monopolies. Instead, the monopolies must be adapted so that there is no discrimination regarding acquisition and marketing conditions between products from the Member States.⁴²

Furthermore, the Court held that Article 37 of the Treaty aims to reconcile the requirements arising from establishing the common market and its functioning with the possibility of maintaining certain trade monopolies to achieve specific objectives of general interest. The purpose of the article is to remove all obstacles to the free movement of goods, except for the trade restrictions that are necessary for the existence of such monopolies.⁴³ Trade goods originating in the other Member States shall not be legally or effectively disadvantaged in relation to trade in domestic goods, and competition between the Member States shall not be distorted. The Court held that Systembolaget's criteria and selection methods are neither discriminatory nor of such a nature that they disadvantage imported products.⁴⁴

The result of the judgment was that the CJEU decided the following conclusions:

"Article 37 does not constitute an obstacle to the Swedish state alcohol monopoly and its functioning. Articles 30 and 37 of the EC Treaty [now Articles 34 and 37

⁴¹ Case C-267/91 and C-268/91 *Keck and Mithouard* 1993. The circumstances in the case was that French law prohibited the resale of products in an unrelated state at prices lower than their actual purchase price, "resale at a loss". Two supermarket owners to act "*Keck and Mithouard*" got accused for infringing the law – but they held the law was incompatible with article 34. The court's judgment stated that there was no breach of article 34. But the court established a distinction between product requirements, packaging and selling arrangements which falls out of the scope if they affect domestic and foreign trades in the same way, both legally and factually.

⁴² Case C-189/95 *Franzén* para 38.

⁴³ *Ibid* para 39.

⁴⁴ *Ibid* para 52.

TFEU] preclude national provisions, which mean that the right to import alcoholic beverages is reserved to operators with a manufacturing or wholesale license".⁴⁵

This case was the leading interpretation of how the provisions would be applied to the Swedish monopoly for many years. After the Franzén case, Systembolaget was the only one who could sell alcohol, confirmed by the CJEU.

3.2 Case C-170/04 Rosengren

Mr Rosengren and the other appellants in the proceedings had purchased Spanish wine through a Danish website. Some of the purchase was made by mail-order and some directly from the producer. The wine was confiscated at the border to Sweden as it hadn't been declared at customs. The importation became a question for the National Court as it had been unlawfully imported in contravention of the Swedish alcohol act.⁴⁶

On March 30th 2004, the Swedish Supreme Court asked the CJEU for a preliminary ruling. They raised four questions regarding the prohibition of private importation.

1. Can it be held that the ... ban on [direct] imports [on the orders of private individuals] constitutes part of the retail monopoly's manner of operation and that on that basis it is not precluded by Article 34 and is to be examined only in the light of Article 37?
2. If the answer to Question 1 is yes, is that ban ... in such a case compatible with the conditions laid down for State monopolies of a commercial character in Article 37?
3. If the answer to Question 1 is no, is Article 34 to be interpreted as meaning that it in principle precludes [that] ... ban on imports despite the obligation of the Systembolaget to obtain, upon request, alcoholic beverages which it does not hold in stock?
4. If the answer to Question 3 is yes, can such a ban ... be considered justified and proportionate to protect the health and life of humans?"⁴⁷

On the grounds of the judgment, the CJEU states that the questions do not concern the monopoly's exercise of its "*specific functioning*." Therefore article 37 lacks importance.⁴⁸ The CJEU's answer to the first question was that the Swedish alcohol

⁴⁵ Ibid para 84 & 85.

⁴⁶ Case C-170/04 Rosengren, Para 10,11.

⁴⁷ Ibid Para 14.

⁴⁸ Ibid Para 21, 22 & 26.

law and the prohibition of the importation of beverages should be interpreted in the light of article 34 and not 37. That was also the answer to the second question.⁴⁹

As a consequence of the first answer, the answer to the third question is that a measure, such as the prohibition of private importation in Swedish law, is a quantitative restriction on imports within the meaning of Article 34. Even though the law already requires the holder of the retail sale monopoly, on request, to supply and, therefore, import the beverages in requested. The Court's answer means that it is not enough that Systembolaget can order the beverages a consumer wants. The prohibition of private importation violates article 34.⁵⁰ However, the Court finds that the prohibition on the private importation of alcoholic beverages by individuals restricts consumers' sources of purchase and, to some extent, can help to prevent the harmful effects of said beverages, due to that purchases are made more difficult for consumers.⁵¹

The fourth and last question. In the reasons for judgment, the Court confirms that measures regarding quantitative restrictions on imports within the meaning of Article 34 may be justified in protecting the health and life of humans (see Franzén case para 75).⁵² The Court also confirms that the life and health of humans rank foremost among the assets or interests protected.⁵³ But the Court points out that the Swedish government has not proved any kind of risks for public health in this case and that private importation cannot be prohibited in Sweden.⁵⁴ In para. 57, the Court finds that the prohibition on private *imports is not proportionate* to the purpose of protecting young people from the harmful effects of alcohol consumption.

In parallel with the Rosengren case, the European Commission brought an action against Sweden for failure to fulfil obligations. In the case C-186/05 Sweden vs the Commission, the Court also refers to the reasoning in Rosengren. In that case, the CJEU concluded that Sweden had breached its obligations under the treaty by

⁴⁹ Ibid. Para 29.

⁵⁰ Case C-170/04 Rosengren para 36.

⁵¹ Ibid para 45.

⁵² Ibid para 38.

⁵³ Ibid para 39.

⁵⁴ Ibid para 42.

prohibiting the importation of alcoholic beverages by private individuals "through an independent intermediary or professional promotion." This expression got significant importance for the design of the amending in Swedish legislation.⁵⁵

3.2.1 Advocate General Tizzano's opinion

Tizzano, on the other side, held that article 37 applied to the question. The duty of importing alcoholic beverages at customers' request is closely related to the exercise of the *specific functioning* that Systembolaget has under national law. The Advocate General referred to the Franzén judgment in support of his position.⁵⁶

As the answer from Tizzano is different from the Court's judgment regarding question one, naturally, question number two, three, and four get another outcome as well. Tizzano considers that the prohibition on importing alcoholic beverages by individuals under the Alcohol Act is contrary to Article 37. Since the same law provides for a retail monopoly on those beverages, the exclusive right holder may decide not to satisfy private individuals' orders for the importation from the other Member States.⁵⁷ Such a prohibition on the importation of alcoholic beverages by private individuals themselves is contrary to Article 37.⁵⁸

3.2.2 Advocate General Mengozzi's opinion

Due to new facts in the case, an additional oral hearing was held in the Court. By this time, Tizzano had quit the position as Advocate General, so a new opinion had to be obtained from Mengozzi. This is the reason behind the two different opinions.

Advocate General Mengozzi shared Tizzanos's opinion regarding the application of article 37.⁵⁹ Accordingly, Mengozzi accepts that the purpose of Article 37 has a limited scope. Still, he does not consider that it automatically means that the

⁵⁵ C-186/05 Commission vs. Sweden para 27.

⁵⁶ Opinion of Mr Advocate General Antonio Tizzano delivered on 30 March 2006 Case C-170/04 Visnapuu. Para 32-48.

⁵⁷ Ibid para 58-61.

⁵⁸ Ibid para 86.

⁵⁹ Opinion of Mr Advocate General Mengozzi delivered on 30 November 2006 Case C-170/04 Visnapuu.

provisions of that article must be interpreted restrictively.⁶⁰ Mengozzi considers provisions relating to the retail monopoly on alcohol and its *functioning* must be assessed in the light of Article 37 since they are closely linked to the exercise of the *specific function* of the monopoly. He believes that this also includes provisions that do not correspond to the scope of the monopoly's exclusive right.⁶¹

Regarding the following questions (number two to four), Mengozzi's opinion differs from Tizzano's. At first, he shares Tizzano's view that the ban on private imports does not in itself disadvantage goods from the other Member States under the Alcohol Act. On the contrary, these goods are put in the same situation as domestic goods (non-discrimination). In both cases, private individuals can only buy the goods in Systembolaget's stores and through its agents, and if the goods are not included in the range, they can, in both cases, be ordered through Systembolaget. However, unlike Advocate General Tizzano, he considers that this assessment is sufficient to give the Supreme Court a helpful answer in the light of the circumstances of the case before it. He also points out that Systembolaget has never used the opportunity not to satisfy an order because it considered that there were "obstacles." Against this background, Mengozzi replies that a ban on private imports such as that provided for in the Alcohol Act is in principle not in breach of Article 37.⁶²

3.2.3 Comments to the judgment

Martin Johansson has, in a comment, emphasises that the Court construed its previous case law very narrowly.⁶³

He points out that "the Court did not at all analyse whether the import ban was *inherent in the existence* of Systembolaget, or whether it was *intrinsically connected* with the specific function of the monopoly."⁶⁴ Johansson expresses that he is surprised that the Court, in this case, did not examine whether the restrictions

⁶⁰ Ibid. Para 29.

⁶¹ Opinion of Mr Advocate General Anonio Mengozzi delivered on 30 November 2006 Case C-170/04 Visnapuu. para 37.

⁶² Ibid para 62-70.

⁶³ Martin Johansson Rosengren – A "*Franzén Light*"? page 609.

⁶⁴ Ibid page 614.

contained in national regulations belong to the existence of the monopoly or whether they are inherently linked to the specific function of the monopoly.

He also argues that in this judgment, the Court limits possible national measures which may fall within the scope of Article 37. In this way, the Court has also limited the possibility for the Member States to use their state monopolies as instruments to achieve objectives of general interest.⁶⁵

3.3 The definition in Swedish legislation

What is classified as private importation?

The alcohol act (2010:1622) is the domestic alcohol law in Sweden. The exception for private import is regulated in chapter four 4§ p.7. The exception is a result of the Rosengren case (see chapter 3.3.3) and is constructed as follows:

Spirits, wine, strong beer, and other fermented alcoholic beverages may be brought in by an individual who has reached the age of 20 years, by professional transport or other *independent intermediaries*. If the importation takes place from another country within the European Economic Area and the drinks are intended for his or her family's personal use.

The criteria's can be stated as follows:

- Minimum age of 20 years.
- Professional transportation or "independent intermediary."
- They are intended for families or personal use.
- Purchased from EU/EEA.

When a company like Winefinder or Vivino sells wine to a Swedish citizen, it is not the company that imports the wine into Sweden. The company only acts as an *independent intermediary* - it is the private individual who is the importer, not the wine companies. This is a significant difference that constitutes the legal basis for the digital wine company's business to Swedish customers.

⁶⁵ Martin Johansson, *Rosengren – A “Franzén Light”?* page 620.

3.4 Development of the law on alcohol in Sweden

As a response to e-commerce purchase and home delivery development, the Swedish government started an investigation (SOU 2014:58) lead by Jörgen Hettne.⁶⁶

The investigation proposes a clarified exemption for private imports. "A person who has reached the age of 20 who has acquired spirits, wine, strong beer or other fermented alcoholic beverages outside Sweden, himself or through the seller's, may bring these in from a country within European Economic Area through transport organised by a *professional or private carrier independent of the seller*".⁶⁷ With this wording and clarification, no intermediary other than the transport service itself is permitted. The exemption for private imports is thus clarified to prevent interpretations which means that business arrangements are considered permitted in the Swedish retail market for alcoholic beverages but are incompatible with the retail monopoly or Swedish alcohol policy.

The inquiry further proposes that the exemption for private importation should be constructed with a ban on the commercial promotion of private importation of alcoholic beverages. It should be forbidden to promote such importation for commercial purposes, except for transport-related business to private importation.⁶⁸

In 2016 a further attempt was made. The government wanted to restrict the regulations on distance selling with the proposal "Regulation of distance selling of alcoholic beverages" (Ds. 2016: 33). The proposal entails an additional restriction compared with the previous proposal (SOU 2014: 58). The new proposal introduced a requirement that the buyer **must** hire the carrier who brings the alcoholic beverages to Sweden (similar to the previous SOU 2014:58). A recent judgment from the CJEU in Case C-198/14 Visnapuu was considered in this proposal. According to the proposal, the amendments to the law would enter into force on January 1st 2018. But it never happened.

⁶⁶ "Ministern vill stoppa nätvinerna" on January 4, 2014
<https://www.aftonbladet.se/nyheter/a/RxKndA/ministern-vill-stoppa-natvinerna> (2021-05-25).

⁶⁷ SOU 2014:58 page 10.

⁶⁸ SOU 2014:58 page 10.

These investigations show that there have been efforts from the Swedish government to clarify and improve domestic law to restrict private imports and restrict companies from using private importation. But without results. The definition is still depending on the Rosengren case that will be presented in the next section. The government has also sent signals indicating that a new investigation might be planned. Minister of Social Affairs Lena Hallgren told the newspaper that the issue is now being prepared within the Government Offices. "One should not be able to act in the same way as Systembolaget if Systembolaget has a monopoly."⁶⁹ One reason for taking action is the rapid increase in companies taking advantage of the exemption, from 41 companies in 2010 to 117 companies in 2020.⁷⁰

3.5 Summary of private import

The definition of private import is fundamental to address whether the online purchase is a legal action or not. The case law has been valuable for the definition and the survival of Systembolaget. The Franzén case outcome was that the monopoly is legal and not in conflict with EU law. But private importation was still not legal. The CJEU accepted Systembolaget as the only retail company of alcohol in Sweden – as long as they do not discriminate or give disadvantages to imported products. That was the state of law for many years until the Rosengren case challenged the legal situation. The Court opted for a much more narrow definition in comparison with the Advocates Generals in this case. The outcome from Rosengren later became the basis for an amendment to the Swedish Alcohol Act and the legal ground to exemption for private imports by individuals. Rosengren is thus an exception to Systembolaget's exclusive right on alcohol in Sweden. This change appears in chapter four, paragraph four § p 7 in the Alcohol Act. The Rosengren case and the subsequent change in Swedish law was interpreted extensively, and this was the current practice until the new verdict in Winefinder and Vivino came, and the legal situation became unclear again.

⁶⁹ “Regeringen vill stoppa vinbutiker på nätet”. March 10, 2020
<https://www.breakit.se/artikel/24037/regeringen-vill-stoppa-vinbutiker-pa-natet> (2021-04-20).

⁷⁰ Ibid.

4 Retail sales of wine

4.1 Definition of retail

"Retail covers all the actions relating to the supply of goods or the provision of service directly to the consumer for his private use. Traditionally, this trade has taken place within one country, but with the growth of e-commerce, it has become increasingly common for a seller in one country to offer his goods or services directly to consumers in another country. Retail can thus take place directly via shops, apps, and remotely via mail order or internet".⁷¹

According to the Swedish Alcohol Act (2010:1622), the definition of retail can be found in the first chapter 11 § *"Sales to consumers is retail."*

Chapter five, paragraph one of the Alcohol Act stipulates that for retail sales in spirits, wine, strong beer, and other fermented alcoholic beverages with an alcoholic strength exceeding 2.25% vol, there must be a specially formed limited liability company owned by the Swedish state. This company is Systembolaget AB.

The most recent case from the CJEU regarding retail sales is *Visnapuu* which constitutes the current interpretation from the CJEU of how a retail sale is assessed.

⁷¹ Retail explained in: Regulation of distance selling of alcoholic beverages (Ds. 2016: 33). Page 15.

4.2 Case C-198/14 Visnapuu “Alkotaxi”

Finland has a monopoly named "Alko." Alko is the only retailer of alcohol stronger than 4,7% alcohol. The European Investment Group Oü (EIG) was based in Estonia, and through their website "alcotaxi.eu" they offered soft and strong alcoholic beverages of various brands. Mr Visnapuu represented the company. The Finish citizens could easily buy alcohol through the website, and EIG would then set up the delivery to the consumers' doorstep. The alcohol was transported from Estonia into Finland by car.⁷² The company lacked a wholesale or retail license, and neither did the company declare the imported alcohol. In the first instance in Finland, EIG was found guilty of tax fraud and violations of the Alcohol Act. Visnapuu appealed against the ruling to the Helsinki Court of Appeal, which asked for a preliminary ruling from the CJEU.

Like the cases mentioned above, this case also concerns whether Article 34 or Article 37 TFEU should be applied regarding the requirement for a retail license to import alcoholic beverages intended for retail sale in Finland.⁷³

The CJEU first stated that the main rule is that the monopoly must be assessed in the light of Article 37 TFEU since that provision lays down rules on a national monopoly on trade and its operation.⁷⁴ However, specific licenses for retail sales do not concern Alko's *functioning* or how it *exercises* its exclusive right. These licenses give persons other than Alko the right to engage in retail trade in specific categories of alcoholic beverages. The question is thus not about Alko but other companies. The Finnish Court's claim against Mr Visnapuu must therefore instead be assessed against Article 34 TFEU.⁷⁵

Further on, the CJEU also made clear that these criteria for a retail license are a quantitative restriction in the meaning of article 34. Still, it could be legitimate with

⁷² C-198/14 Visnapuu para 30.

⁷³ Ibid para 37.

⁷⁴ Ibid para 86.

⁷⁵ Ibid para 92.

support from article 36. The CJEU passed on that judgment to the domestic Court to do.⁷⁶

The Advocate General, Mr Yves Bot, held that the ownership of the alcohol must shift outside Finland to be a private import in the meaning of Rosengren.⁷⁷ The CJEU also confirmed this reasoning.⁷⁸ Due to that, Mr Visnapuu sold the alcoholic beverages through the website, and that he directly delivered the beverages to the Finnish buyers by himself. It could not be classified as a private import in order with the Rosengren case. Instead, they imported the alcohol and then sold it as a retailer. To be able to use private importation, it must be the buyer that imports the alcohol. The company can only act as an independent intermediary. Both the Advocate General and the CJEU agreed that it, in this case, was a retail sales business and not a private importation.⁷⁹

4.3 Comments of the case

A reflection from Jörgen Hettne is that the CJEU gives the Finnish Court rather vague guidance on how to judge. The Advocate General seems to have a clearer opinion that Visnapuu was engaged in retail sales. He also notes that the reasoning of the CJEU in Visnapuu contrasts with Rosengren, where it conducted a full-scale proportionality assessment.⁸⁰

He held that the judgment could be interpreted as: "If the seller engages the intermediary, it is not a question of private importation but *distance selling* and thus *retail*."⁸¹ Furthermore, Hettne argues that "it is therefore not possible to conclude that only private imports as defined above must be allowed under EU law, while

⁷⁶ C-198/14 Visnapuu para 109-123.

⁷⁷ Opinion of Advocate General Mr. Yves Bot delivered on 9 July 2015 Case C - 198/14 Visnapuu. Para 36 & 38.

⁷⁸ C-198/14 Visnapuu para 21.

⁷⁹ Hettne, J. (2017). *Näthandel med alkohol - lagligt eller olagligt?* In B. Nyström, N. Arvidsson, & B. Flodgren (Eds.), *Modern affärsrätt: En antologi* (pp. 101-116). Wolters Kluwer. Page 107.

⁸⁰ Hettne Jörgen *Alkotaxi och alkoholpolitik: E-handel och gårdsförsäljning i Finland* (2016) In *Europarättslig tidskrift* 19(3). p.483.

⁸¹ *Ibid.* Page 484.

distance selling may be prohibited altogether. Instead, it must be decided which restrictions are compatible with the principle of proportionality - whether it is private importation or distance selling. "⁸²

4.4 Summary of retail sales

In the light of the *Visnapuu* case, logistics and the transport procedure are given essential importance. How was the private importation made, was the company in charge of the transportation? And when did the ownership of the alcohol pass? These are essential questions to determine whether a company's business constitutes retail sales or qualifies for private importation.

If a seller is doing business with Swedish customers and the company is taking care of ordering transport to Sweden or drive themselves. Then it is most likely a business that qualifies under the definition of retail instead of private import. And if a business qualifies for retail, it violates the domestic alcoholic laws. The purchase must be made outside the country (in EEA/EU), and the ownership of the alcohol must shift before it reaches Sweden. Otherwise, it will not qualify under the measures of the *Rosengren* case and private importation.⁸³

⁸² Hettne, J. (2016). *Alkotaxi och alkoholpolitik: E-handel och gårdsförsäljning i Finland*. Page 484.

⁸³ Hettne, J. (2017). *Näthandel med alkohol - lagligt eller olagligt?* Page 111.

5 Case study

5.1 Winefinder – background of the case

Winefinder's motto is: - "Buy quality wines from some of the world's most acclaimed wine producers and regions."⁸⁴

The company Winefinder AB was founded in 2005 by a Swedish/Danish entrepreneur in Helsingborg. The warehouse is located in Denmark, and it is from there, the distribution of wines to Swedish customers takes place. The sale to Swedish customers is made via the Danish subsidiary "Winefinder ApS" (hereinafter both called "Winefinder"), which Winefinder AB owns. The business is leaning towards the so-called Rosengrens judgment from 2007 (see chapter 3.3.3).

Winefinder has been reported to the police on two occasions during its collaboration with the grocery store City Gross and MatHem. The collaboration involved home delivery of wine together with grocery bags.⁸⁵ In 2019, it was time again, Systembolaget reported Winefinder to the police for violating the Swedish alcohol law. On October 22nd 2020, the Nordic region's leading wine broker Winefinder lost the lawsuit against Systembolaget.⁸⁶

⁸⁴ <https://www.winefinder.dk/> (2021-04-22).

⁸⁵ Case PMT 2881-19 Winefinder vs Systembolaget page 17.

⁸⁶ News from the Swedish courts 6th of May 2021 "Systembolagets monopol hindrar inte E-handel av vin från Danmark". <https://www.domstol.se/nyheter/2021/05/systembolagets-monopol-hindrar-inte-e-handel-av-vin-fran-danmark/> (2021-05-22).

Systembolaget claims that Winefinder should be forbidden at the fine of two million SEK to market and sell alcohol to Swedish customers. This includes the delivery set up by Winefinder and hired conveyor that takes place directly or indirectly via Winefinder's connection.

In 2019 Systembolaget sent a letter to make Winefinder change their marketing, which they also did. But Systembolaget still claimed that Winefinder was violating the Swedish law on alcohol and marketing rules.

Systembolaget held that it is the Swedish mother company "Winefinder AB" that sells the wines. It is not clear to the buyer that it is the Danish subsidiary that is the seller. Arguments for this are that the mother company provides the subsidiary with IT, economy, and purchase services. In terms and conditions, the Swedish company is the contact for returns and complaints. Previously Winefinders consumer's support was in Sweden, and they used a Swedish phone number as well. Winefinders webpage has since 2018 and until March 2020 only been available in Swedish and the currency in "SEK." The CEO's domicile is in Sweden, and so is the board. The CEO and the board are the same for both companies. The connection to Sweden is therefore strong.

In addition, it is not the customer who pays the carrier. Winefinder pays the payment to the carrier. The customer cannot either choose another carrier and have non or little influence over the delivery. The customer does not have an agreement with the carrier either.

Systembolaget claims that Winefinder is in practice established in Sweden and that its business must be considered to be retail. Since Systembolaget is the only legal alcoholic retail company in Sweden, Winefinders business must be illegal.

Winefinder argues that they have their location in Denmark for business-related reasons and do not aim to circumvent the Swedish rules. They also state that it is clear from the website that the Danish subsidiary makes the sales. Winefinder points out that all bottles can be identified during the transportation and that this proves that it is the customer who brings the wine into Sweden and not Winefinder.

Furthermore, Winefinder held that they only mediate the logistics service to the customer in order with the Swedish alcoholic laws. They only act as independent intermediaries and refers in this regard to the Rosengren case.

5.1.1 Judgment Systembolaget vs Winefinder PMT 2881-19

The Court primarily concentrates on investigating Winefinder's connection to Sweden. The Court mentions that it is hard for a customer to separate the two companies as they have the same name.

According to the Court, the fact that Winefinder offers consumers in Sweden alcoholic beverages through an offer that includes home delivery and that the delivery takes place through a carrier hired by Winefinder indicates that Winefinder should be considered to conduct retail in Sweden.⁸⁷ The Court found that transport is a significant part of Winefinder's service, and transport cannot be disconnected on behalf of the customer. Winefinder has a standard agreement with the carrier. It is not independent transportation as the customer does not influence the transport and all communication is through Winefinder. The Court also notes that Winefinder sends out the notification when the wine has been shipped to Sweden and is available for collection. Based on the procedure Winefinder has shown, the customer is not given any other opportunities. The Court, therefore, saw transportation as an essential and integrated part of the purchase, and it does not qualify under the measures for "independent intermediary."⁸⁸ The shipping has not been on behalf of the customer but was part of Winefinder's business.

All in all, the Court found that Winefinder's activities have had such a connection to Sweden that the actual conduct of business activities must mainly be considered to take place from Sweden and that Winefinder ApS mainly carries out its activities in Sweden. It is not sufficient that Winefinder ApS is a company registered in Denmark and that warehousing takes place in Denmark. Instead, it seemed that the Danish company was primarily used to circumvent the Swedish alcohol legislation.

⁸⁷ PMT 2881-19 page 44.

⁸⁸ PMT 2881-19 page 43.

The Court's conclusion is, therefore, that Winefinder ApS's e-commerce operations are in Sweden. Winefinders connection to Sweden is too strong. The Court, therefore, considers that both Winefinder companies are established in Sweden and in violation of the domestic alcohol act.⁸⁹

Accordingly, the Court found that Winefinder's operations constitute "retail sales" of alcoholic beverages in Sweden. According to the Alcohol Act, only the retail monopoly Systembolaget can conduct such retail trade in Sweden. Winefinder's operations are therefore in violation of the law.

Winefinder has appealed the verdict to the higher instance.⁹⁰

5.2 Vivino - background of the case

Vivino is a Danish online wine company that provides services such as delivering wine and recommendations of wine. The service has over 50 million users all over Europe and over 12 million different wines. They promote their business as the "world's largest wine market." Vivino is the most downloaded wine app and called the wine worlds Spotify. Vivino Denmark is a subsidiary of the American Vivino company founded in 2010.

In 2020 Vivino started marketing its alcoholic services on the Swedish market, which immediately got Systembolaget to act. Systembolaget sued Vivino in the Patents and the Market Court in Sweden for infringing the Swedish alcoholic market. Systembolaget threatened Vivino with a fine of 2 million SEK if marketing and sales did not stop immediately.⁹¹

Vivino opposed the claim in its entirety. Vivino only conducts distance selling from another EU Member State, not retail in Sweden. All sales to Swedish customers take place from Vivino, which is established in Denmark. There is no Swedish

⁸⁹ PMT 2881-19 page 44 & 53.

⁹⁰ Article by Henrik Ek in Dagens Industri on October 22 nd, 2020 ” Winefinder stoppas i rätten - men tänker trotsa beslutet” <https://www.di.se/digital/systembolagets-seger-winefinder-stoppas-i-ratten-men-tanker-trotsa-beslutet> (2021-05-26).

⁹¹ Article in Dagens Juridik 18 February 2020 ”Systembolaget stämmer Vivino” <https://www.dagensjuridik.se/nyheter/systembolaget-stammer-vivino-och-hotar-med-miljonvite/> (2021-04-03).

company, office, or warehouse, and the company has no other connection to Sweden.⁹²

Vivino explained the purchase process: When the customer places their order, the goods are separated, which means that the ownership passes to the customer. In connection with this, the customer receives a message that the goods are ready to be sent. The logistics company then transports the goods from the warehouse in Denmark to Brings or Budbee's logistics terminals in Sweden, depending on which carrier the buyer has chosen for home delivery. Consequently, it is not Vivino that transports the wine to the Swedish customer. Independent transport companies do the transport.⁹³ The customer service is handled by a company in Portugal, to which Vivino has outsourced customer service.

The average price per bottle of wine bought by Swedish private individuals is about 200 SEK. The high price means that public health does not risk being seriously damaged by Vivino's operations. Vivino's collection of wines are in a high quality and price segment. An average consumer is a middle-aged person with a good income and great interest in wine.⁹⁴

Vivino held that if the Patent and Market Court found that Vivino's activities are in conflict with Swedish law, Swedish regulation is incompatible with EU law, including the principle of free movement of goods. Since EU law takes precedence, the Court must, in that case, disregard Swedish law.⁹⁵

Furthermore, Vivino also points out that their activities are compatible with Swedish law, as they have been based on statements in preparatory works. In this legal guidance, it is stated that it is irrelevant whether it is the buyer or the seller who has hired the carrier (see proposition 2007/08: 119 p. 44 and SOU 2009: 22 p. 99 and 100).⁹⁶

⁹² PMT 2069-20 page 21.

⁹³ Ibid page 21.

⁹⁴ Ibid page 22.

⁹⁵ Ibid page 12.

⁹⁶ Ibid page 22.

5.2.1 Judgment Systembolaget vs Vivino PMT 2069-20

The judgment was delivered in May 2021. Surprisingly, the outcome of the case was different from Winefinder's. The Court found that Vivino's business was legal with reference to Rosengren, and it did not constitute retail, contrary to the opinion of Systembolaget.⁹⁷

The Court first confirms that it is clear that situations where the consumer himself chooses a carrier who is independent of the seller (as in the Rosengren case) are covered by the private importation and therefore legal. Furthermore, the Court discusses if it makes any difference if the seller hires the carrier. The Court concludes that it makes no difference. The Court emphasises the legislator's purpose and argues that the law was changed in order to give the right to private individuals to bring alcoholic beverages into the country under conditions that constitute distance selling. If the distance seller's activities would still be prohibited, the result would have been that the barrier to trade would have persisted. That could not have been the intention of the legislator.⁹⁸ The fact that e-commerce has expanded in recent years does not constitute a reason to interpret the Rosengren case narrower than the legal text and preparatory work allows. Therefore, the Patent and Market Court concluded that when the legislation was amended, it was not the legislator's intention that distance selling as Vivino is engaged in would be considered prohibited retail sales in Sweden.⁹⁹

Of central importance for the assessment was that Vivino conducts its operations from another country within the European Economic Area (EEA), Denmark. Vivino may therefore continue to market wine for sale and home delivery to Swedish consumers.¹⁰⁰

⁹⁷ PMT 2069-20.

⁹⁸ Ibid page 35.

⁹⁹ Ibid page 35.

¹⁰⁰ News from the Swedish courts 6th of May 2021 "Systembolagets monopol hindrar inte E-handel av vin från Danmark". <https://www.domstol.se/nyheter/2021/05/systembolagets-monopol-hindrar-inte-e-handel-av-vin-fran-danmark/> (2021-05-22).

The Court rejected Systembolaget's claim and did not ban Vivino from conducting distance selling via the internet to Sweden. Systembolaget has appealed the judgment to the higher instance, the Patents and Markets Court of Appeal (PMÖD).

Since the delivery of the Vivino judgment, there have been interesting discussions about the definition of private import. Systembolaget themselves raised strong critics against the Swedish Court (PMD) for having delivered widely differing assessments in Windefinder and Vivino in a very short period. "Surprisingly, the same court can interpret the law so differently in such a short time," says Systembolaget's Malin Sandquist.¹⁰¹

¹⁰¹ Article by Henrik Ek in Dagens Industri the 11th of May 2021 Systembolaget's kritik efter Vivino-domen: "Vi kommer överklaga." <https://www.di.se/digital/systembolagets-kritik-efter-vivino-domen-vi-kommer-att-overklaga/> (2021-05-12).

5.3 Summary

These new cases constitute a new era regarding the purchase of alcohol. As the old EU cases of Franzén and Rosengren have been the leading case law for a long time, the new Swedish case law means new questions and unclarities.

Offering home delivery as an integrated part of the purchase is banned in Winefinder. The shipping and transport must be under the influence of the customer. To qualify under the measures for private import, the company cannot be the one ordering the transport - It must be the customer. Winefinder did not have such an opportunity. Rather it seemed as Winefinder arranged by itself the transportation to Sweden, which did not qualify under the measures for private importation.

One conclusion from Winefinder is that the establishment and connection are of high importance when assessing whether the business qualifies under the measures for private importation or not. The Court made an overall assessment that since IT, finance, and customer service have been in Sweden and that only the wines have been stored and distributed from Denmark, the company has a close connection and is considered *established* in Sweden.

Interestingly, the judgment is different in Vivino. Within a couple of months, the same Court gave two different judgments on the same legal question. The judgments create even bigger unclarity and insecurity to assess the lawfulness as the Court makes a completely different assessment and ignores the reasoning about transport and the buyer's influence which was a central discussion in the previous Winefinder case. These widely differing judgments create doubts on how the assessment should be made and whether Winefinder's operations remain illegal. The cases on appeal before PMÖD will be interesting to follow.

6 Summary and conclusions

6.1 Conclusions of the thesis

The internal market creates the frame for how goods can be sold and purchased within the EU. Even if the EU constitutes a common market for the sale of goods, this right can be restricted due to urgent public health concerns (Article 36 TFEU). That is the case in Sweden to preserve the alcohol monopoly Systembolaget. But this exception has been challenged several times during the years, and the disputes are still going on.

The answer to the first research question is that private importation must qualify under the conditions set in the Rosengren case to avoid being classified as a retail sale. The borderline between private importation and retail depends on the seller's domicile, how the marketing was done, how the transport was set up, and what influence the customer has over the transportation. Private importation requires that an individual buys wine from another EU member state. As noticed in the case study, a big focus must be given to the word *independent intermediary*. If the transportation is set up by the seller himself, it is highly likely a retail sale as in the Visnapuu case and Winefinder. If a company offers complete solutions where delivery is an integral part of the wine purchase, the activities are prohibited according to Winefinder and constitute retail sales.

What conclusions can be drawn regarding the lawfulness of the private import of wine to Sweden in the light of the Swedish cases of Winefinder and Vivino? The two judgments from the Patent and Market court are in contrast to each other. At the moment, it is unclear under what conditions it is legal or illegal to sell wine to customers in Sweden through the exemption for private imports. It is also unclear whether the legality depends on who orders the transport. The final answer is that it is not possible to draw conclusions about the lawfulness of private importation before the cases have been subject to the higher instance. In addition, there is reason to assume that the disputes will be a matter for the CJEU. Both Vivino and Winefinder have stated that they want the Court to refer the matter to the CJEU as

an EU law issue (preliminary ruling). As Systembolaget is relying on a fragile exception for "public urgent interest", which must be proven before the CJEU, there is a risk that there will be a new decision regarding the existence of Systembolaget. It cannot be excluded that new opinions and findings regarding the monopoly may be made if the dispute reaches the CJEU.

Still, some conclusions can be made as regards the lawfulness of private importation. The recent cases do not prohibit that companies use the exception for private import. They can continue to use the exception for private import – but only if they are cautious and strategic. To avoid being classified as *established* in Sweden and in violation of the monopoly. The buyer must manage the delivery or at least be under the buyer's influence, and the company cannot be too connected to Sweden. It must also be mentioned that the new case law from the Swedish Patent and Market court cannot set aside the Rosengren case from the CJEU. Therefore, online wine companies can still sell alcohol with support from the EU case law.

Overall, the development of the definition seems to tighten up. The Winefinder judgment meant a narrower definition of private importation compared with the Rosengren judgment. But given that the same Court made a completely different assessment in the Vivino judgment, it is still unclear whether it must be the customer who orders the transport to Sweden or not. Previously, it was thought that it is forbidden for the seller to order the transport. But Vivino makes it difficult to determine if that is the case.¹⁰²

The borderline between retail sales and private importation and the lawfulness of the digital wine companies will be entirely dependent on how the next instance interprets the cases and if the cases are referred to the CJEU or not.

¹⁰² Hettne J (2017) *Näthandel med alkohol - lagligt eller olagligt?* Page 114.

6.2 The author's reflections

Due to my interest in the questions about private import and the conclusions of the thesis, I think this new case law is interesting from many perspectives, not least from a consumer perspective. I found it unexpected that the consumer benefits are significantly better when purchasing from Winefinder and Vivino.

Secondly, it is surprising that Systembolaget starts new disputes now, as they have been accepting the interpretation of the Rosengren judgment for several years. Their acting could be an indicator of a changed opinion or strategy. Winefinder has been operating in Sweden for nearly ten years. Therefore, one can wonder why they act now after this long time and without changed circumstances in EU law or Swedish law.

Of course, the competition situation could be one explanation. I notice that Systembolaget started offering home delivery in 2020, maybe as an attempt to keep the consumers and attract them in a way that Winefinder and Vivino cannot? Today Swedish citizens can use Systembolaget to make private importation. They provide this service for free, but it is rather complicated, and time-wasting as the delivery can take over eight weeks, and the cost for shipping is expensive, minimum 1500 SEK.¹⁰³ Therefore, it might not be surprising that a competitor can make the service more efficient instead of waiting for Systembolaget for eight weeks and pay 1500 SEK. The digital wine sellers can deliver your wine in 1-3 days only pay 59 SEK for the shipping.

The urgent public interest "health" is the argument Systembolaget relies on but does it make sense? The average price per bottle of wine bought by Swedish private individuals from Vivino is about 200 SEK. The high price means probably that public health does not risk being seriously damaged by Vivino's operations. Something that further supports this position is that digital wine companies do not sell soft drinks and spirits. The range offered by Vivino and Winefinder is focused

¹⁰³ Systembolagets webpage about private importation

<https://www.systembolaget.se/bestalla-och-handla/privatimport/#:~:text=Privatimport%20%C3%A4r%20ett%20speciellt%20sorts,varorna%20kan%20h%C3%A4mtas%20i%20butik>. (2021-05-01).

on quality wines. Rather they want customers to buy smaller quantities of quality over larger quantities of cheap wine. Compared to Systembolaget that offers bag-in-box wines and strong spirits. If health was the highest priority, then why does Systembolaget offer spirits and bag in boxes? Is that proportionate? I believe that Sweden can achieve the same goal without limiting digital wine companies that offer exclusive wines. The current measures can be claimed to go beyond what is necessary to achieve the objectives.

Winefinder and Vivino use the exemption for private imports to conduct their business with Swedish customers. The online wine companies' business idea is to sell alcohol to Swedes. The company makes money by offering quick delivery and an exotic range of exclusive wines. Is this some kind of abuse? The EU law does not prohibit the use of treaty provisions. However, the discussion can still be conducted: Is it okay to circumvent the alcohol monopoly by exercising the right of private individuals to private imports? In this case, one can also ask the question of whether consumers benefit from this circumvention? My opinion is that consumers enjoy the benefits of the digital wine companies' existence in Sweden and that this benefit may not conflict with the argument about public health. Companies like Vivino and Winefinder attract a group of humans that has wine as an interest. They use the wine apps to gain knowledge of the wine and its origins. The high average price and the fact that online wine companies stand for just over one percent of all alcohol sales in Sweden speak for this position.

I believe that the development will be rapid and that the legislation will look significantly different within a few years. My view is that these new lawsuits will be a paradigm shift regarding private imports and the digital wine market. The future will be very interesting and crucial for the continued legal development of private imports. With these new lawsuits in mind, it is easy to criticise the current wording of private imports in the law. There have been doubts for a long time, and the law enforcement authorities and the government have called for clearer wording in Swedish law.¹⁰⁴ But perhaps it is now the case that the legislator must come up with a clearer wording due to the ambiguity emphasised by these new cases?

¹⁰⁴ See for example, DS 2016:33, SOU 2014:58 and Hettne, J. (2017). *Näthandel med alkohol - lagligt eller olagligt?* Page 113.

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