ROSENGREN – A "*FRANZÉN* LIGHT"?

Martin Johansson*

On 5 June 2007, the Court of Justice of the EC (herinafter the "ECJ or the "court") gave judgment in Case 170/04 *Rosengren and Others v. Riksåklagaren*.

The ECJ considered that a national provision such as the Swedish prohibition on private individuals directly importing alcoholic beverages falls outside the specific function of the State company having the monopoly on retail of alcoholic beverages, Systembolaget, and thus is not to be assessed under Article 31 EC, but under Article 28 EC. Such a provision amounts, in the view of the Court, to a quantitative restriction on imports within the meaning of Article 28 EC and cannot be justified under Article 30 EC on grounds of protection of public health, since it is neither suitable for attaining the objective of limiting alcohol consumption generally, nor proportionate for attaining that of protecting young persons against the harmful effects of such consumption.

Advocate General Tizzano had delivered his Opinion in this case on 30 March 2006.[1] However, by Order of 14 June 2006,[2] the Court re-opened the oral procedure, inviting the parties to concentrate their pleadings on the question of whether or not rules such as the Swedish import ban were to be considered as separable from rules relating to the operation of the monopoly on the retail of alcoholic beverages. The hearing having taken place on 19 September 2006, Advocate General Mengozzi[3] delivered his Opinion on 30 November 2006.[4] Both Advocates General had come to the conclusion that the Swedish prohibition of private importation of alcoholic beverages fell to be examined under Article 31 EC and that, in principle, it was compatible with that provision.

* Senior Counsel, Advokatfirman Vinge, Brussels. An earlier version of this Article has been published in the *European Law Reporter*, 2007, p. 250.

1 Hereinafter "*Advocate General Tizzano*".

2 The order is not published in the ECR, but can be found on the home page of the ECJ: www.curia.europa.eu.

3 Formerly Judge at the Court of First Instance of the EC, appointed Advocate General at the ECJ after Advocate General Tizzano who, in the meantime, had been appointed Judge at the ECJ.

4 Hereinafter "*Advocate General Mengozzi*".

1. FACTS AND PROCEDURE

It follows from the first subparagraph of Paragraph 2 of Chapter 4 of Alkohollagen (Law on Alcohol) that alcoholic beverages may only be imported to Sweden by persons authorized to undertake wholesale of those goods, or by Systembolaget, when fulfilling its obligation under Paragraph 5 of Chapter 5 of Alkohollagen to obtain, on request, alcoholic beverages not held in stock.

The second subparagraph sets out a few limited exceptions to this rule, allowing private individuals in certain circumstances to import alcoholic beverages. The main exception is the one applying to travellers of at least 20 years of age who are allowed to import alcoholic beverages for personal consumption or for that of his or her family or as a gift to a friend or relative for his or her personal consumption or for that of his family.[5]

Mr Rosengren and a number of other individuals, appellants in the main proceedings, had ordered Spanish wine advertised on a Danish website, some of it by mail-order and some direct from the producer. The wine, which was imported into Sweden by a private carrier without being declared at customs, was confiscated at the border on the ground that it had been unlawfully imported in contravention of Alkohollagen.

The confiscation was confirmed by Göteborgs Tingsrätt (Göteborg District Court) and the appeal lodged by the appellants was dismissed by Hovrätten för Västra Sverige (the Court of Appeal for Western Sweden).

The case having been appealed to Högsta Domstolen (the Supreme Court), the latter decided to stay the proceedings and to refer four questions to the ECJ for a preliminary ruling, asking the Court whether a national provision such as the first subparagraph of Paragraph 2 of Chapter 4 of Alkohollagen falls to be examined under Article 28 EC or under Article 31 EC and, depending on the answer, whether it is compatible with the applicable provision.

2. THE JUDGMENT

(1) As to the first question, whether a national provision such as the first subparagraph of Paragraph 2 of Chapter 4 of Alkohollagen is to be assessed under Article 28 EC or under Article 31 EC, the ECJ first recalled its settled case law according to which "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

[5] There are also exceptions applying inter alia to individuals working on a means of transport, moving to Sweden or receiving alcoholic beverages by way of a will or a testament or as a gift from another individual.

exclusive rights".[6] The Court also recalled that 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.[7]

In its analysis of the ban on importation by private individuals the ECJ then examined the existence and the operation of the monopoly separately.

As to the question of whether the ban constitutes a rule relating to the existence of the monopoly, the Court held that the specific function of Systembolaget consists of the exclusive right of retail sale in Sweden of alcoholic beverages to consumers, underlining that that exclusive right does not extend to the importation of such beverages. Consequently, the ban did not, as such, govern the monopoly's exercise of its exclusive right. The Court concluded that, since the national measure in question does not concern the monopoly's exercise of its specific function, it cannot not be considered to relate to the very existence of that monopoly.

With regard to the operation of the monopoly, the ECJ admitted that, because of the obligation on Systembolaget to import any alcoholic beverage at the request and expense of the consumer, the fact that private individuals are prohibited from importing alcoholic beverages is liable to affect the operation of that monopoly. The Court nevertheless concluded that such a ban does not truly regulate that operation, since it does not relate to the methods of retail sale of alcoholic beverages on Swedish territory. The Court pointed out that, in particular, it is not intended to govern either the system for selection of goods by the monopoly, the monopoly's sales network or the organisation of the marketing or advertising of goods distributed by the monopoly. In addition, the ban arose from the provisions of Chapter 4 of Alkohollagen, the chapter relating to wholesale. The Court had already held that those provisions do not feature among the measures regulating the operation of the monopoly.[8]

The ECJ concluded that a national provision such as the Swedish prohibition of private importation of alcoholic beverages cannot be regarded as constituting a rule relating to the existence or operation of the monopoly. Since Article 31 EC consequently was irrelevant, such a provision must be assessed under Article 28 EC.

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[6] The Court referred to Case 91/75 *Hauptzollamt Göttingen v. Miritz* [1976] ECR 217, paragraph 5; Case 120/78 *REWE-Zentral AG v. Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon')* [1979] ECR 649, paragraph 7; Case 91/78 *Hansen v. Hauptzollamt Flensburg* [1979] ECR 935, paragraphs 9 and 10; Case C-387/93 *Banchero ('Banchero II')* [1995] ECR I-4663, paragraph 29; and Case C-189/95 *Criminal proceedings against Harry Franzén* [1997] ECR I-5909, paragraph 35.

[7] The Court referred to *Franzén*, paragraph 36.

[8] Here the Court referred ("to that effect") to *Franzén*, paragraphs 34, 67 and 70.

As the second question concerned the interpretation of Article 31 EC and was only posed in the event that the ECJ would consider that the Swedish import ban should be assessed under that provision, there was no need for the Court to answer it.

(2) With regard to the third question, whether a national provision such as the Swedish import ban amounts to a quantitative restriction on imports within the meaning of Article 28 EC, even though the retail sale monopoly, on demand, is required to supply, and thus to import, if necessary, the alcoholic beverages concerned, the Court answered in the affirmative.

Having recalled that the free movement of goods is a fundamental principle of the EC Treaty, that is expressed in Article 28 EC as well as in the *Dassonville* formula,[9] the ECJ mainly underlined that it was 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. On this point, the Court declared:

"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."[10]

(3) Finally, the ECJ examined the question of whether a national provision such as the Swedish import ban can be regarded as justified, under Article 30 EC, on grounds of protection of the health and life of humans – the fourth question posed by Högsta domstolen.

Here the Court first held that although the prohibition on private individuals directly importing alcoholic beverages appeared to be a means of favouring a distribution channel for those goods by directing requests for the importation of beverages to Systembolaget, it must be considered unsuitable for achievement of the objective to limit generally the consumption of alcohol in the inter-

[9] The Court referred to 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 Case 147/04 *De Groot en Slot Allium and Bejo Zaden* [2006] ECR I-245, paragraphs 70 and 71.

[10] *Rosengren*, paragraph 35.

est of protecting the health and life of humans, because of the rather marginal nature of its effects in that regard.

The Court noted that, although the prohibition 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 remained that, pursuant to Chapter 5, Paragraph 5, of Alkohollagen, the consumer may still ask Systembolaget to supply him with those goods. Even if the former version of that provision, in force at the time of the facts in the national proceedings, allowed Systembolaget to refuse such an order, it did not state the grounds on which such a refusal could be made and, in any event, it did not follow from the information available to the Court that, in practice, Systembolaget had refused to make 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.

Secondly, the ECJ held that it had not been established that the import ban, by directing the demand to Systembolaget, which is obliged to check the age of persons placing orders and may supply alcoholic beverages only to those who are at least 20 years of age, is proportionate for the purpose of attaining the objective of protecting younger persons against the harmful effects of alcohol consumption.

The Court pointed out that since a national provision such as the Swedish import ban 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.[11]

It then declared that the ban, applying to everyone, irrespective of age, goes manifestly beyond what is necessary for the objective sought.

With regard to need for age checks, the Court emphasised that it did not appear that there is, in all circumstances, an irreproachable level of effectiveness and that the objective pursued is only met in part. Although Systembolaget did, in principle, make distribution of beverages subject to a centralised and coherent operation allowing its agents to check the age of purchasers, there were other methods of distribution of alcoholic beverages conferring on third parties the responsibility for such checks. The Court pointed out that it was not disputed that Systembolaget accepts that age checks are made by other 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

[11] The Court referred to Case C-17/93 *Van der Veldt* [1994] ECR I-3537, paragraph 15; *Franzén*, paragraphs 75 and 76; and Case C-434/04 *Ahokainen and Leppik* [2006] ECR I-9171, paragraph 31.

was itself not clearly established in the cases where Systembolaget supplies those beverages by post, or other means of transport, to a station or coach stop.

The ECJ noted that, on the basis on the information before it, nothing indicated that the method suggested by the Commission, by which age checks would be carried out by way of a declaration in which the purchaser of the imported beverages would certify, on a form accompanying the goods when they are imported, that he is more than 20 years of age, if accompanied with appropriate criminal penalties in the event of non-compliance, would necessarily be less effective than that implemented by Systembolaget.

The ECJ consequently held that a measure, such as that in the first subparagraph of Paragraph 2 of Chapter 4 of Alkohollagen, under which private individuals are prohibited from importing alcoholic beverages, cannot be regarded as being justified under Article 30 EC on grounds of protection of the health and life of humans, 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.

3. COMMENTS

The judgment in *Rosengren* came as a surprise to many observers of the case law of the ECJ. From a legal point of view, it is perhaps not so much the result in itself – that the prohibition on private individuals directly importing alcoholic beverages was considered as being contrary to Community law – that comes across as a bit surprising, as the Court's reasoning coming to that result.

(1) In particular, the analysis of the first – and most important – question, where the Court after a rather short and superficial examination comes to the conclusion that the measure should be assessed under Article 28 EC and not under Article 31 EC, is quite astonishing, especially in the light of *Franzén*[12] and *Hanner*.[13]

In *Rosengren* the Court construed its previous case law very narrowly. It decided that the specific function of Systembolaget is the exclusive right of retail sales in Sweden of alcoholic beverages to consumers, a right that does not cover the importation of those beverages. The prohibition on private individuals directly importing alcoholic beverages thus does not *govern* the monopoly's exclusive right. Consequently, that measure does not concern the monopoly's exercise of its specific function and therefore does not relate to the *very* existence of the monopoly.

[12] Case C-189/95 *Criminal proceedings against Harry Franzén* [1997] ECR I-5909.
[13] Case C-438/02 *Criminal proceedings against Christer Hanner* [2005] ECR I-4551.

The rule set out in the previous case law of the ECJ, and which the Court itself quoted in *Rosengren* (paragraphs 17 and 18), is that measures *relating* to the existence and operation of the monopoly should be examined under Article 31 EC, while provisions which, although having a bearing upon the monopoly, are separable from its operation should be examined under Article 28 EC.[14] The case law does hold that Article 31 EC is specifically applicable to the exercise by a monopoly of its exclusive rights, but it does not require the provisions in question to *govern* those rights and clearly not that they relate to the *very* existence of the monopoly.

It follows already from *Cassis de Dijon*[15] that the national provisions which are excluded from the scope of application of Article 31 EC are those which do not *concern* the exercise by a public monopoly of its exclusive right *but apply in a general manner to the production and marketing of alcoholic beverages.* In *Peureux I*,[16] delivered only a few weeks later, the ECJ added that the rules contained in Article 31 EC concern activities which are *intrinsically connected* with the specific business of the monopoly.[17]

In addition, it is doubtful whether the distinction between Systembolaget's exclusive right of retail sales of alcoholic beverages and the private importation of such beverages is in line with paragraph 50 of *Franzén*, where the Court, when analysing the product selection system of the monopoly, stated that there are other ways for traders to have their products marketed by the monopoly than via the assortment selected by Systembolaget and in that context inter alia pointed to the fact that Systembolaget is required to import any alcoholic beverage at the request and cost of the consumer, thus seemingly intimating that the regulation of the question of the right for private individuals to import alcoholic beverages is intrinsically connected with the specific function of the monopoly.

With regard to the operation of the monopoly, the Court held that the import ban "does not truly regulate" that operation, since it does not relate to the methods of retail sale of alcoholic beverages on Swedish territory. Again the ECJ uses wording that is much more narrow than "relating to the existence and operation of the monopoly". The Court seems to consider that only provisions relating to the *methods* of retail sale can constitute rules relating to the operation of a retail sale monopoly. Moreover, the statement that the import ban is not intended to govern either the system for selection of goods by the monopoly,

[14] See *Franzén*, paragraphs 35 and 36, and the case law referred to.
[15] Case 120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649, paragraph 7.
[16] Case 86/78 *Grandes Distilleries Peureux v. Directeur des Services Fiscaux* [1979] ECR 897, paragraph 35.
[17] Advocate General Tizzano concludes that what matters is not the exclusive right per se but the monopoly function with a view to which the exclusive right is accorded (*Advocate General Tizzano*, paragraph 38).

the monopoly's sales network, or the organisation of the marketing or advertising of goods distributed by the monopoly, ignores the fact that in *Franzén*, where those elements were set out, and in *Hanner*, where they were confirmed, they were examined in order to determine whether Systembolaget was arranged in a way that met the conditions for being compatible with Article 31 EC, not whether the rules concerned came within the scope of that Article.[18]

The ECJ also makes a peculiar reading of its judgment in *Franzén*. Having stated that the import ban arises from the provisions of Chapter 4 of Alkohollagen relating to wholesale, it then declares that it has already held that the rules contained in that chapter do not feature among the measures regulating to the operation of the monopoly, referring to paragraphs 34, 67 and 70 of *Franzén*. However, apart from the fact that the ECJ is not competent to pronounce itself on the interpretation of national law, in those paragraphs the Court only dealt with the rules relating to wholesale licenses and not the provision prohibiting private individuals from importing alcoholic beverages. Nowhere in that judgment is there a general statement regarding the provisions of Chapter 4. Further, according to its heading, Chapter 4 relates to "Wholesale, etc.". The first subparagraph of Paragraph 2 regulates who may import alcoholic beverages, not who may undertake wholesale of those beverages, and none of the provisions of the second and third subparagraphs, indicating the exceptions to the rule set out in the first subparagraph, relate to wholesale. In any case, the argument does not come across as very convincing, since the Court is surely not suggesting that private individuals should be allowed to import alcoholic beverages in order to engage in wholesale.

In *Franzén* and in *Hanner* the ECJ held that Article 31 EC aims at the elimination of obstacles to the free movement of goods, save, however, for restrictions on trade which are inherent in the existence of the monopolies in question.[19] However, in *Rosengren* 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. This question was dealt with by the Advocates General though, and, it is submitted, rather convincingly. It was therefore so much more important for the Court to carry out an adequate analysis thereof.

Advocate General Tizzano recalled that the case law preceding *Franzén* holds that Article 31 EC concerns not national provisions related to the monopoly's

[18] In *Hanner*, the ECJ held that those elements had to be examined when considering whether the way in which the State monopoly in question (the company having the monopoly on retail of medicinal preparations – Apoteket) was organised and operated was liable to place medicinal preparations from other Member States at a disadvantage (see paragraphs 38 to 41 of the judgment).

[19] *Franzén*, paragraph 39, and *Hanner*, paragraph 35.

exclusive right, but rather those which are "intrinsically connected with the specific function" of the monopoly. In other terms, the case law assumed that if a monopoly exists, it is in order to fulfil a function. It was consequently with regard to this function that it had to be determined whether the rules concerned related to the existence and operation of the monopoly. He considered that also *Franzén* could be read in accordance with this interpretation, referring to the fact that in paragraph 49 of that judgment the Court considered under Article 31 EC not only the provisions concerning Systembolaget's sales network and promotion, but also all the rules concerning the system by which products are selected, including the rule which reserves to the monopoly the task of importing at customer's request alcoholic beverages not in the assortments on offer.[20] The objective of the import ban being to ensure that private persons wishing to purchase alcohol have to do it through Systembolaget, it must be deemed to be a provision relating to the operation of the monopoly.[21]

Advocate General Mengozzi considered that "the rules subject to Article 31 EC include all the provisions connected with the existence and operation of the retail monopoly in 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".[22] In his view, "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 thirty years, the case-law of the Court has stressed the notion of "specific function" and not simply that of "exclusive right(s)"".[23]

In addition, while the ECJ did not at all examine whether the provisions concerned were separable from the operation of the monopoly, Advocate General Mengozzi considered that the separability criteria set out in *Franzén*, "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

[20] *Advocate General Tizzano*, paragraphs 38 to 41.
[21] *Advocate General Tizzano*, paragraphs 43 and 44.
[22] *Advocate General Mengozzi*, paragraph 37.
[23] *ibid.*, paragraph 36.

of alcohol".[24] In his view the prohibition in question would not have any rationale without the existence and operation of the monopoly.

Further, both Advocates General were of the view that the rule allowing the consumer to require the monopoly to order alcoholic beverages not held in stock, set out in Chapter 5, Paragraph 5, of Alkohollagen, and the one prohibiting private importation of such beverages by individuals are complementary and indivisible: both of them being designed to channel demand for alcohol on the part of Swedish consumers into the exclusive system of retail sales of alcohol controlled by Systembolaget.[25]

The Advocates General considered that the specific function of the Swedish retail monopoly on sales of alcoholic beverages is to create a single and controlled channel for the purchase of such beverages.[26]

Against this background it is clear that the ECJ deliberately did not take up the question of whether the ban on private imports of alcoholic beverages is inherent in the monopoly, nor examine whether it is separable from that monopoly. On the contrary, it considered that only the provisions that *govern* the monopoly's exclusive rights and relate to the *very* existence of the monopoly or that *truly regulate* the operation of the monopoly, i.e., in the case of a retail sale monopoly, govern the *methods* of retail sale, shall be assessed under Article 31 EC. Provisions not fulfilling those criteria have to be assessed under Article 28 EC.

It is difficult to draw any other conclusion from the answer to the first question than that the ECJ is going back on its previous case law, as set out in particular in *Franzén* and *Hanner*, narrowing down its interpretation of Article 31 EC, seemingly considering it almost as a derogation from the rule set out in Article 28 EC which, as an exception to a fundamental rule, must be given a strict interpretation and not just as a limitation to that article.

(2) With regard to the ECJ's answer to the third question, there is not much to say other than that it is not quite clear whether the reasoning of the Court should be interpreted to mean that, under certain circumstances, a national provision such as the Swedish ban on private imports of alcoholic beverages could be compatible with Article 28 EC.

In fact, in paragraph 34, the Court states that it is not disputed that, when using the service of Systembolaget through which private individuals can order

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[24] *ibid.*, paragraph 59. In Case E-4/05 *HOB-vín* v. *The Icelandic State and Áfengis- og tóbaksverslun ríkisins (the State Alcohol and Tobacco Company of Iceland)* [2006] EFTA Ct. Rep. 4, the EFTA Court noted that: "At the oral hearing, the agent for the Commission suggested a test whereby a given measure should be deemed to fall under the ambit of Article 16 EEA [which is identical in substance to Article 31 EC] in cases where it would not exist without the monopoly."

[25] *Advocate General Mengozzi*, paragraph 47, and *Advocate General Tizzano*, paragraph 45.

[26] See, e.g. *Advocate General Mengozzi*, paragraph 51, and *Advocate General Tizzano*, paragraph 42.

alcoholic beverages not held in stock, consumers are confronted with a number of inconveniences they would not face if they were to import the alcoholic beverages themselves. In paragraph 35, the Court mentions, "in particular", a number of these inconveniences. It then holds, in paragraph 36, that, "consequently", the Swedish ban on importation by private individuals of alcoholic beverages amounts to a quantitative restriction on imports within the meaning of Article 28 EC, even if the monopoly is required, on request, to supply and therefore, if necessary, to import such beverages.

Even if the Court's answer to the question, contained in paragraph 36 of the judgment, seems rather categorical, the reasoning in paragraphs 34 and 35 could thus be read as indicating that such a ban might be compatible with Article 28 EC if combined with a requirement on the monopoly, in every case, to supply (and import) on request, alcoholic beverages not in its assortment *and* this service, in principle, only confronts those concerned with the same inconveniences as those which they would be faced were they to import the beverages themselves.

(3) Within the framework of the fourth question and the first objective invoked by the Swedish government in order to justify the import ban, i.e. to limit generally the consumption of alcohol in the interest of protecting the health and life of humans, the ECJ would first appear to be indicating to the Swedish legislator that he should actually have maintained and strengthened the possibility for Systembolaget to refuse an order by a private individual to supply, and import, alcoholic beverages not in its assortment. The provision should have set out the grounds on which such a refusal could be made, such as by reference to maximum quantities of alcohol which may be ordered, at least with regard to the beverages with the highest alcohol content.

The Court then notes that, as emphasised by the Advocates General, the aim of the Swedish prohibition on private individuals to import alcohol is to favour a distribution channel by directing requests for the importation of alcoholic beverages to Systembolaget. However, without indicating on what facts or figures its conclusion is based, the Court declares that the effects of the import ban in relation to the objective of limiting generally the consumption of alcohol is of rather marginal nature and that the import ban therefore must be considered unsuitable for achievement of that objective.[27]

It thus follows that, for a measure to be considered suitable (in French "apte") for the attainment of the objective sought, and thus capable of being

[27] In this context, it could be noted that, according to an article in the Swedish newspaper Dagens Nyheter, of 20 September 2006, during the first six months of 2006 the Swedish customs authorities confiscated more than 200 000 liters of privately imported alcoholic beverages (mostly beer and wine).

justified under Article 30 EC, it has to have a certain minimal effect in relation to that objective. It does seem a bit odd to carry out such an assessment within the framework of the suitability criterion, the fulfilment of which should not depend on *how* efficient a measure is, but rather *whether* or not it is capable of achieving the objective.[28] The assessment carried out by the ECJ would seem to fall more naturally into the framework of the proportionality criterion, under which it would have to be ascertained whether the objective of limiting generally the consumption of alcohol could be as effectively achieved by measures which are less restrictive of the free movement of goods.[29] This latter question, however, still remains open.

As to the objective of protecting younger persons against the harmful effects of alcohol consumption, the ECJ comes to the opposite conclusion as Advocate General Tizzano, who did not believe "that without the ban this very objective could be pursued with the same degree of effectiveness by requiring customs authorities, postal services and private delivery companies to check the ages of consignees of alcoholic liquor ordered outside Sweden".[30]

The Court emphasised that the import ban being applicable to everyone, irrespective of age, it goes manifestly beyond what is necessary for the objective sought. Pointing *inter alia* to the fact that Systembolaget accepts that age checks are made by a great number of agents when alcoholic beverages are delivered outside the monopoly's shops, the Court also concluded that the level of effectiveness with respect to the age checks is not irreproachable. In those circumstances it did accept the suggestion of the Commission that age checks could be carried out by way of declaration by the purchaser, but only after having added that such a method would have to be accompanied with appropriate criminal sanctions in the event of non-compliance. It must be assumed that the Court felt assured that the age checks presently carried out when alcoholic beverages are delivered outside the shops of Systembolaget are effective, since otherwise it would be suggesting the generalisation of an ineffective control system.

It is interesting to note that in its analysis of the proportionality criteria, the Court, although in the end coming to the opposite conclusion, seems to bear Advocate General Tizzano out that "what must be ascertained is not which measures would be feasible and more effective in abstract terms but whether the actual measures adopted by [the Member State concerned] are appropriate for

[28] Unless, of course, the effects are so minimal that they are negligible.

[29] The Court actually in paragraphs 43 and 44 seems to indicate that it is carrying out the assessment within the framework of the proportionality criterion. After having recalled the content of that criterion, it goes on to state that, in that regard, the Swedish government seeks to justify the provision concerned on the ground of the general need to limit the consumption of alcohol. Nevertheless, the Court's conclusion in paragraph 47 of the judgment expressly finds the import ban to be "unsuitable" (in French "inapte") for the achievement of the objective.

[30] *Advocate General Tizzano*, paragraph 81.

achieving the degree of protection of public health pursued by that State and do not go beyond what is necessary for that purpose".[31]

4. CONCLUSIONS

With regard to Article 31 EC, the ECJ seems to indicate a more narrow interpretation of the *Franzén* and *Hanner* case law, making Article 31 EC almost a derogation from the fundamental principle of free movement of goods and not just a limitation of it, as set out in that case law. The Court would now seem to take the view that the specific function of a State monopoly of commercial character is limited to the scope of its exclusive rights. Only the provisions that *govern* the monopoly's exclusive rights and relate to the *very* existence of the monopoly or that *truly regulate* the operation of the monopoly, i.e., in the case of a retail sale monopoly, govern the *methods* of retail sale, shall be assessed under Article 31 EC. Provisions not fulfilling those criteria have to be assessed under Article 28 EC.

The ECJ did not at all examine whether the restrictions resulting from the national provisions concerned are inherent in the existence of the monopoly or whether they are intrinsically connected with the specific function of the monopoly.

The Court is thus clearly limiting the number of national measures that could fall within the scope of application of Article 31 EC and thereby the possibility for Member States to use State monopolies as instruments for the pursuit of public interest aims.

Also with regard to the possibility for national measures to be justified under Articles 28 and 30 EC, the Court appears to be signalling a stricter interpretation of the suitability and proportionality criteria, the free movement of goods seemingly being given a certain pre-eminence to the interests protected by Article 30 EC, such as health and life of humans

On the other hand, the ECJ seems to be sending the message to the Swedish legislator that, if he wants to maintain the prohibition on private individuals directly importing alcoholic beverages, he should either,

– in order for the import ban not to constitute a quantitative restriction on imports within the meaning of Article 28 EC, combine it with a requirement on the monopoly in every case to supply (and import), on request, alcoholic beverages not in its assortment and ensure that those concerned

[31] *Advocate General Tizzano*, paragraph 78. Advocate General Tizzano considered that without the measure in question, "[the] very objective" pursued by the national legislature could not be pursued "with the *same degree of effectiveness*" (emphasis added). On this point, see further Martin Johansson, "The EC Court of Justice and the Swedish Monopolies – An Analysis of the Case Law on State Monopolies", in *Swedish Studies in European Law*, Vol. 2, (Hart), forthcoming.

are, in principle, only confronted with the same inconveniences as those with which they would be faced were they to import the beverages themselves, or,

– in order for the ban to be suitable for attaining the objective of limiting alcohol consumption generally and thereby to be capable of being considered as justified under Article 30 EC, reintroduce and strengthen the possibility for Systembolaget to refuse an order by a private individual to supply (and import) alcoholic beverages not in its assortment, limiting the maximum quantities of alcohol which may be ordered, at least with regard to the beverages with the highest alcohol content.

It should finally be mentioned that most commentators in Sweden seem to be of the view that the effects of *Rosengren* will, in practice, be rather limited, because of the judgment of the ECJ in *Joustra*,[32] delivered on 23 November last year, in which the Court established that the excise duty on alcoholic beverages acquired in another Member State by a private individual for his own requirements or for those of other private individuals, and not transported by himself, is to be paid in the Member State of delivery (but the excise duty levied in the Member State of acquisition has to be reimbursed). Since the excise duties thus have to be paid in Sweden, economically it would be much less interesting to import alcoholic beverages.

There are, however, differing views as to how efficiently the customs and tax authorities will be able to control and enforce the application of the tax rules. Although the first indications seem to show that the authorities will have difficulties in monitoring the private importation of alcoholic beverages, and thus to enforce the tax rules, this still remains an open question.

[32] Case C-5/05 *Staatssecretaris van Financiën v. B. F. Joustra* [2006] ECR I-11075.