European Court of Justice, 5 June 2007, Rosengren

FREE MOVEMENT

A measure under which private individuals are prohibited from importing alcoholic beverages

- **A national provision under which private individuals are prohibited from importing alcoholic beverages, must be assessed in the light of Article 28 EC and not in the light of Article 31 EC.**
- **Measure is a quantitative restriction on imports**

A measure under which private individuals are prohibited from importing alcoholic beverages amounts to a quantitative restriction on imports within the meaning of Article 28 EC, even though that law requires the holder of the retail sale monopoly, on request, to supply and therefore, if necessary, to import the beverages in question.

- **Measure is unsuitable and not proportionate**

A measure under which private individuals are prohibited from importing alcoholic beverages,

– as it is unsuitable for attaining the objective of limiting alcohol consumption generally, and

– as it is not proportionate for attaining the objective of protecting young persons against the harmful effects of such consumption,

cannot be regarded as being justified under Article 30 EC on grounds of protection of the health and life of humans.

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European Court of Justice, 5 June 2007

(P. Jann, C.W.A. Timmermans, A. Rosas, R. Schintgen, J. Klučka, J.N. Cunha Rodrigues, R. Silva de Lapuerta, M. Ilešič, J. Malenovský, U. Lõhmus, E. Levits, A. Ó Caoimh and L. Bay Larsen)

JUDGMENT OF THE COURT (Grand Chamber)

5 June 2007 (*)

(Free movement of goods – Articles 28 EC, 30 EC and 31 EC – National provisions prohibiting the importation of alcoholic beverages by private individuals – Rule relating to the existence and operation of the Swedish monopoly on sales of alcoholic beverages – Assessment – Measure contrary to Article 28 EC – Justification on grounds of protection of the health and life of humans – Review of proportionality)

In Case C-170/04,

REFERENCE for a preliminary ruling under Article 234 EC, by the Högsta domstolen (Sweden), made by decision of 26 March 2004, received at the Court on 6 April 2004, in the proceedings

Klas Rosengren,
Bengt Morelli,
Hans Särman,
Mats Åkerström,
Åke Kempe,
Anders Kempe,
Mats Kempe,
Björn Rosengren,
Martin Lindberg,
Jon Pierre,
Tony Staf,

v

Riksåklagaren,

THE COURT (Grand Chamber),

composed of P. Jann, President of the First Chamber, acting as President, C.W.A. Timmermans, A. Rosas, R. Schintgen, J. Klučka, Presidents of Chambers, J.N. Cunha Rodrigues, R. Silva de Lapuerta, M. Ilešič, J. Malenovský (Rapporteur), U. Lõhmus, E. Levits, A. Ó Caoimh and L. Bay Larsen, Judges,

Advocate General: A. Tizzano, subsequently P. Mengozzi,

Registrar: C. Strömholm, subsequently J. Swedenborg, Administrators,

having regard to the written procedure and further to the hearing on 30 November 2005,

after considering the observations submitted on behalf of:

– K. Rosengren, B. Morelli, H. Särman, M. Åkerström, Å. Kempe, A. Kempe, M. Kempe, B. Rosengren, M. Lindberg, J. Pierre and T. Staf, by C. von Quitzow, juris doktor, and U. Stigare, advokat,

– the Swedish Government, by A. Kruse and K. Wistrand, acting as Agents,

– the Finnish Government, by A. Guimares-Purokoski, acting as Agent,

– the Norwegian Government, by T. Nordby and I. Djupvik, acting as Agents,

– the Commission of the European Communities, by L. Ström van Lier and A. Caeiros, acting as Agents,

– the EFTA Surveillance Authority, by N. Fenger and A.T. Andersen, acting as Agents,

after hearing the Opinion of Advocate General Tizzano at the sitting of 30 March 2006,

having regard to the order of 14 June 2006 reopening the oral procedure and further to the hearing on 19 September 2006,

after considering the observations submitted on behalf of:

– K. Rosengren, B. Morelli, H. Särman, M. Åkerström, Å. Kempe, A. Kempe, M. Kempe, B. Rosengren, M. Lindberg, J. Pierre and T. Staf, by C. von Quitzow, juris doktor, and U. Stigare, advokat,

– the Swedish Government, by A. Kruse and K. Wistrand, acting as Agents,

– the Finnish Government, by A. Guimares-Purokoski and E. Bygglin, acting as Agents,
– the Norwegian Government, by T. Nordby, I. Djupvik and K. Fløistad, acting as Agents,
– the Commission of the European Communities, by L. Ström van Lier and A. Caeiros, acting as Agents,
– the EFTA Surveillance Authority, by N. Fenger and A.T. Andersen, acting as Agents,
after hearing the **Opinion of Advocate General** Mengozzi at the sitting on 30 November 2006,
gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Articles 28 EC, 30 EC and 31 EC.

2 This reference was made in the context of proceedings between K. Rosengren, B. Morelli, H. Särman, M. Åkerström, Å. Kempe, A. Kempe, M. Kempe, B. Rosengren, M. Lindberg, J. Pierre and T. Staf, on the one hand, and the Riksåklagaren (Public Prosecutor), on the other, concerning the seizure of cases of wine imported into Sweden contrary to the Alkohollagen (Law on alcohol) (SFS 1994:1738) of 16 December 1994 ('alkohollagen').

National legal context

3 In Chapter 1, headed 'Preliminary provisions', the alkohollagen provides that it applies to the production, marketing and importation of alcoholic beverages and to the sale of those products.

4 Pursuant to Chapter 1, Paragraph 8:

'Sale means any form of supply of beverage for payment.

Sales to consumers are known as retail sales or, if the reference is to consumption on the premises, a service included in catering. Any other sale is known as wholesale.'

5 Chapter 4 of the alkohollagen, entitled 'Wholesale trade', provides, in Paragraphs 1 and 2:

'Paragraph 1 – Wholesale of spirits, wine or strong beer may be undertaken only by persons who are approved warehouse-keepers or who are registered recipients of such goods in accordance with Paragraph 9 or 12 of the lagen om alkoholskatt (Law on taxation of alcohol) ([SFS] 1994:1564) [of 15 December 1994]. It follows that the right to sell as a wholesaler applies only to drink included in the approval to act as a warehouse-keeper or registration as a recipient pursuant to the provisions of the lagen om alkoholskatt.

In addition to the provisions of the first paragraph, wholesale of spirits, wine and strong beer may be undertaken by the retail sales company in accordance with the provisions of the third subparagraph of Chapter 5, Paragraph 1.

Without prejudice to the provisions of the first subparagraph, holders of catering permits may sell individually goods covered by the permits to any person authorised to undertake wholesale of those goods.

Paragraph 2 – Spirits, wine and strong beer may be imported into Sweden only by persons authorised under the first subparagraph of Paragraph 1 to undertake wholesale of those goods and by the retail sales company in order that it may fulfil its obligations under Chapter 5, Paragraph 5.

Without prejudice to the provisions of the first subparagraph, spirits, wine and strong beer may be imported:

…

2. by any traveller of at least 20 years of age or by any person who works on some means of transport and has reached that age, for personal consumption or for that of his family or as a gift to a friend or relative for his personal consumption or for that of his family;

…

4. by any individual of at least 20 years of age, or by a professional transporter for an individual, of at least 20 years of age, travelling to Sweden if the drinks are intended for his personal consumption or for that of his family;

5. by any individual of at least 20 years of age, or by a professional transporter for an individual of at least 20 years of age, who received the drinks by way of a will or testament, if the drinks are intended for his personal consumption or for that of his family, and

6. as a single present sent, by the intermediary of a professional transporter, from an individual resident in another country to an individual resident in Sweden of at least 20 years of age for his personal consumption or for that of his family.

…'

6 Chapter 5 of the alkohollagen, headed 'Retail sale', confers on a State-owned company specially constituted for that purpose a monopoly over retail sales in Sweden of wine, strong beer and spirits. The company thus designated is Systembolaget Aktiebolag ('Systembolaget'), all shares in which are held by the Swedish State.

7 The activities, operations and regulation of that company are laid down in an agreement concluded with the State.

8 Chapter 5, Paragraph 5, provides:

'Spirits, wine or strong beer not held in stock shall be obtained on request, provided that the retail sale company does not consider that there are grounds precluding it.'

9 Chapter 10, Paragraph 10, of the alkohollagen provides that unlawful import and export of alcoholic beverages attract penalties pursuant to the lagen om straff för smuggling (Law on smuggling) of 30 November 2000 (SFS 2000:1225) ('smugglingslagen'), which provides that wine fraudulently imported is to be declared forfeit unless that would be manifestly unreasonable.

The dispute in the main proceedings and the questions referred for a preliminary ruling

10 From their place of residence in Sweden, the appellants in the main proceedings ordered, by correspondence and without intermediary, cases of bottles of wine produced in Spain.

11 Those cases, imported into Sweden without being declared to customs, were confiscated on the ground that they had been unlawfully imported in contravention of the alkohollagen.

12 By judgment of 3 January 2002, the Tingsrätt (District Court) in Göteborg (Sweden) confirmed the confiscation of the goods. The Hövrätten för Västra Sverige (Court of Appeal for Western Sweden) dismissed the appeal lodged against that judgment by the appellants in the main proceedings.

13 The appellants in the main proceedings therefore appealed to the Högsta domstolen (Supreme Court). The latter took the view that its decision depended on the compatibility of the Swedish legislation with the EC Treaty, as the issue in question concerned the prohibition in principle on all residents against directly importing alcoholic beverages into Sweden, without personally undertaking the transport thereof.

14 It is against that background that the Högsta domstolen decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'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 28 EC and is to be examined only in the light of Article 31 EC?

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 31 EC?

3. If the answer to Question 1 is no, is Article 28 EC 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 in order to protect health and life of humans?'

The questions referred for a preliminary ruling

The first question

15 By its first question, the national court asks essentially whether, in order to verify its compatibility with Community law, a national provision, such as that in the first subparagraph of Paragraph 2 of Chapter 4 of the alkohollagen, under which private individuals are prohibited from importing alcoholic beverages, must be assessed in the light of Article 31 EC on State monopolies of a commercial character or in the light of Article 28 EC, which prohibits all quantitative restrictions on imports and all measures having equivalent effect.

16 It is common ground that the national measure at issue in the main proceedings constitutes a provision of the alkohollagen, which has also set up a retail monopoly on which has been conferred the exclusive right to retail sales of alcoholic beverages in Sweden. That monopoly has been given to Systembolaget.

17 Having regard to the case-law of the Court, it is necessary to examine the rules relating to the existence and operation of the monopoly with reference to Article 31 EC, which is specifically applicable to the exercise, by a domestic commercial monopoly, of its exclusive rights (see Case 91/75 Miritz [1976] ECR 217, paragraph 5; Case 120/78 REWE-Zentral [1979] ECR 649, 'Cassis de Dijon', paragraph 7; Case 91/78 Hansen [1979] ECR 935, paragraphs 9 and 10; Case C□387/93 Banchero [1995] ECR I□4663, paragraph 29; and Case C□189/95 Franzén [1997] ECR I□5909, paragraph 35).

18 However, the effect on intra-Community trade of the other provisions of the domestic legislation, which are separable from the operation of the monopoly although they have a bearing upon it, must be examined with reference to Article 28 EC (see Franzén, paragraph 36).

19 Accordingly, it is necessary to check whether the ban at issue in the main proceedings amounts to a rule relating to the existence or operation of the monopoly.

20 Firstly, it should be recalled that the specific function assigned to the monopoly by the alkohollagen consists of the exclusive right of retail sale in Sweden of alcoholic beverages to consumers, with the exception of the catering industry. It is common ground that that exclusive right does not extend to the importation of those beverages.

21 While, by regulating the importation of alcoholic beverages into the Kingdom of Sweden, the measure at issue in the main proceedings affects the free movement of goods within the European Community, it does not, as such, govern that monopoly's exercise of its exclusive right of retail sale of alcoholic beverages on Swedish territory.

22 That measure, which does not, therefore, concern the monopoly's exercise of its specific function, accordingly cannot be considered to relate to the very existence of that monopoly.

23 Next, it is clear from the information before the Court that, by application of Chapter 5, Paragraph 5, of the alkohollagen, Systembolaget is in principle required to import any alcoholic beverage at the request and expense of the consumer. Accordingly, the fact that private individuals are prohibited from importing alcoholic beverages, as provided for in the first subparagraph of Paragraph 2 of Chapter 4 of the alkohollagen, has the effect of channelling consumers who wish to acquire such beverages towards the monopoly and, on that basis, is liable to affect the operation of that monopoly.

24 However, such a ban does not truly regulate the operation of the monopoly since it does not relate to the methods of retail sale of alcoholic beverages on Swedish territory. In particular, it is not intended to govern either the system for selection of goods by the monopoly, its sales network, or the organisation of the marketing or advertising of goods distributed by that monopoly.

25 Furthermore, that measure arises from the provisions of Chapter 4 of the alkohollagen relating to wholesale. The Court has already held that the rules contained in that chapter, under which only holders of wholesale licences are allowed to import alcoholic beverages, did not feature among the measures regulating the operation of the monopoly (see, to that effect, Franzén, paragraphs 34, 67 and 70).

26 In those circumstances, such a ban cannot be regarded as constituting a rule relating to the existence or

operation of the monopoly. Accordingly, Article 31 EC is irrelevant for the purposes of determining whether such a measure is compatible with Community law, in particular with the provisions of the Treaty relating to free movement of goods.

27 The answer to the first question must therefore be that a national provision, such as that in the first subparagraph of Paragraph 2 of Chapter 4 of the alkohollagen, under which private individuals are prohibited from importing alcoholic beverages, must be assessed in the light of Article 28 EC and not in the light of Article 31 EC.

The second question

28 The second question is posed only in the event that the Court should take the view that the ban at issue in the main proceedings must be assessed in the light of Article 31 EC.

29 Having regard to the answer to the first question, there is no need to answer the second question.

The third question

30 By its third question, the national court asks essentially whether a measure, such as that in the alkohollagen, under which private individuals are prohibited from importing alcoholic beverages amounts to a quantitative restriction on imports within the meaning of Article 28 EC, even though that law requires the holder of the retail sale monopoly, on demand, to supply and therefore, if necessary, to import the beverages in question.

31 In that regard, it should be recalled that the free movement of goods is a fundamental principle of the Treaty which is expressed in the prohibition, set out in Article 28 EC, of quantitative restrictions on imports between Member States and all measures having equivalent effect (Case C□147/04 De Groot en Slot Allium and Bejo Zaden [2006] ECR I□245, paragraph 70).

32 The prohibition of measures having an effect equivalent to a quantitative restriction, laid down in Article 28 EC, applies to all legislation of the Member States that is capable of hindering, directly or indirectly, actually or potentially, intra-Community trade (see, inter alia, Case 8/74 Dassonville [1974] ECR 837, paragraph 5; Case C□192/01 Commission v Denmark [2003] ECR I□9693, paragraph 39; Case C□41/02 Commission v Netherlands [2004] ECR I□11375, paragraph 39; and De Groot en Slot Allium and Bejo Zaden, paragraph 71).

33 In the present case, it must be held, first of all, that the actual provisions of Chapter 5, Paragraph 5, of the alkohollagen, in the version in force at the date of the facts of the main proceedings, granted Systembolaget the possibility of refusing an order from a consumer for the supply and therefore, if necessary, the importation of beverages not included in the range offered by the monopoly. In those circumstances, the fact that private individuals are prohibited from importing such beverages directly into Sweden, without personally transporting them, in the absence of a counterbalancing obligation in every case on the monopoly to import such beverages when requested to do so by private individuals, constitutes a quantitative restriction on imports.

34 In fact, and independently of the possibility referred to in the preceding paragraph, it is not disputed that, when consumers use the services of Systembolaget to have alcoholic beverages imported, those concerned are confronted with a variety of inconveniences with which they would not be faced were they to import the beverages themselves.

35 In particular, it appears, in the light of the information provided during the written procedure and at the hearing, that the consumers involved must complete an order form in one of the monopoly's shops, return to sign that order when the supplier's offer has been accepted, and then collect the goods after they have been imported. Moreover, such an order is accepted only if it represents a minimum quantity of bottles to be imported. The consumer has no control over the conditions of transport or arrangements for the packaging of the beverages ordered and cannot choose the type of bottles he would like to order. It also appears that, for every import, the price demanded of the purchaser includes, in addition to the cost of the beverages invoiced by the supplier, reimbursement of the administrative and transport costs borne by Systembolaget and a margin of 17% which the purchaser would not, in principle, have to pay if he directly imported the goods himself.

36 Consequently, the answer to the third question must be that a measure, such as that in the first subparagraph of Paragraph 2 of Chapter 4 of the alkohollagen, under which private individuals are prohibited from importing alcoholic beverages amounts to a quantitative restriction on imports within the meaning of Article 28 EC, even though that law requires the holder of the retail sale monopoly, on request, to supply and therefore, if necessary, to import the beverages in question.

The fourth question

37 By its fourth question, the national court asks essentially whether a measure, such as that in the first subparagraph of Paragraph 2 of Chapter 4 of the alkohollagen, under which private individuals are prohibited from importing alcoholic beverages, can be regarded as justified, under Article 30 EC, on grounds of protection of the health and life of humans.

38 It is indeed true that measures constituting quantitative restrictions on imports within the meaning of Article 28 EC may be justified, inter alia, on the basis of Article 30 EC, on grounds of protection of the health and life of humans (see, to that effect, Franzén, paragraph 75).

39 It is settled case-law that the health and life of humans rank foremost among the assets or interests protected by Article 30 EC and it is for the Member States, within the limits imposed by the Treaty, to decide what degree of protection they wish to assure (see Case C□322/01 Deutscher Apothekerverband [2003] ECR I□14887, paragraph 103, and case-law cited).

40 The Court has already ruled that legislation which has as its objective the control of the consump-

tion of alcohol so as to prevent the harmful effects caused to health of humans and society by alcoholic substances, and which thus seeks to combat alcohol abuse, reflects health and public policy concerns recognised by Article 30 EC (see Case C-434/04 Ahokainen and Leppik [2006] ECR I-9171, paragraph 28).

41 Nevertheless, it is necessary, as required by Article 30 EC, that the measure under consideration should not constitute either a means of arbitrary discrimination or a disguised restriction on trade between Member States.

42 In that respect, it should be pointed out that there is nothing before the Court to suggest that the public health grounds on which the Swedish authorities rely in the circumstances set out in paragraphs 44 and 48 of the present judgment have been diverted from their purpose and used in such a way as to discriminate against goods originating in other Member States or indirectly to protect certain national products (Case C-405/98 Gourmet International Products [2001] ECR I-1795, paragraph 32, and case-law cited).

43 Furthermore, national rules or practices likely to have a restrictive effect, or having such an effect, on imports are compatible with the Treaty only to the extent to which they are necessary for the effective protection of health and life of humans. A national rule or practice cannot benefit from the derogation provided for in Article 30 EC if the health and life of humans may be protected just as effectively by measures which are less restrictive of intra-Community trade (see, to that effect, Deutscher Apothekerverband, paragraph 104).

44 In that regard, the Swedish Government seeks first of all to justify the prohibition at issue in the main proceedings on the ground of the general need to limit the consumption of alcohol.

45 However, it must be noted that, although the prohibition on private individuals directly importing alcoholic beverages reduces the sources available to the consumer and may contribute, to a certain extent, because of the difficulty of supply, to prevention of the harmful effects of those beverages, the fact none the less remains that, pursuant to Chapter 5, Paragraph 5, of the alkohollagen, the consumer may still ask Systembolaget to supply him with those goods.

46 It is true, as is apparent from paragraph 33 of this judgment, that, pursuant to Chapter 5, Paragraph 5, of the alkohollagen, in the version in force at the time of the facts in the main proceedings, the duty to supply alcoholic beverages to order was balanced by the fact that it was possible for Systembolaget to refuse such an order. However, that paragraph of the alkohollagen did not state the grounds on which such a refusal could be made. It does not follow, in any event, from the information available to the Court that, in practice, Systembolaget has refused to make such a supply by reference to maximum quantities of alcohol which may be ordered or, at the very least, with regard to such maximum quantities for beverages with the highest alcohol content.

47 In those circumstances, the fact that private individuals are prohibited from importing alcoholic beverages directly appears to be a means of favouring a distribution channel for those goods by directing requests for the importation of beverages to Systembolaget. However, in the light of the alleged objective, that is to say, limiting generally the consumption of alcohol in the interest of protecting the health and life of humans, that prohibition, because of the rather marginal nature of its effects in that regard, must be considered unsuitable for achievement of that objective.

48 The Swedish Government goes on to submit that the prohibition at issue in the main proceedings, by directing the demand to Systembolaget, fulfils the objective of protecting younger persons against the harmful effects of alcohol consumption since Systembolaget, which is obliged to check the age of persons placing orders, may supply alcoholic beverages only to those who are at least 20 years of age. The second subparagraph of Paragraph 2 of Chapter 4 of the alkohollagen also precludes, moreover, the importation of alcohol into Sweden by such persons as travellers, which is not the case with regard to older persons.

49 It cannot be disputed that if the ban at issue in the main proceedings thus proves to be a means effectively of preventing younger persons from becoming purchasers of alcoholic beverages and therefore of reducing the risk of their becoming consumers of such beverages, it must be regarded as being justified in the light of the objective of protection of public health referred to in Article 30 EC.

50 However, since a ban such as that which arises from the national legislation at issue in the main proceedings amounts to a derogation from the principle of the free movement of goods, it is for the national authorities to demonstrate that those rules are consistent with the principle of proportionality, that is to say, that they are necessary in order to achieve the declared objective, and that that objective could not be achieved by less extensive prohibitions or restrictions, or by prohibitions or restrictions having less effect on intra-Community trade (see, to that effect, Case C-17/93 Van der Veldt [1994] ECR I-3537, paragraph 15; Franzén, paragraphs 75 and 76; and Ahokainen and Leppik, paragraph 31).

51 The ban on imports at issue in the main proceedings applies to everyone, irrespective of age. Accordingly, it goes manifestly beyond what is necessary for the objective sought, which is to protect younger persons against the harmful effects of alcohol consumption.

52 With regard to the need for age checks, it should be noted that, by limiting, as a result of the ban at issue in the main proceedings, the sale of imported alcoholic beverages to the Systembolaget shops, the national legislation seeks to make distribution of such beverages subject to a centralised and coherent operation which must allow the monopoly's agents, in accordance with the objective pursued, to satisfy themselves in a consis-

tent manner that the goods are provided only to persons of more than 20 years of age.

53 That being the case, it follows from the information before the Court that, although Systembolaget does have, in principle, recourse to such methods of distribution and checking the age of purchasers, there are other methods of distribution of alcoholic beverages, thus conferring on third parties the responsibility for such checks. In particular, it is not disputed that Systembolaget accepts that age checks may be made by a great number of agents when alcoholic beverages are supplied, outside the monopoly's shops, for example in food shops or service stations. Furthermore, the existence of such checks is itself not clearly established and verifiable in the event that the alcoholic beverages are supplied by Systembolaget, inter alia, as stated by the Swedish Government, 'by post or by any other suitable means of transport to the nearest station or coach stop'.

54 In that context, it does not appear that there is, in all circumstances, an irreproachable level of effectiveness with respect to the checking of the age of private individuals to whom those beverages are delivered and the objective pursued by the present system is met only in part.

55 The question remains to be answered whether, in order to achieve that objective of protection of the health of young persons with at least an equivalent level of effectiveness, there are other methods less restrictive of the principle of free movement of goods and capable of replacing the method at issue.

56 In that regard, the Commission of the European Communities submits, without being contradicted on that point, that age check could be carried out by way of a declaration in which the purchaser of the imported beverages certifies, on a form accompanying the goods when they are imported, that he is more than 20 years of age. The information before the Court does not, on its own, permit the view to be taken that such a method, which attracts appropriate criminal penalties in the event of non-compliance, would necessarily be less effective than that implemented by Systembolaget.

57 Accordingly it has not been established that the ban at issue in the main proceedings is proportionate for the purposes of attaining the objective of protecting young persons against the harmful effects of alcohol consumption.

58 In those circumstances, the answer to the fourth question must be that:

a measure, such as that in the first subparagraph of Paragraph 2 of Chapter 4 of the alkohollagen, under which private individuals are prohibited from importing alcoholic beverages,

– as it is unsuitable for attaining the objective of limiting alcohol consumption generally, and

– as it is not proportionate for attaining the objective of protecting young persons against the harmful effects of such consumption,

cannot be regarded as being justified under Article 30 EC on grounds of protection of the health and life of humans.

Costs

59 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds,

the Court (Grand Chamber) hereby rules:

1. A national provision, such as that in the first subparagraph of Paragraph 2 of Chapter 4 of the Law on alcohol (alkohollagen) of 16 December 1994, under which private individuals are prohibited from importing alcoholic beverages must be assessed in the light of Article 28 EC and not in the light of Article 31 EC.

2. A measure, such as that in the first subparagraph of Paragraph 2 of Chapter 4 of the Law on alcohol, under which private individuals are prohibited from importing alcoholic beverages amounts to a quantitative restriction on imports within the meaning of Article 28 EC, even though that law requires the holder of the retail sale monopoly, on request, to supply and therefore, if necessary, to import the beverages in question.

3. A measure, such as that in the first subparagraph of Paragraph 2 of Chapter 4 of the Law on alcohol, under which private individuals are prohibited from importing alcoholic beverages,

– as it is unsuitable for attaining the objective of limiting alcohol consumption generally, and

– as it is not proportionate for attaining the objective of protecting young persons against the harmful effects of such consumption,

cannot be regarded as being justified under Article 30 EC on grounds of protection of the health and life of humans.

OPINION OF ADVOCATE GENERAL MENGOZZI
delivered on 30 November 2006 1(1)
Case C-170/04
Klas Rosengren and Others
v
Riksåklagaren
(Reference for a preliminary ruling from the Högsta domstolen (Sweden))
(Alcoholic beverages – Swedish monopoly on the retail sale of alcohol – Prohibition of private importation by individuals – Separable element of the existence and operation of the monopoly – Article 31 EC – Article 28 EC – Compatibility)

I – Introduction

1. By order for reference of 30 March 2004, the Högsta domstolen (Supreme Court) (Sweden) referred four questions to the Court for a preliminary ruling on the interpretation of Articles 28 EC, 30 EC and 31 EC.

2. Essentially, the national court wishes to know whether provisions such as those in the Law on alcohol (alkohollag (1738:1994) of 16 December 1994; 'the Law on alcohol') (2) which prohibits, under the circumstances set out in the order for reference, private

importation by individuals of alcoholic beverages the retail sale of which is subject to a monopoly in Sweden, should be examined in the light of Article 31 EC on State monopolies of a commercial character or under Article 28 EC, which prohibits all quantitative restrictions and measures having equivalent effect (the first question), and whether such provisions are compatible with whichever one of those provisions is deemed to apply (second, third and fourth questions).

3. The reference for a preliminary ruling was made in proceedings between 11 Swedish nationals, including Mr Rosengren, and the Riksåklagaren (State Prosecutor) concerning the seizure of cases of wine imported by way of correspondence, some of it ordered on the website of a Danish distributor and some of it direct from a Spanish producer, contrary to the Law on alcohol.

4. The case was originally allocated to the Third Chamber of the Court, before which a hearing took place on 30 November 2005.

5. At the hearing on 30 March 2006, Advocate General Tizzano, to whom the present case had been previously allocated, delivered his Opinion.

6. In that Opinion, and in reply to the first question referred by the national court, Advocate General Tizzano proposed, primarily, that the provisions of Chapter 4 of the Law on alcohol, dealing with the prohibition on private imports of alcoholic beverages by individuals, should be evaluated in the light of Article 31 EC. (3) In support of that finding, and with reference to the grounds in the judgment in Franzén concerning the Swedish monopoly on the retail sale of alcohol, (4) Advocate General Tizzano considered that the provisions of Chapter 4 of the Law on alcohol are not separable from the operation of the monopoly on the retail sale of alcohol, Systembolaget Aktiebolag ('Systembolaget'), in so far as they are intrinsically connected with the exercise of the specific function assigned to that monopoly by the Law on alcohol. That function is not simply that of selling the alcoholic beverages that are available on the Swedish market, but also that of creating a single and controlled channel of access for the purchase of such beverages. (5)

7. As regards the question whether the prohibition on private imports of alcoholic beverages by individuals laid down in Chapter 4 of the Law on alcohol was compatible with Article 31 EC – an issue which was the subject-matter of the second question referred by the national court – Advocate General Tizzano took the view that that was not the case.

8. In that respect, by examining the whole of the system established by the Law on alcohol, Advocate General Tizzano underlined that that law gave Systembolaget discretion, under the provisions of Paragraph 5 of Chapter 5 of the Law on alcohol in the version applicable at the time of the facts in the main proceedings, to refuse 'on serious grounds' customers' special orders and import requests for alcoholic beverages which were not available in the range of the monopoly on retail sale, without precluding, therefore, that the discretionary power thus conferred on Systembolaget may be used in a discriminatory manner to the detriment of alcoholic beverages from other Member States.

9. In those circumstances, if that discretion was to be exercised in a discriminatory manner, and in so far as the Kingdom of Sweden had not cited any objective reason capable of justifying the disadvantage at which goods from other Member States may be placed under the combined application of the provisions of Chapter 4 and Paragraph 5 of Chapter 5 of the Law on alcohol, Advocate General Tizzano proposed that the conclusion be reached that the prohibition of importation into Sweden of alcoholic beverages by individuals is incompatible with Article 31 EC. (6)

10. Having regard to the importance of the question whether the characteristics of the provisions of Chapter 4 of the Law on alcohol permit the inference that they are separable from those of the same law which lay down the rules on the operation of the monopoly on the retail sale of alcohol and whether they must be examined in the light of Article 28 EC or in that of Article 31 EC, the Third Chamber of the Court decided on 27 April 2006, in accordance with Article 44(3) and (4) of the Rules of Procedure, to refer the case back to the Court, which reassigned it to the Grand Chamber.

11. On 14 June 2006, the Grand Chamber ordered the reopening of the oral procedure and fixed the hearing of the oral arguments for 19 September 2006.

12. It also invited the parties in the main proceedings and the interested parties referred to in Article 23 of the Statute of the Court of Justice which had submitted written observations to the Court before the hearing of 30 November 2005 or their oral observations at that hearing to concentrate their oral arguments on the question whether the characteristics of provisions such as those of Chapter 4 of the Law on alcohol, which have the effect of prohibiting the importation of alcohol into Sweden by individuals, permit the inference that such provisions are separable from those of the same law which lay down the rules on the operation of the monopoly on the retail sale of alcohol.

13. The concentration of oral arguments requested by the Court in the present case directly recalls the criterion which it upheld in the judgment in Franzén.

14. In paragraphs 35 and 36 of that judgment, the Court held that 'it [was] necessary to examine the rules relating to the existence and operation of the monopoly with reference to Article [31 EC], which is specifically applicable to the exercise, by a domestic commercial monopoly, of its exclusive rights', (7) whereas 'the effect on intra-Community trade of the other provisions of the domestic legislation, which are separable from the operation of the monopoly although they have a bearing upon it, must be examined with reference to [Article 28 EC]'. (8)

15. In accordance with the order of 14 June 2006, the appellants in the main proceedings, the Kingdom of Sweden, the Republic of Finland, the Kingdom of Norway, the Commission of the European Communities and the EFTA Surveillance Authority presented oral submissions at the hearing on 19 September 2006.

16. The three intervening governments submit, essentially, that the rules at issue in the main proceedings are not separable from the existence and the operation of the monopoly on the retail sale of alcohol and must therefore be analysed, according to the criterion drawn from Franzén, in the light of Article 31 EC.
17. They thus share the view expressed by Advocate General Tizzano in his Opinion in the present case in reply to the first question referred by the national court.
18. Also relying on the judgment in Franzén, the appellants in the main proceedings, the Commission and the EFTA Surveillance Authority set out arguments which are diametrically opposed to those invoked by the intervening governments.
19. They take the view that, although the rules at issue affect the monopoly on the retail sale of alcohol, they are none the less separable from its existence and operation and must therefore be the subject of an examination in the light of Articles 28 EC and 30 EC. Their view is based, essentially, on the premiss that only the rules specifically applicable to the exercise, by a domestic commercial monopoly, of its exclusive rights are not separable from that monopoly. Those parties consider that that is not the position in the present case. The EFTA Surveillance Authority adds that Article 31 EC should be interpreted strictly and that the specific function of a monopoly is indissociable from the scope of its exclusive rights.
20. In the present Opinion, I intend primarily to focus attention on certain points argued by the parties which presented submissions at the hearing of 19 September 2006 in reply to the first question referred by the national court.
21. As will be explained in the following analysis of that question, my assessment is along the same lines as that set out by Advocate General Tizzano as the principal argument of his Opinion in the present case.
22. None the less, I also take the view that it is necessary to make some observations concerning the reply to be made to the second question referred by the national court, since my approach differs in some respects from the arguments regarding it in the Opinion of Advocate General Tizzano in the present case.
23. Having regard to the answer which I propose to put forward to the first two questions, in my opinion there is no need to examine the third and fourth questions concerning the interpretation of Articles 28 EC and 30 EC, which were referred solely in the alternative by the national court.

II – Legal analysis

A – The first question referred for a preliminary ruling

24. By its first question, the national court asks: ‘Can it be held that the abovementioned [in the decision making the reference] ban on imports constitutes part of the retail monopoly’s manner of operation and that on that basis it is not precluded by Article 28 EC and is to be examined only in the light of Article 31 EC?’

1. The interpretation of Article 31 EC

25. In its written observations, the EFTA Surveillance Authority submitted that Article 31 EC, as a lex specialis which derogates from the provisions of Article 28 EC, must on that basis be interpreted restrictively. Referring to paragraph 35 of the judgment in Franzén, it infers therefrom, supported by the appellants in the main proceedings and the Commission, that Article 31 EC applies only to national provisions specifically applicable to the exercise, by a domestic commercial monopoly, of its exclusive rights. According to the EFTA Surveillance Authority, the specific function of a monopoly is indissociable from the scope of its exclusive rights.
26. I believe that that view originates in a partial reading of the case-law of the Court.
27. First of all, even if Article 31 EC could be defined as a lex specialis (9) which is designed to adjust national commercial monopolies, such a description does not imply the consequence that that provision must be interpreted strictly.
28. The Court has repeatedly recalled that Article 31 EC is designed to ensure compliance with the fundamental rule of the free movement of goods throughout the common market, in the event that a given product is subject, in one or other of the Member States, to a national monopoly of a commercial character. (10) It has, however, also made clear that Article 31 EC is designed to reconcile the possibility for Member States to maintain certain monopolies of a commercial character as instruments for the pursuit of public interest aims with the requirements of the establishment and functioning of the common market. (11) At issue is not therefore a provision derogating from the free movement of goods by contrast, for example, to Article 30 EC, in respect of which it is established that the principle of restrictive interpretation of its provisions applies.
29. Accordingly, if it is accepted readily that Article 31 EC has a limited scope of application on the very basis of its purpose, none the less I do not believe that its provisions must be interpreted restrictively.
30. Next, I take the view that the argument of the appellants in the main proceedings, the Commission and the EFTA Surveillance Authority, based on paragraph 35 of Franzén, to the effect that only the rules concerning the existence and operation of the monopoly specifically applicable to the exercise by the latter of its exclusive rights fall within the scope of Article 31 EC cannot be accepted.
31. As Advocate General Tizzano stated in point 38 of his Opinion in this case, it is apparent from the case-law of the Court that it emphasises activities which are ‘inextricably connected with the specific business’ assigned to the monopoly in question. (12) None of the parties which intervened before the Court in this case has called that case-law into question.
32. It should however be observed that the case-law of the Court, including that cited in paragraphs 35 and 36 of the Franzén judgment, is not unambiguous as regards the exact scope of the notion of ‘specific business’ of a monopoly. It seems to me that it is for that reason that the EFTA Surveillance Authority also

proposes that the specific business of a monopoly should be found to be indissociable from the scope of its exclusive rights.

33. In an examination of certain judgments of the Court, that interpretation might a priori be convincing. Thus in paragraph 7 of Cassis de Dijon, (13) to which paragraph 35 of Franzén refers, the Court stated that Article 31 EC 'is … irrelevant with regard to national provisions which do not concern the exercise by a public monopoly of its specific function – namely, its exclusive right …'.

34. However, the Court has also held that the application of Article 31 EC 'is not limited to imports or exports which are directly subject to the monopoly but covers all measures which are connected with its existence and affect trade between Member States in certain products …'. (14)

35. In addition, the Court has examined in the light of Article 31 EC a commercial monopoly the specific function of which concerned the obligation on national producers of certain types of alcohol to maintain production of such alcohol within the limits of annual quotas fixed by the public authorities and to deliver their production only to the monopoly with the corresponding obligation on the monopoly to buy the said products at officially fixed prices. (15) The Court thus evaluated under Article 31 EC national rules which exceeded, in strict terms, the exercise of the exclusive right of purchase of alcohol attributed to that monopoly. As Advocate General Tizzano highlighted in points 41 and 42 of his Opinion in the present case, the Court adopted a similar step in Franzén.

36. I believe that the line of reasoning which precludes treating the specific function of a monopoly in the same way as the scope of its specific rights is correct. First, it is a matter for the Member States to define the specific function assigned to the monopoly, subject to review by the Court, since its exclusive rights are, in fact, only the means of fulfilling the function assigned to it. Secondly, if the specific function of a monopoly were in fact limited to the scope of its exclusive rights, that reasoning would amount to tautology which is difficult to understand in that it consists of maintaining that the specific function of a monopoly is the monopoly itself! It would then not be possible to understand the reason why, for more than 30 years, the case-law of the Court has stressed the notion of 'specific function' and not simply that of 'exclusive right(s)'.

37. Accordingly, I consider that the rules subject to Article 31 EC include all the provisions connected with the existence and operation of the retail monopoly on alcohol, on the basis of their intrinsic connection with the exercise of the specific function assigned to that monopoly, including those which do not, in strict terms, correspond to the scope of the right of exclusivity conferred on that monopoly.

38. Therefore, it must be examined whether the prohibition on private imports of alcoholic beverages by individuals fulfils the criterion set out in the preceding point of this Opinion, namely whether, although it does not correspond, in strict terms, to the scope of the exclusive right conferred on Systembolaget, it is intrinsically connected with the exercise of the specific function of the retail monopoly in alcohol. If that is the case, that prohibition will be connected with the existence and operation of that monopoly and will therefore come within the scope of Article 31 EC.

2. The applicability of Article 31 EC to the situation at issue in the main proceedings

39. Chapter 4 of the Law on alcohol governs the private importation of alcoholic beverages by individuals. It sets out the cases in which such importation is allowed, in particular that effected by travellers of over 20 years of age who live in Sweden, for their personal consumption. Outside the cases exhaustively allowed, private importation of alcoholic beverages by individuals is prohibited. That prohibition thus concerns distance orders placed by Swedish consumers without a trip to another Member State. However, in respect of alcoholic beverages which are not listed in Systembolaget's range, Paragraph 5 of Chapter 5 of the Law on alcohol requires, on application by an individual, that enterprise to place the order requested, unless there are serious grounds for refusal.

40. The parties which presented submissions at the hearing of 19 September 2006 discussed the scope of the rules in question.

41. The Commission takes the view that the provisions of Chapter 4 of the Law on alcohol, as it refers to 'prohibition on importation by private individuals', concerns a stage before the retail sale of alcohol (exercised under the regime of exclusivity) and does not therefore come within the scope of application of Article 31 EC.

42. The EFTA Surveillance Authority submits that the legislation in question is designed not to prohibit importation of alcoholic beverages by private individuals but to regulate the transport of those beverages imported by an individual, since the latter can transport them only if he himself travels with those beverages. Since they are separable from the existence and operation of the retail monopoly on alcohol, according to the EFTA Surveillance Authority those rules therefore escape the scope of Article 31 EC. The appellants in the main proceedings appear, essentially, to support a similar view. Moreover, the EFTA Surveillance Authority bases its arguments on the judgment in the HOB-vín case of the EFTA Court. (16)

43. By contrast, the Swedish Government, supported by the other two intervening governments, pleads that the prohibition on the private importation of alcoholic beverages by individuals is only a facet of national provisions which govern the distance sale of alcohol, which are part of the monopoly system on the retail sale of alcohol.

44. First of all, it seems very clear to me that the rules in question do not constitute legislation on the transport of alcoholic beverages.

45. It should be remembered that the lawfulness of the existence of the Swedish monopoly on retail trade in alcohol was not called into question by the parties which intervened at the hearing. That was confirmed by

Franzén. As the Swedish Government has stated, the sale of alcoholic beverages in Sweden which are not consumed on the premises is channelled across Systembolaget's distribution network. Systembolaget is therefore the only intermediary which supplies alcoholic beverages to individuals in Sweden. (17) That also means that an individual wishing to order alcoholic beverages in Sweden has to place an order with Systembolaget. If those beverages are available in the retail monopoly's, stock, the individual will be able to acquire them directly from a Systembolaget sales outlet or, as the case may be, place a distance order. (18) If those beverages are not in the range on offer in the retail monopoly on alcohol, it is the rule in Paragraph 5 of Chapter 5 of the Law on alcohol which applies, which has already been considered to relate to the operation of the retail monopoly in alcohol in Franzén. (19)

46. The prohibition of the private importation of alcoholic beverages by individuals, such as that referred to in the first question referred by the national court, must be examined against that background. It is not designed to regulate a stage before retail trade, as pleaded by the Commission, but to ensure that individuals do not, by means of distance orders placed directly with producers in the other Member States, distort the system of channelling sales of alcoholic beverages chosen by the Kingdom of Sweden and recognised as compatible with Article 31 EC in the judgment in Franzén.

47. It is in that sense, as Advocate General Tizzano correctly stated in his Opinion in this case, that the task of importing alcoholic beverages on request is intrinsically connected with the exercise of the specific function assigned to Systembolaget by the Law on alcohol. That function is one of creating a single and controlled channel of access for the purchase of such beverages. (20) The rule governing the transfer of orders for alcoholic beverages to Systembolaget (Paragraph 5 of Chapter 5 of the Law on alcohol) and the rule on the prohibition of private importation of such beverages by individuals (Chapter 4 of the Law on alcohol) are complementary and indivisible: both of them are designed to channel demand for alcohol on the part of Swedish consumers into the exclusive system of retail sales of alcohol controlled by Systembolaget. (21)

48. It might, admittedly, be argued, as the EFTA Surveillance Authority does, that the Swedish legislation does not expressly prohibit individuals from directly placing distance orders with a Swedish or foreign producer or a distributor of their choice, including by internet.

49. It seems to me, however, that such an express prohibition would be redundant. Since the only means of marketing laid down by the Law on alcohol is the sale of alcoholic beverages through the retail monopoly on alcohol which, moreover, is part of the specific function assigned to that monopoly and applies irrespective of the origin of the products, there is absolutely no need to expressly prohibit individuals from engaging in distance purchases of alcohol directly from other suppliers.

50. Further, the Commission's contention that Systembolaget does not ensure the transport of alcoholic beverages which were ordered and bought directly by an individual from a producer established in another Member State is equally irrelevant.

51. It is precisely because the specific function of the retail monopoly on sales of alcohol is to create a single and controlled channel for the purchase of alcoholic beverages and that Systembolaget is most certainly not a transport company that it cannot transport alcoholic beverages on behalf of an individual who has not applied to it, regardless of the specific function assigned to it by the national legislature.

52. Next, as regards the more general argument that the EFTA Surveillance Authority derives from the judgment in HOB-vín, relating to the operation of the Icelandic monopoly on the retail sale of alcohol (ÁTVR), in my opinion it should be rejected.

53. According to the EFTA Surveillance Authority, it follows from that judgment that a national provision is not separable from the operation of the monopoly solely if it directly concerns that monopoly. By contrast, the provisions relating to the activity of operators and individuals, in the broad sense, are separable from the operation of that monopoly and should be examined in the light of Article 28 EC.

54. I would like to draw attention to the fact that, in the HOB-vín case, the EFTA Court, on a reference from an Icelandic court, was asked whether two commercial requirements – imposed by the Icelandic monopoly on the retail sale of alcohol by decision and contract, with which the pallets of its suppliers were to comply (22) – had to be examined in the light of Article 11 of the Agreement on the European Economic Area ('the EEA Agreement'), the wording of which is substantially identical to that of Article 28 EC, or in the light of Article 16 of the EEA Agreement, the wording of which is substantially identical to that of Article 31 EC.

55. Taking as a basis the distinction drawn in paragraphs 35 and 36 of the Franzén judgment, the EFTA Court held that, in the case at hand, the crucial factor as to whether the commercial requirements in question were inseparably linked to the operation of the Icelandic monopoly on the retail sale of alcohol had to be the fact that they applied only to ÁTVR and not to other undertakings that, in respect of their commercial operations, also operated warehouses. Since they exclusively regulated ÁTVR's contractual relationships, the commercial requirements in issue were therefore considered inseparable from the operation of that monopoly and examined in the light of Article 16 of the EEA Agreement. (23)

56. I believe that it would be rash to seek to draw general consequences from the distinction made by the EFTA Court in HOB-vín. That court carefully observed that the dividing line which it highlights was drawn 'in the case at hand'. In other words, although legislative provisions or, a fortiori, commercial requirements im-

posed by the monopoly itself, as in the case brought before the EFTA Court, which apply only to the monopoly, may be regarded as inseparable from its operation, national rules which refer to other operators or individuals are not necessarily separable from the operation of that monopoly. In addition I would like to observe that, in the cases cited in point 35 of this Opinion, the Court examined national rules in the light of Article 31 EC, although those rules did not directly address the monopoly in question. In fact, as I have already explained, everything depends, in my opinion, on the specific function assigned by national legislation to the monopoly in question.

57. Finally, according to the appellants in the main proceedings, the Commission and the EFTA Surveillance Authority, the fact that, in Finland, the monopoly on retail sales of alcohol carries out its functions independently of a prohibition similar to the one at issue in our case shows that that prohibition is separable from the operation of the monopoly.

58. Advocate General Tizzano has already rejected that argument by correctly highlighting that it does not have to be ascertained whether a monopoly can ever operate in the absence of the prohibition in question, but rather whether or not the prohibition laid down is intrinsically linked to the exercise of the specific function that the legislature has decided to assign to its monopoly. (24)

59. In order to expand that suggestion a little without, I hope, misinterpreting it, I believe that the criterion drawn from Franzén, namely that of the separability of national provisions in relation to the existence and operation of the monopoly on retail sales of alcohol, must lead the Court to ask whether the prohibition in question has a ratio which is independent of the existence and operation of the Swedish monopoly on retail sales of alcohol.

60. Accepting that a rule is 'separable' from the existence and operation of the monopoly on retail sales of alcohol is, to my mind, tantamount to taking the view that that rule has a rationale in itself such as to exist, subject to its compatibility with Community law, independently of the existence and operation of that monopoly. (25) Yet the prohibition in question would not have any rationale without the existence and operation of the monopoly since, as I have stated previously, it is intrinsically connected with the exercise of the specific function assigned by national law to the Swedish monopoly on retail sales of alcohol.

61. Having regard to all of those considerations, I propose that the Court reply to the first question referred for a preliminary ruling by ruling that the prohibition of the private importation of alcoholic beverages by individuals described by the national court must be evaluated in the light of Article 31 EC.

B – The second question referred for a preliminary ruling

62. By its second question, the national court asks whether the prohibition of the private importation of alcoholic beverages by individuals is compatible with the conditions laid down in Article 31 EC.

63. It will be recalled that Article 31(1) EC provides that Member States are to 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. As regards sales monopolies, the Court has held that 'monopolies are not allowed if they are arranged in such a way as to put at a disadvantage, in law or in fact, trade in goods from other Member States as compared with trade in domestic goods'. (26) Furthermore, the Court has stated that, in order to determine whether a sales monopoly is arranged in such a way as to exclude any discrimination within the meaning of Article 31(1) EC, it is necessary to consider whether that monopoly is liable to place products from other Member States at a disadvantage or whether, in practice, it does place such products at a disadvantage. (27)

64. In respect of the main proceedings, I share entirely the view of Advocate General Tizzano when he states that, in the context of the Law on alcohol, the prohibition of the private importation of alcoholic beverages by individuals does not of itself place goods from other Member States at a disadvantage but, on the contrary, those products are placed on exactly the same footing as home-produced goods. First, both may be purchased by private individuals only in Systembolaget shops and sales outlets. Secondly, if those alcoholic beverages are not available in the range provided by Systembolaget, they have both to be ordered through that company, pursuant to Paragraph 5 of Chapter 5 of the Law on alcohol. (28)

65. However, contrary to Advocate General Tizzano, that assessment does not seem to me to suffice for the purpose of giving a useful answer to the national court in the light of the facts of the main proceedings.

66. We should not lose sight of the fact that the appellants in the main proceedings placed orders directly with a foreign distributor and producer, without even attempting to ask Systembolaget to carry them out, contrary to the procedure set out in Paragraph 5 of Chapter 5 of the Law on alcohol.

67. That is why the national court asks about the compatibility with Article 31(1) EC of the prohibition of the private importation of alcoholic beverages by individuals in conjunction with the veryprinciple of the obligation to place orders with Systembolaget to obtain alcoholic beverages which are not included in the range provided by the monopoly on retail sales of alcohol.

68. On the other hand, the national court is not asking the Court about the compatibility of the prohibition in question with Article 31(1) EC in the hypothetical situation in which the appellants in the main proceedings were indeed to have placed their orders to Systembolaget and subsequently met with refusal on the part of the latter on'serious grounds' pursuant to the final provision of Paragraph 5 of Chapter 5 of the Law on alcohol, in the version applicable at the relevant time. (29)

69. In addition, it is common ground that Systembolaget has never made use of the possibility to refuse

orders on 'serious grounds' pursuant to the final provision of Paragraph 5 of Chapter 5 of the Law on alcohol.

70. It follows, in my opinion, that a prohibition of the private importation of alcoholic beverages by individuals such as that laid down in the Law on alcohol does not, in principle, infringe Article 31 EC.

71. Despite what has been stated previously, if the Court were to consider that the matter brought before it also raised the question whether the prohibition in issue is compatible with Article 31(1) EC, in so far as that prohibition may apply concurrently with the refusal on 'serious grounds' by Systembolaget to effect orders from individuals for alcoholic beverages not available in the range provided by the monopoly on retail sales of alcohol, pursuant to the final provision of Paragraph 5 of Chapter 5 of the Law on alcohol, the answer should be as follows: a prohibition such as that referred to by the decision making the reference can be compatible with Article 31(1) EC only if it has the effect that products from other Member States are treated in a non-discriminatory manner, in law and in fact. It is for the national court to determine whether that is the case in the main proceedings.

III – Conclusion

72. In the light of the foregoing considerations, I propose that the Court reply to the questions referred by the Högsta domstolen as follows:

(1) A prohibition of the private importation of alcoholic beverages by individuals, such as that laid down in the Law on alcohol (alkohollag (1738:1994) of 16 December 1994), is to be considered, in the particular system introduced by that law, to be a rule intrinsically connected with the existence and operation of a monopoly on retail sales of alcohol. As such, it must be examined in the light of Article 31 EC.

(2) Under a specific system such as that introduced by the Law on alcohol, the prohibition of the private importation of alcoholic beverages by individuals is, in principle, compatible with Article 31(1) EC.

However, in so far as it may apply concurrently with the possibility of the monopoly on retail sales of alcohol refusing on serious grounds orders from individuals for alcoholic beverages not available in the range provided by that monopoly, that prohibition can be compatible with Article 31(1) EC only if it has the effect that products from other Member States are treated in a non-discriminatory manner, in law and in fact. It is for the national court to determine whether that is the case in the main proceedings.

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1 – Original language: French.

2 – SFS 1994, No 1738.

3 – Opinion of Advocate General Tizzano in the present case, point 43.

4 – Case C-189/95 [1997] ECR I-5909.

5 – Points 41 to 43 of the Opinion cited above,

6 – Ibid., points 58 to 61.

7 – Paragraph 35.

8 – Paragraph 36.

9 – See, to that effect, Case 91/75 Miritz [1976] ECR 217, paragraph 5, and Case 120/78 Rewe-Zentral ('Cassis de Dijon') [1979] ECR 649, paragraph 7.

10 – See, inter alia, Case C-387/93 Banchero [1995] ECR I-4663, paragraph 27, and Franzén, paragraph 37.

11 – Franzén, paragraph 39, and Case C-438/02 Hanner [2005] ECR I-4551, paragraph 35.

12 – See, in that respect, Case 86/78 Peureux [1979] ECR 897, paragraph 35, to which paragraph 36 of Franzén refers, and Case 17/81 Pabst & Richarz [1982] ECR 1331, paragraph 23, which state that: 'the rules contained in [Article 31 EC] concern only activities intrinsically connected with the specific business of the monopoly in question. They are thus irrelevant to national provisions which have no connection with such specific business'.

13 – Cassis de Dijon, cited above.

14 – Case 13/70 Cinzano [1970] ECR 1089. paragraph 5, and Miritz, paragraph 8.

15 – Case 119/78 Peureux [1979] ECR 975, paragraph 29.

16 – Judgment E-4/05 of 17 January 2006, not yet published in the EFTA Court Reports. A version of that judgment is available on the website: http://eftacourt.lu/.

17 – The fact that, besides its own network of sales outlets, Systembolaget delegates, in certain sparsely populated or outlying municipalities, the actual distribution of alcoholic beverages to post offices or other persons is irrelevant. In all the cases here, Systembolaget remains the sole supplier of alcoholic beverages to Swedish consumers.

18 – It should be noted in addition, as was stated by the Swedish Government, that Systembolaget does not market alcoholic beverages over the internet.

19 – Opinion of Advocate General Tizzano in the present case, point 41.

20 – Ibid., point 42.

21 – Ibid., point 45.

22 – It is apparent from paragraph 4 of the HOB-vín judgment, that, first, ÁTVR had adopted a general rule on the purchase and sale of alcoholic beverages under which the requirements with which the pallets had to comply were specified and, secondly, those conditions were also reproduced in the contracts which that undertaking concluded with its pallet suppliers.

23 – HOB-vín, paragraphs 24 to 26.

24 – Opinion cited above, point 47.

25 – It should be noted that that appears, essentially, also to have been the view of the Commission before the EFTA Court in the HOB-vín case. It was stated, in paragraph 23 of the judgment, that '… the agent for the Commission suggested a text whereby a given measure should be deemed to fall under the ambit of Article 16 EEA in cases where it would not exist without the monopoly'.

26 – Franzén (paragraph 40) and Hanner, point 36,

27 – See, to that effect, Hanner, paragraphs 37 and 38.

28 – See, to that effect, the Opinion cited above, point 55.

29 – As a matter of interest, since 1 January 2005 the Swedish legislature has put an end to the possibility of Systembolaget refusing orders of alcoholic drinks on 'serious grounds' pursuant to the final provision of Paragraph 5 of Chapter 5 of the Law on alcohol.