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Alcoholic Goods and Sweden

The EU Law of Private Imports, Retail Sale, and State Monopolies

Graham Butler

POLICIES OF THE EUROPEAN UNION

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Preface

The Nordic states have a long history of using state monopolies to control the retail sale of alcoholic goods. Systembolaget – Sweden's state-owned monopoly regarding the retail sale of alcoholic goods – is culturally and politically deeply anchored in society. However, as an EU Member State, Sweden must act within the bounds of EU law, and state monopolies generally conflict with the free movement of goods. The Court of Justice of the European Union (CJEU) was presented with the issue soon after the state's accession, in the *Franzén* case. It ruled that Systembolaget was compatible with the internal market, provided that the principle of non-discrimination is respected.

In the 25 years since that judgment was handed down, Systembolaget and Sweden's wider state alcohol policy have changed significantly. Meanwhile, the jurisprudence of the CJEU on state monopolies today places greater weight on the free movement of goods, and less on the specific provision regarding state monopolies. If Systembolaget came under scrutiny today, would the CJEU find that changes to national law in Sweden are now in breach of the EU Treaties? In other words: does the lifeline that the CJEU threw Sweden and its state monopoly, more than two decades ago, still exist?

This report by Graham Butler seeks to answer that question by examining the recent case law of the CJEU, and the recent history of the Swedish state monopoly on the retail sale of alcoholic goods. In publishing it, the aim is to provide a legal perspective on an ongoing political debate in Sweden with a distinct EU dimension, shedding light on an issue where Member State policies and the internal market inevitably meet – and often collide.

Göran von Sydow
Director, SIEPS

About the author

Dr. Graham Butler (B.A., LL.M., Ph.D.) is Associate Professor of Law at Aarhus University, Denmark.

His research and scholarship focuses on various aspects of European Union law, including EU constitutional law, EU internal market law, and EU external relations law. Dr. Butler's research has been published in all the leading academic law reviews and journals in European law, and he has authored and edited numerous books. In 2021, he was named Sapere Aude Research Leader (*Sapere Aude Forskningsleder*) by the Independent Research Fund Denmark (*Danmarks Frie Forskningsfond*), a public research foundation, for his writings on EU law.

He has authored several works on state monopolies in EU law and EEA law previously, including, 'State Monopolies and the Free Movement of Goods in EU Law: Getting Beyond Obscure Clarity', *Legal Issues of Economic Integration* 48, no. 3 (2021): 285–308; 'State Monopolies and the Free Movement of Goods in EEA Law: Ensuring Substantive Homogeneity at the EFTA Court'. *International Trade Law & Regulation* 28, no. 1 (2022): 55–72 (with Marius Meling); and 'Reconciling the Special Provision on State Monopolies with the General Provisions on the Free Movement of Goods: Opinion of Advocate General Warner in *Manghera*', in *Shaping EU Law the British Way: UK Advocates General at the Court of Justice of the European Union*, edited by Graham Butler and Adam Łazowski. Oxford: Hart Publishing, 2022.

Dr. Butler holds a number of academic degrees from University College Dublin (UCD), National University of Ireland (NUI), the University of Iceland (*Háskóli Íslands*), and the University of Copenhagen (*Københavns Universitet*), Denmark. He has delivered invited lectures, seminars, and speeches at Europe's leading universities, public bodies, and international organisations, and has had his research cited in judicial opinions on many occasions at the Court of Justice of the European Union on various aspects of EU law.

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The opinions expressed in this publication are those of the author alone.

List of abbreviations

AG	Advocate General
CJEU	Court of Justice of the European Union
EEA	European Economic Area
EEC	European Economic Communities
EFTA	European Free Trade Association
EU	European Union
GATT	General Agreement on Tariffs and Trade
MEEQR	Measures having equivalent effect to a quantitative restriction
OJ	Official Journal
QR	Quantitative restriction
SEK	Swedish kronor
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
V&S	Vin & Sprit

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Executive Summary

Sweden is an EU Member State that has had a history of strict regulation relating to the sale and purchase of goods and products containing alcohol (alcoholic goods). Most notably, it has long had in place a state monopoly known as Systembolaget, which as a matter of national law, has possessed the exclusive right to engage in the retail sale of certain alcoholic goods within the state. In the 1990s, the looming accession of Sweden to the EU meant that significant aspects of national law had to be amended to ensure that national law in Sweden was compatible with the free movement of goods provisions – Articles 34–36 TFEU and Article 37 TFEU – as set down in the EU Treaties. The business operations of Systembolaget were amended to some extent, to bring it into line with EU law. Within Sweden, Systembolaget's exclusive right to engage in the retail sale of certain alcoholic goods remains to this day.

At the time of signature of the Agreement on the European Economic Area (EEA Agreement) in the early 1990s, to which Sweden became a party prior to becoming an EU Member State not long thereafter in 1995, it may have been argued that the basis upon which national law provided for the continued functioning of Systembolaget was contrary to the free movement of goods as set down in the EU Treaties. However, the *Franzén* judgment, delivered by the Court of Justice of the European Union (CJEU) in 1997, upheld the general lawfulness of Systembolaget, as the state monopoly then stood, concerning its exclusive right to engage in the retail sale of certain alcoholic goods, provided that the conditions otherwise imposed by EU law continued to be respected.

This report analyses the contemporary legal issues that arise and with regard to national measures concerning alcoholic goods in Sweden, in light of the current state of the EU law of the free movement of goods. That said, the legal analysis presented in this report will first demonstrate that the *Franzén* judgment was significantly flawed. In fact, in its subsequent case law, the CJEU has moved away from using the grounds of reasoning from that case, and has shied away from adjudicating on Article 37 TFEU altogether. In effect, what is currently seen in the case law of the CJEU amounts to a renunciation of the *Franzén* judgment. Consequently, assuming that Sweden and Systembolaget itself could rely upon that infamous judgment to maintain the status quo, would be a misreading of the current state of the law. The subsequent case law of the CJEU on the free movement of goods on matters relating to private imports, retail sale, exclusive rights, and state monopolies, has shown quite a different approach in the current age.

This report emphasises a number of developments. First, the CJEU has changed its course when assessing the lawfulness of national measures relating to

state monopolies. The 'public interest aim', which the CJEU declared out of nowhere in *Franzén*, no longer appears to be an acceptable legal ground for a state monopoly to continue to exist. Sweden and Systembolaget itself heavily relied on this exact legal ground to motivate the exclusive right of retail sale of certain alcoholic goods, and to justify the existence of a state monopoly and its rights under national law. Rather, the CJEU now appears to focus on the general provisions regarding restrictions of the movement of goods. In the future, the compatibility of state monopolies and wider national laws concerning the sale of alcoholic goods, will have to be assessed on the basis of Articles 34–36 TFEU.

Second, it has become apparent through subsequent case law of the CJEU, that the private import of alcoholic goods into Sweden, from other EU Member States, is lawful, permissible, and compatible with EU law. Consequently, any national measures taken by Sweden, or Systembolaget, to prevent the private import of alcoholic goods from other EU Member States into Sweden, are contrary to EU law, and moreover, are not justified on the basis of trying to protect the health and life of humans, or any form of mandatory requirement, such as a claimed overriding reason of public interest. Inter-state trade in alcoholic goods by private import is lawful, which national courts and tribunals in Sweden must vindicate. Furthermore, the case law of the CJEU is also clear regarding private imports of alcoholic goods being made by independent intermediaries and professional transporters, who may also conduct private imports of alcoholic goods on behalf of consumers in Sweden. Thus, Systembolaget is no longer the only venue or location in which consumers in Sweden can acquire alcoholic goods.

Third, the report argues that changes to national law to allow for even more alcoholic goods to be sold outside of Systembolaget, such as domestically produced alcoholic goods, would be discriminatory – in law, and in practice – against alcoholic goods produced in, and coming from other EU Member States. Such amendments to national law would be contrary to the free movement of goods as set down in the EU Treaties, and not be able to be justified. Thus, partial liberalisation of national law to allow domestically produced alcoholic goods to be sold in any way outside of Systembolaget would result in the right of other economic actors, such as general retailers, to have the possibility also to sell alcoholic goods, domestically produced, or goods produced in other EU Member States, in their own outlets in Sweden, in competition with Systembolaget. The report argues that this also affects the proposed farm sales regime in Sweden. The state monopoly, Systembolaget, would no longer be a state monopoly. This poses the issue that such a farm sales regime, however designed, would potentially unravel the current system regarding how alcoholic goods are sold in Sweden.

The report concludes by offering views on the future of alcohol regulation in Sweden, in light of the applicable considerations deriving from EU law, and recalls that the current regime of regulation concerning alcoholic goods, and any future regime in light of changes to national law, will be heavily scrutinised

by legal actors – both in Sweden (market operators, consumers, and national courts and tribunals), and by EU institutions (the European Commission and the CJEU) – for their compatibility with the free movement of goods.

1 Introduction

Sweden is an EU Member State that has had a history of strict regulation of goods and products containing alcohol (alcoholic goods). One of the best-known features of national law in Sweden relating to alcoholic goods is that they, for alcoholic goods containing over 2.25% alcohol content,[1] must be sold in retail stores called Systembolaget. That company is state-owned, but not only that, as it is also a state monopoly, owing to the fact that Systembolaget is in possession of the exclusive right of retail sale within the state.

Upon the accession of Sweden to the EU in 1995, aspects of Systembolaget's business operations had to be amended to bring it into line with EU law, and today, the exclusive right of retail sale of certain alcoholic goods remains in place. Whilst some argued that the broader economic integration of Sweden into Europe meant the justification for retaining Systembolaget and its exclusive right of retail sale of certain alcoholic goods was on thin ice, nobody had to wait long to find out whether the legal regime, and practical effect of Systembolaget, was indeed in conformity with EU law, namely, the free movement of goods provisions. It is this point of departure from which national law in Sweden relating to alcoholic goods, and the EU law of the free movement of goods, intertwine with one another.

This report is divided into five sections. Section 2 details the legal history of state monopolies in Europe, including why specific legal provision relating to state monopolies was included in the original EU Treaties, back when the Treaty of Rome was ratified in 1957. It thereafter moves on to assessing the inclusion of the free movement of goods provisions within the Agreement on the European Economic Area (EEA Agreement), to which Sweden became a contracting party, alongside all the other Nordic states, and all other EU Member States at the time. Section 2 concludes by contextualising the state monopoly of Systembolaget, and how it is provided for in national law.

Section 3 analyses the two key provisions of the EU Treaties concerning the free movement of goods. On the one hand, there are the general provisions of Articles 34–36 TFEU, and on the other hand, there is the special provision of Article 37 TFEU. As illustrated, the case law of the Court of Justice of the European Union (CJEU) concerning state monopolies and the free movement of goods has changed over time. In particular regarding Sweden, in the well-known *Franzén* case,[2] the exclusive right of retail sale of Systembolaget was found compatible,

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[1] For further elaboration on drinks caught by national law in Sweden, see section 2.3 of this report.

[2] Case C-189/95, *Criminal proceedings against Harry Franzén*, ECLI:EU:C:1997:504.

in part, with the legal provisions concerning the free movement of goods in the EU Treaties, in particular, the special provision of Article 37 TFEU concerning state monopolies. Seeing the *Franzén* judgment of the CJEU as a *carte blanche* justification for Sweden's way of having certain alcoholic goods regulated within the state, however, would be a profound misreading. The CJEU has moved away from its *Franzén* judgment when assessing state monopolies, and the 'public interest aim' pursued by state monopolies, which the CJEU created out of nowhere in the case, that Systembolaget heavily relies upon for its continued possession of exclusive rights to sell certain alcoholic goods, no longer appears to be a pertinent, or an acceptable ground for a state monopoly to continue to exist. Subsequent case law from the CJEU on the free movement of goods has shown a different approach to that of the *Franzén* judgment. Section 3 seeks to ground the current debate in the existing state of the case law of the CJEU.

Section 4 examines and analyses the tripartite issues of the modern era: the development of the practice and case law of the CJEU concerning the private import of goods; the attempt by Systembolaget to use the judicial system of Sweden to try to prevent private imports; and the consideration being given to allowing domestically produced goods be sold as part of farm sales. The private importation of alcoholic goods produced in, or coming from, other EU Member States is permissible, as made clear in the *Rosengren* judgment of the CJEU.[3] Further, in *Commission v Sweden (Private Imports)*,[4] the CJEU confirmed that 'independent intermediaries and professional transporters' may also conduct private imports of alcoholic goods on behalf of consumers in Sweden. Notwithstanding this case law, there have been two judgments rendered by national courts in Sweden in recent years, currently pending appeal, where private imports have arisen. Such issues arising therein are measured and assessed. Furthermore, the issues arising regarding farm sales, in light of an inquiry commissioned by Sweden in 2021, is also assessed, as regards the compatibility of such sales with the entirety of the free movement of goods provision in the EU Treaties, concluding that any such changes would be unlawful – in law, and in practice – given that they would be discriminatory in nature, and not be justifiable under any possible grounds of exception. Moreover, given that it would allow for certain alcoholic goods to be sold outside of Systembolaget, such changes would undermine the existing justification for Systembolaget, and would threaten its ability to be a state monopoly, and could risk Systembolaget losing its exclusive right of retail sale of alcoholic goods.

In conclusion, section 5 reflects on the state of the EU law on the free movement of goods, specifically with regard to alcoholic goods, and the state of the law in Sweden. Without question, the existence of Systembolaget as a state monopoly possessing an exclusive right of retail sale of certain alcoholic goods

[3] Case C-170/04, *Klas Rosengren and Others v Riksåklagaren*, ECLI:EU:C:2007:313.
[4] Case C-186/05, *Commission v Sweden*, ECLI:EU:C:2007:571 (*Private Imports*).

is a restriction on the free movement of goods in the EU. Thus, it has until now only been compatible with EU law given the existence of a 'public interest aim', which is understood as a proportionate way to achieve an aim of reduced alcohol consumption. It is also understood that for Systembolaget to be a state monopoly, it has to be in possession of exclusive rights of retail sale of alcoholic goods, operating in a non-discriminatory manner. With the 'public interest aim' coming under increased pressure, so does the sustainability of Systembolaget as a state monopoly. The introduction of farm sales runs the risk of undermining it completely. Though changes concerning the regulation of alcoholic goods in Sweden could happen at any time, it will be the case that any changes will be made under the watchful eye of legal actors – both in Sweden (market operators, consumers, and national courts and tribunals), and EU institutions (the European Commission and the CJEU), for their compatibility with the free movement of goods.

2 State Monopolies, European Economic Integration, and the Retail Sale of Alcohol

In this section, several matters are contextualised as regards the regulation of alcoholic goods in Sweden, and Sweden's broader economic integration into Europe. First, it reflects the backdrop of how state monopolies in Europe have been provided for as a matter of law (Section 2.1). As will be apparent, state monopolies have long existed prior to, and long before the original European Economic Communities (EEC), and accordingly, their incorporation into EU primary law was thus necessitated. Second, it considers how state monopolies were to be incorporated into the EEA Agreement, and Sweden becoming a contracting party to that international agreement, before quickly thereafter becoming an EU Member State (Section 2.2). Third, analysis is provided of the national law of Sweden concerning the state monopoly possessing the exclusive right of retail sale of certain alcoholic goods (Section 2.3).

2.1 The Legal History of State Monopolies in Europe

State monopolies of a commercial character (state monopolies)[5] are the most curious of creatures of the market economy. A monopoly, in definitional terms, means there is only one supplier of some good or product. Their existence within states, prior to the establishment of the EU, and their compatibility with the EU's internal market, has long been a source of interest.[6] Many state monopolies have long histories dating back to times long before the EU, including Systembolaget. The reasons for the existence of state monopolies have been as manifold as they have been varied. Whether it was to be a guarantor of employment, the creation of new industries, a state-industry bargain, or a particular policy reason, their lawfulness prior to the EU, was a matter of national law. That said, with the EU's internal market, it is state monopolies, and the Member States themselves, that have had to navigate their way in ensuring that how they conduct themselves in compliance with EU law.

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[5] 'State monopolies', beyond the EU, are occasionally referred to by other names. For example, they are otherwise known as state trading monopolies, national monopolies, public monopolies, state enterprises, state trading, and state commerce.

[6] For contemporary analysis on the entire history of state monopolies, the free movement of goods, and EU law, including the case-law that has arisen before the CJEU, see, Graham Butler, 'State Monopolies and the Free Movement of Goods in EU Law: Getting Beyond Obscure Clarity' (2021) 48 Legal Issues of Economic Integration 285.

Many of the older state monopolies in European states were geared towards the manufacture of primary goods, such as raw materials, or other resources that were needed in human use and consumption. That was in times prior to mass global trade. They were less concerned with ordinary tasks such as retail sales. But the purpose of state monopolies varied widely. Today, it is not a given that all remaining state monopolies are compatible with EU law. Historically, state monopolies have been of various kinds: import monopolies, export monopolies, production monopolies, wholesale monopolies, and retail monopolies, amongst others. What all types of state monopolies shared, however, was an exclusive right, in some form or another. Furthermore, all types were and are part of a good's lifecycle, and as a group, state monopolies cannot easily be categorised into one form or another.[7] Instead, when state monopolies are tested for their compatibility with EU law, a case-by-case assessment must be carried out, owing to the divergences in the types of state monopolies that exist.

By their very nature, state monopolies are an impediment to the promotion of the EU's internal market, and given their protectionist form, are an opponent of the liberalisation of European markets for goods that consumers wish to acquire. Also by their very nature, they are obstacles to cross-border trade. Yet state monopolies have been accommodated within EU law, with certain specificities. Prior to the predecessor to the EU being formed in the 1950s, state monopolies were also provided for in some international agreements as part of international economic law. For example, the General Agreement on Tariffs and Trade (GATT), through Article XVII, had a specific provision on state monopolies. Therefore, when it came to drafting the Treaty of Rome that was signed in 1957, which entered into force in 1958, it was naturally accommodating, within legal limits, of permitting the continuation of state monopolies in some form, despite the restrictions on trade that state monopolies entailed. In this vein, Sweden's eventual accession to the EU saw the issue of Sweden's state monopoly on certain alcoholic goods, come into sharp focus.

2.2 The EEA Agreement, and Accession to the EU

It was recognised that the EEA Agreement, to which Sweden became a party as an EFTA state before becoming an EU Member State,[8] which came into effect in 1994, would 'have an impact on the various alcohol monopolies in the Nordic

[7] It was once stated that, '[i]t is not difficult to imagine a monopoly with twin purposes, or a monopoly with a main and a secondary purpose'. Opinion of Advocate General Warner, Case 59/75, *Pubblico Ministero v Flavia Manghera and others*, ECLI:EU:C:1976:1, at p. 106. See Graham Butler, 'Reconciling the Special Provision on State Monopolies with the General Provisions on the Free Movement of Goods: Opinion of Advocate General Warner in *Manghera*' in Graham Butler and Adam Łazowski (eds), *Shaping EU Law the British Way: UK Advocates General at the Court of Justice of the European Union* (Hart Publishing 2022).

[8] See, Jörgen Hettne and Maria Fritz, *Sverige möter EG-rätten: EES-avtalet och dess införlivande med svensk rätt* (Nerenius & Santérus Förlag 1994); Sven Norberg and others (eds), *EG-rätten i EES: En kommentar till EES-avtalet* (Fritzes 1994).

countries'.[9] The four original Nordic states, which were not EU Member States applying the EEA Agreement,[10] made a declaration which was annexed to the EEA Agreement, to try to save their alcohol monopolies from the demands of the EEA Agreement, and by extension, EEA law.[11] The Declaration to the EEA Agreement stated that, '[w]ithout prejudice to the obligations arising under the Agreement, Finland, Iceland, Norway[,] and Sweden recall that their alcohol monopolies are based on important health and social policy considerations'.[12] That declaration, as it transpired, was of little material legal value,[13] and the EFTA Court has subsequently adjudicated upon a number of cases relating to state monopolies in EFTA states applying the EEA Agreement.[14]

Yet Sweden was only a contracting party to the EEA Agreement as a non-EU Member State for a short period of time. At the same time that the EEA Agreement came into effect, accession to the EU was on the horizon for Sweden, and it quickly acceded to the EU in 1995.[15] There was consequently a need to amend the national laws relating to alcohol. Whereas the initial six EU Member States provided for a transition period starting in 1958 for state monopolies under what is today Article 37 TFEU, which subsequently ended in 1969, no such transition

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[9] Thérèse Blanchet, Risto Piipponen and Maria Westman-Clément, *The Agreement on the European Economic Area (EEA): A Guide to the Free Movement of Goods and Competition Rules* (Clarendon Press 1994), p. 10. See generally, Graham Butler (ed), *Research Handbook on EEA Internal Market Law* (Edward Elgar Publishing 2023).

[10] Finland, Iceland, Norway, and Sweden. The other Nordic state – Denmark – was an EU Member State from 1973.

[11] On state monopolies and EEA law, see, Graham Butler and Marius Meling, 'State Monopolies and the Free Movement of Goods in EEA Law: Ensuring Substantive Homogeneity at the EFTA Court' (2022) 28 International Trade Law & Regulation 55.

[12] It is likely that, on the insistence of the Commission, the Declaration included the wording that such a declaration was 'without prejudice to the obligations arising under the Agreement'.

[13] Put more strongly, the caveated language in the sentence 'essentially eliminat[ed] the legal significance' of the declaration. Jonas W Myhre, 'Article 16 [State Monopolies of a Commercial Character]' in Finn Arnesen and others (eds), *Agreement on the European Economic Area: A Commentary* (Nomos/Hart 2018), p. 325. Indeed, as the EFTA Court later noted in *Karlsson*, 'important health and social policy considerations…are not pertinent with respect to alcohol import monopolies'. Case E-4/01, *Karlsson hf. v The Icelandic State*, Judgment of the EFTA Court of 30 May 2002, paragraph 43.

[14] Case E-1/94, *Ravintoloitsijain Liiton Kustannus Oy Restamark*, Judgment of the EFTA Court of 16 December 1994. Case E-6/96, *Tore Wilhelmsen AS v Oslo kommune*, Advisory Opinion (Judgment) of the EFTA Court of 27 June 1997. Case E-1/97, *Fridtjof Frank Gundersen v Oslo kommune, supported by the Government of the Kingdom of Norway*, Advisory Opinion (Judgment) of the EFTA Court of 3 December 1997. Case E-9/00, *EFTA Surveillance Authority v The Kingdom of Norway*, Judgment of the EFTA Court of 15 March 2002 (*Alcopops*). Case E-4/01, *Karlsson hf. v The Icelandic State*, Judgment of the EFTA Court of 30 May 2002. Case E-4/05, *HOB-vín v the Icelandic State and the State Alcohol and Tobacco Company of Iceland*, Judgment of the EFTA Court of 17 January 2006. Case E-19/11, *Vín Tríó ehf v the Icelandic State*, Judgment of the EFTA Court of 30 November 2012. For more on the state monopolies and the EEA Agreement, see Butler and Meling (n 11).

[15] Note, however, that Sweden remains a signatory state to the EEA Agreement given it is a mixed agreement ratified by the EU and its Member States.

period was put in place concerning the application of the same Article 37 TFEU to the three EU Member States which acceded to the EU in 1995, including Sweden.[16]

Therefore, as a new EU Member State, Sweden had to ensure that: the retail monopoly on alcohol sales did not discriminate against alcoholic goods produced in, or coming from, other EU Member States; and that any production, wholesale, and import monopoly linked to the retail sale were not in place. The Act of Accession for Sweden to the EU made no reference to any form of state monopoly relating to retail sale. Yet that did not prevent Sweden from nonetheless making a declaration trying to reiterate the policy significance of the state monopoly of Systembolaget.[17]

Before the EEA Agreement and accession to the EU was forthcoming, there was another state monopoly in Sweden called V&S (*Vin & Sprit*), which enjoyed the exclusive right to manufacture spirits within the state. This was coupled with the exclusive right of V&S to export such goods, and an exclusive right of import for other spirits, as well as the same exclusive rights to import beer and wine. Today, V&S is a mere producer and distributor of alcoholic goods,[18] with no such exclusive rights of any kind. Yet it was not V&S itself that engaged in the retail sale and wholesale sale of such goods.[19] Those latter exclusive rights were held by Systembolaget. Accession of Sweden to the EU had to result in fundamental changes to both V&S and Systembolaget. V&S could no longer possess exclusive rights, given it had long been the case that import monopolies (and thus, export monopolies) were prohibited under EU law; and Systembolaget could only retain its exclusive rights regarding the retail sale of alcoholic goods, in conformity with the full rigours of EU law.

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[16] The other states that became EU Member States at the same time as Sweden were Austria and Finland.

[17] Declaration by the Republic of Finland and the Kingdom of Sweden on alcohol monopolies: 'The Conference at Ministerial level was informed at its 5th meeting on 21 December 1993 of the exchange of letters between the Commission and Finland and the Commission and Sweden on alcohol monopolies under Chapter 6: Competition policy, recorded in documents CONF-SF 78/93 and CONF-S 82/93'.

[18] V&S, previously a state-owned enterprise by the Swedish government, was sold to Pernod Ricard, a French company, in 2008.

[19] As a matter of law, the wholesale trade in goods is distinct from their retail sale. Case C-234/89, *Stergios Delimitis v Henninger Bräu AG*, ECLI:EU:C:1991:91, paragraphs 16–17. The CJEU further added, '[t]hat finding is not affected by the fact that there is a certain overlap between the two distribution networks, namely inasmuch as retail sales allow new competitors to make their brands known and to use their reputation in order to gain access to the market constituted by premises for the sale and consumption of drinks'.

2.3 The State Monopoly in Sweden on the Retail Sale of Alcoholic Goods

Today, the Alcohol Law[20] in Sweden provides for a state monopoly with the exclusive right of retail sale of certain alcoholic goods within the state. Specifically, Section 1 of Chapter 5 (Retail) of the Alcohol Law (*Alkohollag*) states,

> For retail trade in spirits, wine, strong beer, and other fermented alcoholic goods and with alcohol good-like preparations, there shall be a limited company formed specifically for the purpose (the retail company). The company shall be owned by the state.[21]

That exclusive right is designated as being held by Systembolaget, which is incorporated as a private company within the state, with the Ministry of Health and Social Affairs (*Socialdepartementet*) being the sole shareholder. In other words, national law in Sweden views Systembolaget as being the only lawful place in which the retail sale of alcoholic goods, within the state, can be transacted.

Despite this exclusive right of retail sale of alcoholic goods conferred on Systembolaget by national law, there is a non-discriminatory and generally applicable derogation from this exclusive right. This is that certain alcoholic goods containing alcohol content below a certain percentage level – 2.25%[22] – may be sold through retail sale in retail premises other than Systembolaget. Thus, other economic operators in Sweden, such as supermarkets, or other retail premises, can sell certain low-alcohol content goods. There is also a special type of beer – medium beer (*folköl*)[23] – which contains 2.25% to 3.5% alcohol content, that may be sold outside of Systembolaget, indiscriminately of origin of the good. That said, however, the vast majority of alcoholic goods sold in Sweden contain alcohol content above the low percentage level of 2.25% (or 3.5% for *folköl*), and given that Systembolaget is the only point of retail sale of such alcoholic goods above this low percentage within a state of just over ten million people, Systembolaget is one of the largest single procurers and sellers of alcoholic goods in the world.

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[20] As current recast, Alkohollag (2010:1622). For a commentary, see Stefan Lundin, *Alkohollagen: Kommentarer och rättsfall* (Norstedts Juridik 2019).

[21] Author's translation. In Swedish: '*För detaljhandel med spritdrycker, vin, starköl och andra jästa alkoholdrycker och med alkoholdryckslikнande preparat ska det finnas ett särskilt för ändamålet bildat aktiebolag (detaljhandelsbolaget). Bolaget ska ägas av staten.*'

[22] Alkohollag (2010:1622), 5§: '*Dryck som är alkoholfri eller som har en alkoholhalt om högst 2,25 volymprocent benämns lättdryck.*' Author's translation: 'Drinks that are non-alcoholic, or that have alcohol content of no more than 2.25% volume, are called soft drinks'.

[23] Alkohollag (2010:1622), 5§: '*Med öl avses en dryck som framställts genom jäsning med torkat eller rostat malt som huvudsakligt extraktgivande ämne. Öl med en alkoholhalt som överstiger 2,25 men inte 3,5 volymprocent benämns folköl och öl med en alkoholhalt som överstiger 3,5 volymprocent benämns starköl.*' Author's translation: 'Beer refers to a beverage prepared by fermentation with dried or roasted malt as the main extract-giving substance. Beer with an alcohol content exceeding 2.25%, but not 3.5% by volume, is called medium beer [*folköl*], and beer with an alcohol content exceeding 3.5% by volume is called strong beer.'

Producers of alcoholic goods from around the world that are keen to get those goods sold in Sweden ultimately must succeed in getting Systembolaget to put their goods into its distribution channels, and then on sale. Systembolaget has an extensive supply chain, and it can be quite attractive for manufacturers of alcoholic goods to get within it. This means that the state monopoly controls the types and brands of alcoholic goods that make it on to the retail sale market. Systembolaget thus possesses and materially exercises extensive purchasing power. Whatever methods that Systembolaget has in place as regards product selection, there is no getting away from the fact that there is inherently a large amount of discretion involved in which alcoholic goods actually end up being offered to consumers in Sweden on the shelves of Systembolaget. Given that Systembolaget is the gateway for consumers wanting to purchase alcoholic goods in-store in Sweden, several legal issues arise relating to market access, which poses considerable issues for the compatibility of national law in Sweden relating to alcoholic goods, and EU free movement law.

The rationale put forward by the state for why there is only one commercial entity owned by the state – Systembolaget – where the retail sale of alcoholic goods can be transacted, involves the aims to protect public health and of wanting to ensure the reduced consumption of alcohol within the state. Whilst it is accepted that EU Member States have important roles to play as regards protecting public health, such aims, however well-intentioned, do not allow EU Member States *carte blanche* powers to do as they see fit. It is recalled that any national measures taken by a state, whatever they are, have to be exercised in line with a general principle of EU law: proportionality.[24]

There are numerous ways in which EU Member States can act in trying to reduce and minimise the consumption of alcoholic goods. On the extreme end of the regulatory spectrum, bans, or quotas can be imposed, but they rarely work, given the potential that such national measures creates for black markets to arise. In EU law, bans or quotas are a form of what are known as quantitative restrictions (QRs). Rules which do not amount to a quantitative restriction, but nonetheless are measures that impede cross-border trade are considered other obstacles, barriers, or hinderances to trade, are known as 'measures having equivalent effect' to quantitative restrictions (MEEQRs). Both QRs and MEEQRs are, in principle, incompatible with EU law, unless such exceptions are justified and proportionate, and such exceptions must always be construed narrowly.

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[24] On proportionality as a general principle of EU law, see Takis Tridimas, *The General Principles of EU Law* (Second Edition, Oxford University Press 2006), chapters 4 and 5. For a more recent assessment, see, Takis Tridimas, 'The Principle of Proportionality' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law: Volume 1: The European Union Legal Order* (Oxford University Press 2018), and, Eirik Bjorge and Jan Zglinski, 'The Principle of Proportionality in EU Law and Its Domestic Application: Ni Tout à Fait Le Même, Ni Tout à Fait Un Autre' in Katja Ziegler, Päivi Johanna Neuvonen and Violeta Moreno-Lax (eds), *Research Handbook on General Principles in EU Law: Constructing Legal Orders in Europe* (Edward Elgar Publishing 2022).

3 EU Free Movement Law: Goods, State Monopolies, and the Case Law

Within the EU Treaties – EU primary law – there are several provisions related to the free movement of goods. Of particular interest as regards national laws relating to alcohol, is Chapter 3 (Prohibition of Quantitative Restrictions between Member States), contained within Title II (Free Movement of Goods), which in turn is within Part Three (Union Policies and Internal Actions) in the Treaty on the Functioning of the European Union (TFEU).

Despite the articles contained there being relatively short provisions, they cannot be read in isolation from one another. In fact, the CJEU has delivered hundreds of rulings based on these articles over the decades.[25] In light of the way in which the way they are framed, a distinction within Chapter 3 needs be drawn right away. First, Article 37 TFEU is categorised as the 'special provision' concerning the free movement of goods, given that it concerns state monopolies alone (Section 3.1). Second, Articles 34–36 TFEU are categorised as the 'general provisions' concerning the free movement of goods, given that they concern imports, exports, and possible grounds of exception (Section 3.2).

Third, where the dividing line between the special provision and the general provisions lies is not clear from the EU Treaties. Thus, it has been left for the CJEU to draw the lines (Section 3.3). Fourth, given that it has been questionable whether certain state monopolies – including Systembolaget – are indeed compatible with EU law, the CJEU once upon a time stated that they may pursue a 'public interest aim', though the credibility of such reasoning is most uncertain (Section 3.4). Fifth, the report demonstrates how the Court, today, adjudicates on the basis of the general provisions of Articles 34–36 TFEU, and considers the ramifications of this development (Section 3.5).

[25] For the most comprehensive assessments of the free movement of goods provisions, two books stand out for their comprehensive analysis of the law concerning these provisions. See, Peter Oliver (ed), *Oliver on Free Movement of Goods in the European Union* (Hart Publishing 2010), and, Laurence W Gormley, *EU Law of Free Movement of Goods and Customs Union* (Oxford University Press 2009). For an earlier monograph study, see Laurence W Gormley, *Prohibiting Restrictions on Trade within the European Economic Community: The Theory and Application of Articles 30–36 of the EEC Treaty* (Elsevier Science Publishers 1985).

3.1 The Special Provision of Article 37 TFEU Concerning Goods and State Monopolies

Presently, Article 37 TFEU states:

> 1. Member States shall adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.
>
> The provisions of this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others.
>
> 2. Member States shall refrain from introducing any new measure which is contrary to the principles laid down in paragraph 1 or which restricts the scope of the articles dealing with the prohibition of customs duties and quantitative restrictions between Member States.
> 3. If a State monopoly of a commercial character has rules which are designed to make it easier to dispose of agricultural products or obtain for them the best return, steps should be taken in applying the rules contained in this Article to ensure equivalent safeguards for the employment and standard of living of the producers concerned.

Whilst it is certain that the special provision of Article 37 TFEU has direct effect, it is nonetheless plagued with obscurity[26] given its unclear relationship with the general provisions of Articles 34–36 TFEU, as well as other parts of EU primary law. It has even been claimed that the difficulties with the special provision of Article 37 TFEU are 'legendary'.[27] Despite the wording being more elaborate than the import provision of Article 34 TFEU and the export provision of Article 35 TFEU contained in the general provisions, the additional text of the special provision of Article 37 TFEU does not alleviate the confusion that has long surrounded it.[28] In the famous *Costa v ENEL* case, the CJEU stated that Article 37 TFEU suffered from 'complexity'.[29] But the reasons for having a special provision on state monopolies have resulted in 'technical ramifications',[30] which have the consequence of generating equally technical interpretations by national actors (including national courts) and in the judgments of the CJEU.

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[26] See, Butler, 'State Monopolies and the Free Movement of Goods in EU Law: Getting Beyond Obscure Clarity' (n 6), p. 287, citing, Claude-Albert Colliard, 'L'obscure clarité de l'article 37 du traité de la communauté économique européene' [1964] Recueil Dalloz 263, who coined the phrase 'obscure clarity'.

[27] José Luis Buendía Sierra, *Exclusive Rights and State Monopolies under EC Law Article 86 (Former Article 90) of the EC Treaty* (Oxford University Press 2000), p. 77.

[28] See, Opinion of Advocate General Tesauro, Case C-202/88, *France v Commission*, ECLI:EU:C:1990:64 (*Terminals Equipment*), paragraph 11.

[29] Case 6/64, *Flaminio Costa v ENEL*, ECLI:EU:C:1964:66, p. 598. *Costa v ENEL* is the case known for establishing the primacy of EU law.

[30] See Derrick Wyatt, 'State Monopolies of a Commercial Character' (1980) 5 European Law Review 213.

Accordingly, it is no surprise that in the vast majority of well-known books and materials on EU law, analysis of the special provision of Article 37 TFEU, and the ensuing case law, is largely omitted. As argued in more specialised literature,[31] the continued presence of the special provision of Article 37 TFEU in the EU Treaties means that dealing with situations like state monopolies in possession of exclusive rights of retail sale is more complicated than it otherwise should and could be. The reason for including Article 37 TFEU in the EU Treaties was due to how international economic law stood when the Treaty of Rome was being drafted in the 1950s.[32]

In some quarters, it might be pleaded that the special provision of Article 37 TFEU must be seen as an exception to the free movement of goods, but this would be the incorrect way to understand the matter. In no way should the special provision of Article 37 TFEU be seen as an exception, but rather, and as will be demonstrated, it is merely special.[33] Rather, a more appropriate way to read the special provision of Article 37 TFEU would be to ensure that the general provisions concerning the free movement of goods, such as the Article 34 TFEU, would not be circumvented by an EU Member State having a state monopoly in place. Furthermore, it is to be noted that in an Article 37 TFEU situation, it is not possible for Member States to invoke the grounds of exception in Article 36 TFEU. Article 36 TFEU is unequivocal that it only applies to 'Articles 34 and 35' TFEU, and, therefore, does not apply to situations governed by Article 37 TFEU.

Despite initially hesitating about whether the applicable test when assessing national measures under the special provision of Article 37 TFEU is a discrimination test, or the more all-encompassing restrictions test, as seen in *Manghera*,[34] the CJEU later confirmed that the standard is a mere discrimination test.[35] Restrictions are inherent in a state monopoly, which is perhaps the reason that the CJEU has never endorsed a restrictions test in situations concerning the special provision of Article 37 TFEU, which it ordinarily applies as regards the general provisions of Article 34 TFEU concerning imports. With regard to Sweden specifically, it was accepted by the Commission and Sweden, given the case law at that time, pre-accession, that Systembolaget would have to be compatible with the special provision of Article 37 TFEU. Thus, the anticipated obligation was that Sweden would have to ensure that there would be no discrimination as regards the national law concerning the retail sale of alcoholic goods.

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[31] See Butler, 'State Monopolies and the Free Movement of Goods in EU Law: Getting Beyond Obscure Clarity' (n 6).

[32] See section 2.1 of this report.

[33] Instead, Article 36 TFEU, the exception within the general provisions, is the only provision in Chapter 3 to be understood as an exception.

[34] Case 59/75, *Pubblico Ministero v Flavia Manghera and others*, ECLI:EU:C:1976:14.

[35] Butler, 'State Monopolies and the Free Movement of Goods in EU Law: Getting Beyond Obscure Clarity' (n 6), pp. 300–304.

The current state of the case law of the CJEU as regards the special provision of Article 37 TFEU is that it rarely arises. In fact, most cases relating to state monopolies that have come before the CJEU in the past twenty years have seen national measures by Member States assessed under the general provisions of Articles 34–36 TFEU instead. Whilst the CJEU has not confirmed that the special provision of Article 37 TFEU is no longer relevant, it has certainly fallen out of favour.

3.2 The General Provisions of Articles 34–36 TFEU Concerning Goods

The general provisions relating to the free movement of goods are contained in Articles 34–36 TFEU.

Article 34 TFEU states:

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

Article 35 TFEU provides that:

> Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.[36]

Article 36 TFEU states:

> The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Article 34 TFEU is directly applicable, and has (vertical) direct effect, and in broad terms concerns market access for economic operators.[37] Whilst it does not

[36] For the purposes of this report, the relevance of Article 35 TFEU and exports are not considered further, given that the contemporary issues related to Sweden do not concern the export of alcoholic goods.

[37] On the notion of market access, see Robert Schütze, *European Union Law* (Third Edition, Oxford University Press 2021), pp. 534–537; Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (Seventh Edition, Oxford University Press 2022), chapters 3 and 4. For the case law on this point, see Case C-110/05, *Commission v Italy*, ECLI:EU:C:2009:66 (*Trailers*), and, Case C-142/05, *Åklagaren v Percy Mickelsson and Joakim Roos*, ECLI:EU:C:2009:336. On the issues of 'use' of goods, see, Johan Lindholm and Mattias Derlén, 'Article 28 E.C. and Rules on Use: A Step towards a Workable Doctrine on Measures Having Equivalent Effect to Quantitative Restrictions' (2010) 16 Columbia Journal of European Law 191.

prevent EU Member States from regulating trade within their own jurisdiction, it does prevent them from imposing national measures that inhibit or hinder access to the market of goods produced in, or coming from other EU Member States. If it is to be understood that national measures concerning the retail sale of alcoholic goods come within the scope of Article 34 TFEU, then attention can immediately turn to Article 36 TFEU to see whether it offers EU Member States any justifiable and proportionate grounds for derogation from the prohibition laid down in Article 34 TFEU.

Article 36 TFEU provides, *inter alia*, for 'the protection of health and the life of humans'. It was back in the *De Peijper* case that the CJEU stated that the health and life of humans as contained in Article 36 TFEU 'rank first among the property or interests protected by Article 36 TFEU'.[38] However, the CJEU has also been keen to reassert the full wording of Article 36 TFEU, in that for national measures to be permissible that breach Articles 34 TFEU, they 'shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'.[39]

Furthermore, the CJEU has recognised in *Ahokainen and Leppik* that there is a possibility for national measures, compatibly with EU law, 'to prevent the harmful effects caused to health and society by alcoholic substances', and that, 'combat[ing] alcohol abuse reflects health and public policy concerns recognised by Article [36 TFEU]'.[40] But such assessment of national measures would have to be done on a case-by-case basis. The case law under the general provision of Article 36 TFEU has given no *carte blanche* to EU Member States. It is well established as regards the free movement of goods that the justification grounds contained in Article 36 TFEU are merely *possible* exceptions, and not absolute exceptions. Within EU law, exceptions invoked by EU Member States to impede free movement are always interpreted narrowly. Moreover, any measures by Member States must always be tested to ensure that they comply with the general principle of proportionality. This means that national measures must not go beyond what is necessary to achieve a declared objective, and that EU Member States must adopt the least extensive restrictions or obstacles to cross-border trade, where such are possible,[41] in order to achieve a desired objective.

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[38] Case 104/75, *Adriaan de Peijper, Managing Director of Centrafarm BV*, ECLI:EU:C:1976:67, paragraph 15. It did go on to state that, '… it is for the Member States, within the limits imposed by the Treaty, to decide what degree of protection they intend to assure and in particular how strict the checks to be carried out are to be'.

[39] For early restatement and forcefulness of not forgetting this aspect of Article 36 TFEU, see Case 152/78, *Commission v France*, ECLI:EU:C:1980:187 (*Advertising of Alcoholic Beverages*), paragraph 17.

[40] Case C-434/04, *Criminal proceedings against Jan-Erik Anders Ahokainen and Mati Leppik*, ECLI:EU:C:2006:609, paragraph 28.

[41] See, for example, Case C-17/93, *Criminal proceedings against J.J.J. Van der Veldt*, ECLI:EU:C:1994:299.

3.3 The Separability of the Special Provision and the General Provisions

Given the special provision of Article 37 TFEU and the general provisions of Articles 34–36 TFEU, it is less than clear when they apply to a state monopoly: separately, or cumulatively; and if applied separately, under which provision(s) should a state monopoly be scrutinised. As will be demonstrated, the case law of the CJEU on such matters has varied over time. As seen in the Opinions of the two Advocates General in *Rosengren*, one stated that separability has been 'anything but a straightforward exercise',[42] and the other described delimiting the inseparable from the separable as 'not unambiguous'.[43] Similarly in *Visnapuu*, the Advocate General there stated that the issue of separability had 'some ambiguity'.[44] Distinguishing between the two is uncertain when anything concerning state monopolies and the free movement of goods comes before the CJEU.

The formative case law of the CJEU concerning state monopolies did not engage in analysis concerning separability of these provisions at all. Instead, it merely subjected national measures concerning state monopolies to scrutiny under the special provision of Article 37 TFEU alone. For the purposes of illustration, in *Cinzano*, the CJEU stated that the special provision was:

> 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, whether or nor* [sic] *subject to the monopoly*.[45]

In other words, anything to do with state monopolies was to be assessed under the special provision of Article 37 TFEU alone, and not the general provisions of Articles 34–36 TFEU. Likewise in *Miritz*, the CJEU stated that Article 37 TFEU was:

> 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, *whether or not subject to the monopoly*.[46]

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[42] Opinion of Advocate General Tizzano, Case C-170/04, *Klas Rosengren and Others v Riksåklagaren*, ECLI:EU:C:2006:213, paragraph 33.

[43] Opinion of Advocate General Mengozzi, Case C-170/04, *Klas Rosengren and Others v Riksåklagaren*, ECLI:EU:C:2006:213, paragraph 32.

[44] Opinion of Advocate General Bot, Case C-198/14, *Valev Visnapuu v Kihlakunnansyyttäjä (Helsinki) and Suomen valtio – Tullihallitus*, ECLI:EU:C:2015:463, paragraph 123.

[45] Case 13/70, *Francesco Cinzano & Cia GmbH v Hauptzollamt Saarbrücken*, ECLI:EU:C:1970:110, paragraph 5, emphasis added.

[46] Case 91/75, *Hauptzollamt Göttingen and Bundesfinanzminister v Wolfgang Miritz GmbH & Co.*, ECLI: EU:C:1976:23, paragraph 8, emphasis added.

But that changed starting from the seminal *Cassis de Dijon* judgment.[47] There, the CJEU stated that a separation must be made between the special provision and the general provisions, when assessing national measures relating to or concerning state monopolies. This amounted to a partial overruling of its prior case law in *Cinzano*, *Manghera*, and *Miritz*.

As the CJEU stated in *Cassis de Dijon*:

> *Article 37 [TFEU]* relates specifically to [s]tate monopolies of a commercial character.
>
> That provision *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* — but apply in a general manner to the production and marketing of alcoholic beverages, whether or not the latter are covered by the monopoly in question.
>
> That being the case, the effect on intra-[Union] trade of the measure referred to by the national court must be examined solely in relation to the requirements under Article [34 TFEU]…[48]

Therefore, the CJEU held that national measures relating to alcoholic goods can indeed be separable. The CJEU had affirmed that separating out the various national measures had to be undertaken, with some but not defined national measures assessed for their compatibility with the special provision of Article 37 TFEU, and other national measures assessed under the general provisions of Articles 34–36 TFEU. Yet the CJEU did not provide any further elaboration whatsoever on how such separation was to be undertaken. Thereafter, the CJEU has affirmed its separability approach,[49] but, again, without explanation.

Such developments, much later, led to *Franzén*, where the CJEU then stated that the special provision of Article 37 TFEU was aimed 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*.[50]

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[47] Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1979:42 (*Cassis de Dijon*). This judgment is known for many things, including the introduction of the doctrine of mutual recognition within the meaning of Article 34 TFEU, and the introduction of the doctrine of mandatory requirements, subject to the general principle of proportionality. It is less known for its significance regarding Article 37 TFEU. On this point, Butler, 'State Monopolies and the Free Movement of Goods in EU Law: Getting Beyond Obscure Clarity' (n 6), pp. 292–293.

[48] Case C-120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1979:42 (*Cassis de Dijon*), paragraph 7, emphasis added.

[49] For example, Case 86/78, *SA des grandes distilleries Peureux v directeur des Services fiscaux de la Haute-Saône et du territoire de Belfort*, ECLI:EU:C:1979:64 (*Peureux I*), paragraph 35.

[50] Case C-189/95, *Criminal proceedings against Harry Franzén*, ECLI:EU:C:1997:504, paragraph 39, emphasis added.

Much like in *Cassis de Dijon*, however, the CJEU in *Franzén* did not explain what is inherent in the existence of a state monopoly.

3.4 The Special Provision of Article 37 TFEU and the Outlier Judgment of Franzén

Up to the mid-1990s, the CJEU had always ensured that state monopolies did not engage in discriminatory behaviour. So when the *Franzén* case arrived at the CJEU, referred to it from a Swedish court, it was the first opportunity that the CJEU was given to pronounce on the adjustments made by Sweden to Systembolaget as a result of the state's accession to the EU. *Franzén* is a well-known case of a poorly reasoned, and incoherent judgment; that would be unlikely to be able to stand the test of time.

Out of nowhere in its judgment, the CJEU in *Franzén* made a statement in which it backed itself into a corner, from which it has later tried to escape. The CJEU claimed that there was a 'public interest aim[…]' that applied in situations governed by the special provision of Article 37 TFEU. It had never stated such a claim before, despite having adjudicated upon a string of state monopolies in other EU Member States in prior cases.

Specifically, the CJEU in *Franzén* stated that:

> The purpose of Article 37 [TFEU]…is to reconcile the possibility for Member States to maintain certain monopolies of a commercial character as instruments *for the pursuit of public interest aims* with the requirements of the establishment and functioning of the common market. It 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.[51]

This was remarkable since it came late in the development of the case law on state monopolies. In effect, the CJEU stretched the theory of the general provision of Article 36 TFEU, the possible grounds of exception – but not Article 36 TFEU itself – to national measures assessed under the special provision of Article 37 TFEU. The CJEU spoke of the 'public interest aim' as if that special provision of Article 37 TFEU were in itself an exception. Textually, Article 36 TFEU rules out its application to national measures assessed under the special provision of Article 37 TFEU.

In very early case law, the CJEU indeed precluded applying the exception contained in the general provision of Article 36 TFEU to a free movement of goods case concerning customs matters. In *Commission v Italy (Works of Art)*, the CJEU did not accept the possibility that the grounds of exception contained

[51] Case C-189/95, *Criminal proceedings against Harry Franzén*, ECLI:EU:C:1997:504, paragraph 39, emphasis added.

in Article 36 TFEU could be applied to situations concerning customs duties and charges having equivalent effect as contained in Articles 28–30 TFEU. As helpfully noted by the Advocate General in *Commission v Italy (Manufactured Tobacco)*, Article 36 TFEU 'unambiguously rules out' its application to national measures assessed under the special provision of Article 37 TFEU.[52]

Indeed, in the *Electricity* cases,[53] in which the judgments were delivered by the CJEU on the same day as the *Franzén* judgment, the CJEU explicitly ruled out the possibility of using the possible grounds of exception contained in Article 36 TFEU to national measures examined under Article 37 TFEU.[54] And yet it did so in *Franzén*! As the Advocate General stated in his Opinion in *Franzén*, which he delivered prior to the Court's judgment in the case: '[t]he wording of the Treaty provides no support for the assumption that Article 37 [TFEU] … derogates from the fundamental rule on the free movement of goods laid down in Article [34 TFEU]'.[55]

A closer reading of the operative part of the judgment in *Franzén*, which the national court had to apply, did not implicate a test of any kind to be applied in future cases. Rather, it merely stated that the special provision of Article 37 TFEU does not preclude the national measures regarding the retail sale of certain alcoholic goods 'such as those mentioned in the order for reference'. That meant that the national measures in the case at hand, as they then stood, at that time. Prior to the *Franzén* judgment, there had never been a 'public interest aim' in the special provision of Article 37 TFEU. This was not stated in EU primary law, and the CJEU appeared to have created it out of thin air. The CJEU also provided no guidance on what a public interest aim actually was, or was not. Nor did it state anything about the necessity or proportionality of a public interest aim. And nor did it elaborate on it when it reiterated it in its *Hanner* judgment some years thereafter.[56] The CJEU in *Hanner* was equally unable to define what a public interest aim was.

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[52] Opinion of Advocate General Rozès, Case 78/82, *Commission v Italy*, ECLI: EU:C:1983:109 (*Manufactured Tobacco*), p. 1984.

[53] The *Electricity* cases were four, with separate judgments, but all were delivered the same day. Case C-157/94, *Commission v Netherlands*, ECLI:EU:C:1997:499 (*Electricity*); Case C-158/94, *Commission v Italy*, ECLI:EU:C:1997:500 (*Electricity*); Case C-159/94, *Commission v France*, ECLI:EU:C:1997:501 (*Electricity*). The fourth of these cases, did not deal with the issue: Case C-160/94, *Commission v Spain*, ECLI:EU:C:1997:502 (*Electricity*).

[54] By illustration to just one of the *Electricity* judgment, see, Case C-157/94, *Commission v Netherlands*, ECLI:EU:C:1997:499 (*Electricity*), paragraph 24.

[55] Opinion of Advocate General Elmer, Case C-189/95, *Criminal proceedings against Harry Franzén*, ECLI:EU:C:1997:101, paragraph 71.

[56] Case C-438/02, *Criminal proceedings against Krister Hanner*, ECLI:EU:C:2005:332, paragraph 35. See, Jörgen Hettne, 'Apoteksdomen: Monopolet på fallrepet?' [2005] Europarättslig tidskrift 562.

Getting to the true heart and meaning of a public interest aim has proven to be next to impossible. The operative part of the *Hanner* judgment is quite telling, in that it merely stated that the special provision of Article 37 TFEU precludes a sales regime that 'is arranged in the same way as the sales regime at issue in the main proceedings'. This was similar to the way in which the CJEU had ruled in *Franzén*. This clearly tried to limit the precedential basis of the judgment and the reliance upon the special provision of Article 37 TFEU. In fact, the judgment of the CJEU in *Hanner* remains the last judgment of the CJEU in which it has decided a case upon the special provision of Article 37 TFEU. Thus, the lasting precedential value of *Franzén* has proven to be limited.

3.5 The Case Law and the Move Away from the Special Provision of Article 37 TFEU

Since *Hanner* – a case concerning pharmacies in Sweden – the CJEU has not decided a single further case on the basis of the special provision of Article 37 TFEU. In fact, in all cases since that have been in some way related to state monopolies, the CJEU has assessed the compatibility of national measures with the general provisions of Articles 34–36 TFEU.

For example, in *Rosengren*, the national measures that were the subject of the dispute in question (*viz*: the prohibition of private imports) were in some way related to the exclusive right of retail sale that Systembolaget possessed. Yet the CJEU found the national measures separable from the state monopoly, notwithstanding that the national measures would have had an effect upon the state monopoly.

In *Rosengren,* the CJEU construed the special provision of Article 37 TFEU more narrowly than it ever had before, despite the fact that the national measures were related to the state monopoly. This was contrary to its *Franzén* judgment. The CJEU in *Rosengren* went as far to state that rules related to the prohibition of consumers privately importing alcoholic goods produced in, or from other EU Member States:

> cannot be regarded as constituting a rule relating to the existence or operation of the monopoly.[57]

This thus meant that national measures relating to private imports had to be assessed for their compatibility with the general provisions of Articles 34–36 TFEU. Therefore, the widest effect of the separability test arising from the *Cassis de Dijon* case was seen in full, where national measures concerning private imports were separable from the state monopoly.

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[57] Case C-170/04, *Klas Rosengren and Others v Riksåklagaren*, ECLI:EU:C:2007:313, paragraph 26. See, Martin Johansson, 'Rosengren – A "*Franzén* Light"?' [2007] Europarättslig tidskrift 608.

The CJEU's decision that national measures concerning private imports were not to be assessed under the special provision of Article 37 TFEU had two distinct implications. First, the CJEU did not have to deal with applying the possible exemption in Article 36 TFEU to national measures assessed under the special provision of Article 37 TFEU, given that Article 37 TFEU would not be applicable. Given that the CJEU got itself into a contradictory bind over this in its *Franzén* judgment, this was a welcome clarification. Second, it meant that the CJEU also avoided delving into the applicable of any possible 'public interest aim' any further than it had previously done in *Franzén* and *Hanner*. This avoidance of dealing with a potential public interest aim was also welcome, given the critique (and ridicule) of the 'public interest aim' that the CJEU declared in *Franzén*.[58]

With *Rosengren* being a sign of a turn in the case law, with the special provision of Article 37 TFEU playing a lesser role, there was still more of it to come. The decline of the relevance of Article 37 TFEU concerning matters related to state monopolies was further exemplified in *Commission v Sweden (Private Imports)*. Like in *Rosengren*, Sweden claimed that the prohibition of private imports on alcoholic goods was not caught by the general provisions of Articles 34–36 TFEU, but instead fell within the special provision of Article 37 TFEU. Sweden specifically tried to rely upon the CJEU's prior judgement in *Franzén*, but this was rejected by the Court. Rather, the CJEU stated, as it had in *Rosengren*, that the national measures were separable from the state monopoly[59] and thus subject to assessment under the general provisions of Articles 34–36 TFEU.

This was also the scenario in *Visnapuu*,[60] a case referred to the CJEU by a national court in Finland. It appeared that the national law in Finland was in line with what the CJEU had stated in *Rosengren*, in that the private imports of alcoholic goods were permissible. It also appeared that Finland's national law was in line with *Commission v Sweden (Private Imports)*, in that the national measures permitted the import of the goods by independent intermediaries and professional transporters designated by consumers. In other words, the purchase of alcoholic goods produced in and coming from other EU Member States, that were subsequently imported into Finland, were to be accompanied by a third party who, importantly, was an entity other than the seller. In other words,

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[58] For a scathing critique of the *Franzén* judgment, see Opinion of Advocate General Léger, Case C-438/02, *Criminal proceedings against Krister Hanner*, ECLI:EU:C:2004:317, paragraphs 74–81, and the full Opinion of the Advocate General offered in that regard. See also, Butler, 'State Monopolies and the Free Movement of Goods in EU Law: Getting Beyond Obscure Clarity' (n 6).

[59] Case C-186/05, *Commission v Sweden*, ECLI:EU:C:2007:571 (*Private Imports*), paragraphs 22–26.

[60] Case C-198/14, *Valev Visnapuu v Kihlakunnansyyttäjä (Helsinki) and Suomen valtio – Tullihallitus*, ECLI:EU:C:2015:751. See Jörgen Hettne, 'Alkotaxi och alkoholpolitik – E-handel och gårdsförsäljning i Finland' [2016] Europarättslig tidskrift 469.

Finland stated that the seller and the importer/cross-border transporter could not be the same entity. This was in the name of preserving the exclusive right of retail sale of the state monopoly on alcoholic goods.

In *Visnapuu*, the CJEU did not engage in a separability approach, but continued with the way in which it approached the matter in *Rosengren*. This demonstrates that the CJEU appears to have stopped engaging in separability, and instead, assesses matters related to or concerning state monopolies under the general provisions of Articles 34–36 TFEU only. In other words, the special provision of Article 37 TFEU now no longer appears relevant to scrutinising national measures related to state monopolies. *Visnapuu* was the fourth case in a line of recent post-*Hanner* cases in which the special provision of Article 37 TFEU could have been used to assess national measures. Instead, in *Rosengren*, *Commission v Sweden (Private Imports)*, *ANETT*, and *Visnapuu*, the CJEU assessed all the national measures in question under the general provisions of Articles 34–36 TFEU.

Without doubt, the demarcation line between the special provision and general provisions is 'at best unclear'.[61] Case law up until now has not rectified this. It is thus submitted that the CJEU's current approach of assessing national measures related to state monopolies and the free movement of goods by means of only the general provisions of Articles 34–36 TFEU is the correct one. After all, pinpointing what is and is not inherently part of a state monopoly has always been a convoluted, indeterminate, and imprecise undertaking, and the ill-conceived 'public interest aim' was never explained by the CJEU.

Given the current case law, EU law demands that national courts in EU Member States make the necessary references for a preliminary ruling under Article 267 TFEU when faced with national measures that relate in any way to state monopolies and the free movement of goods so that the CJEU is given the opportunity to determine matters on a case-by-case basis, thus providing a clear judgement for national courts and tribunals to apply.

[61] Gormley (n 25)., p. 443.

4 Private Imports, Attempts to Prevent Them, and Liberalising the Retail Sale of Domestically Produced Alcoholic Goods

Two things have become clearer under the current state of the case law from the CJEU arising from the entirety of the provisions in the EU Treaties related to the free movement of goods. First, Systembolaget has thus far managed to continue to possess, as a matter of law, its exclusive right to engage in the retail sale of alcoholic goods within Sweden. Second, it is possible for alcoholic goods to be imported into Sweden from other Member States by economic operators, thereby enabling the goods to reach consumers in Sweden. In other words, a distinction can be drawn between retail sale and private import.

While an analysis on alcoholic goods and state monopolies in Sweden has been historically undertaken,[62] much has changed in the current era. There are several matters which have arisen concerning, in particular, private imports of alcoholic goods into Sweden (Section 4.1), attempts by the state monopoly to use the national courts in Sweden to restrict private imports (Section 4.2) and potential changes to national laws in Sweden concerning the retail sale of alcoholic goods (Section 4.3). Each of these is analysed in turn.

4.1 Private Imports, and Goods Imported from Other EU Member States

Systembolaget cannot be the sole intermediary of the private import of alcoholic goods from other EU Member States. As has been known since the *Manghera*

[62] For example, see Martin Johansson, 'The EC Court of Justice and the Swedish Monopolies – An Analysis of the Case Law on State Monopolies' in Per Cramér and Thomas Bull (eds), *Swedish Studies in European Law*, vol 2 (Hart Publishing 2008); Jörgen Hettne, 'Transforming Monopolies: EU-Adjustment or Social Changes?' in Lars Pehrson, Lars Oxelheim and Sverker Gustavsson (eds), *How Unified Is the European Union? European Integration Between Visions and Popular Legitimacy* (Springer 2009); Jörgen Hettne, 'EU, monopolen och försvaret av den rådande ordningen' [2004] Europarättslig tidskrift 589; Jörgen Hettne, 'Har Sverige spelat bort sina monopol? EU och svenska lagstiftningsstrategier' [2004] Ny Juridik 7.

judgement in 1976,[63] import monopolies (that is, the exclusive right to import goods), including for alcoholic goods, have long been contrary to EU law. The modern case law of the CJEU also reiterates this, but the prohibition of exclusive rights to import is captured by the general provision of Article 34 TFEU.[64] Practically, this means that if it is permissible as a matter of EU law to have the exclusive right of retail sale of certain goods through a state monopoly, but there is a prohibition on the existence of import monopolies, then certain goods that are subject within the state to a state monopoly on retail sale must be possible to import privately. Having the possibility to privately import goods from other Member States is important for consumers, since they have an even greater range of goods from which to choose.

What a 'private import' is, however, was once upon a time very uncertain. Today, thanks to the case law of the CJEU relating to Sweden, what counts as a 'private import' can now be determined on the basis of a number of factors. Owing to the *Rosengren* and *Commission v Sweden (Private Imports)* judgments, private imports of alcoholic goods are permitted, and the exclusive right of retail sale within the state of the state monopoly is not affected. What is intriguing about this case law is that it is based upon the general provision of Article 34 TFEU, in which the grounds of possible exception contained in Article 36 TFEU as regards the protection of public health could not necessarily be relied upon. For example, it has long been the case that potential grounds like public health in Article 36 TFEU are only possible 'within the limits set by the Treaty and must, in particular, comply with the principle of proportionality'.[65] In any event, an invocation of Article 36 TFEU, 'shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States',[66] even if it is 'expressly specified' in Article 36 TFEU.[67] The health risk must be genuine, and scientifically proven. As put by the Court in *Van der Veldt*, '[health] risk must be measured, not according to the yardstick of general conjecture, but on the basis of relevant scientific research'.[68]

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[63] Case 59/75, *Pubblico Ministero v Flavia Manghera and others*, ECLI:EU:C:1976:14. Note that in *Manghera*, the CJEU decided the case on the basis of Article 37 TFEU, which was normal for the time. It was only later in *Cassis de Dijon* that the Court began engaging in separability (see section 3.3 of this report).

[64] On imports by retailers, see Case C-456/10, *Asociación Nacional de Expendedores de Tabaco y Timbre (ANETT) v Administración del Estado*, ECLI:EU:C:2012:241, paragraphs 25–26.

[65] Joined Cases C-1/90 and C-176/90, *Aragonesa de Publicidad Exterior SA and Publivía SAE v Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña*, ECLI:EU:C:1991:327, paragraph 16.

[66] Article 36 TFEU, last sentence.

[67] Case 152/78, *Commission v France*, ECLI:EU:C:1980:187, paragraph 17.

[68] Case C-17/93, *Criminal proceedings against J.J.J. Van der Veldt*, ECLI:EU:C:1994:299, paragraph 17. This pointed to Case 178/84, *Commission v Germany*, ECLI:EU:C:1987:126 (*Beer Purity*), for authority on the use of relevant scientific research as a determining factor.

At issue in *Rosengren* was the absolute prohibition on imports of certain alcoholic goods. It was not that the state monopoly had the sole right to import certain goods, but rather, that individuals were not allowed to undertake private imports. The CJEU found that the ban on private imports, in effect, a quantitative restriction, 'cannot be regarded as constituting a rule relating to the existence or operation of the monopoly',[69] and thus the special provision of Article 37 TFEU was 'irrelevant'.[70] Consequently, all national measures related to private imports are separable from rules concerning a state monopoly. Therefore, a private import comes under the general provisions of Articles 34–36 TFEU.

The *Rosengren* judgment established that private imports of goods from other EU Member States, that would otherwise only be sold in a state monopoly within an EU Member State, was possible, and that to impede private imports was incompatible with the general provisions of Articles 34–36 TFEU. But the very matter of a 'private' import was also open to wider interpretation. The judgment in *Rosengren* suggested that the private import of goods did not have to be done by the buyers themselves. As the CJEU stated:

> the fact that private individuals are prohibited from importing such beverages directly into Sweden, without personally transporting them, in the absence of a counter-balancing 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.[71]

But the *Rosengren* judgment was not completely clear whether persons, other than the consumers themselves, personally, could do the importing. A determinable factor regarding whether something is a private import or not might depend on whom actually doing the importing, and thus, the transportation. Furthermore, a question might linger over who selects the transporter: the buyer or the seller.

The Commission was of the view that the general provision of Article 34 TFEU regarding imports meant that it was open to 'independent intermediaries and professional transporters' designated by the purchaser. Simultaneously with the *Rosengren* case pending before the CJEU, the Commission brought Sweden before the CJEU through the infringement procedure contained in Article 258 TFEU. In the proceedings, the Commission pleaded that arising from the national law, private persons – consumers – residing in Sweden could not purchase certain alcoholic goods for their own consumption from producers or retailers located in other EU Member States, and have such alcoholic goods sent

[69] Case C-170/04, *Klas Rosengren and Others v Riksåklagaren*, ECLI:EU:C:2007:313, paragraph 26.
[70] Case C-170/04, *Klas Rosengren and Others v Riksåklagaren*, ECLI:EU:C:2007:313, paragraph 26.
[71] Case C-170/04, *Klas Rosengren and Others v Riksåklagaren*, ECLI:EU:C:2007:313, paragraph 33.

to them in Sweden.[72] Accordingly, as alleged by the Commission, the national law of Sweden prohibited private imports of alcoholic goods into Sweden, and such measures were an obstacle to cross-border trade.

In essence, the CJEU agreed with the Commission, and in *Commission v Sweden (Private Imports)*, delivered a few months after its judgment in *Rosengren*, it stated that a prohibition in national law on private imports by consumers, other than consumers themselves, was incompatible with EU law. The CJEU clarified that 'independent intermediaries and professional transporters'[73] can conduct the private import of alcoholic goods on behalf of consumers. In other words, the private import of a good does not physically have to accompany a person, and could instead be done by persons other than the actual purchaser. For Sweden to demand that the seller and transporter be different parties was a breach of Article 34 TFEU, and one that is not justified on the basis of Article 36 TFEU. Nonetheless, to make use of the possibility for private imports, as established under *Rosengren* and *Commission v Sweden (Private Imports)*, both economic operators and consumers have to be strategic and careful, to ensure the conditions necessary for something to be a private import are met.

4.2 Attempts to Prevent Private Imports from Other EU Member States

Before the age of instant communication by electronic devices, the traditional route for consumers in Sweden to acquire alcoholic goods was through Systembolaget. Today, however, as illustrated, private imports by consumers, without purchasing goods in Systembolaget, is both possible and lawful under EU law. The extent to which independent intermediaries and professional transporters can make use of such a possibility of private import reignited when, in recent years, Systembolaget has tried to use the national courts in Sweden to prevent economic operators, engaging in the economic activity of private import of goods from other EU Member States, from being able to access consumers in Sweden. Systembolaget, through proceedings lodged at national courts, has sought to prevent the private import of goods from other EU Member States, contrary to the case law of the CJEU. Two such cases have arisen.

The *Winefinder* case was brought by Systembolaget against a private company at the Patent and Market Court (*Patent- och marknadsdomstolen*) within the Stockholm District Court (*Stockholms tingsrätt*). Winefinder is a company with

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[72] Case C-186/05, *Commission v Sweden*, ECLI:EU:C:2007:571 (*Private Imports*), paragraph 9. Author's translation. In French: '*Un particulier résidant en Suède ne pourrait donc acheter ou commander des boissons alcoolisées pour son propre usage auprès de producteurs et de détaillants dans d'autres États membres et les faire expédier en Suède*.' In Swedish: '*En privatperson som är bosatt i Sverige kan således inte köpa eller beställa sådana drycker för eget bruk av producenter eller detaljhandlare i andra medlemsstater och få dryckerna skickade till Sverige*.'.

[73] Case C-186/05, *Commission v Sweden*, ECLI:EU:C:2007:571 (*Private Imports*), paragraph 26. In French: '*intermédiaires indépendants ou des transporteurs professionnels qu'elles auraient désignés*' In Swedish: '*genom oberoende mellanhand eller yrkesmässig befordran*'.

establishments in both Sweden and in Denmark, and it specialises in the sale of goods on the internet, and in particular, cross-border trade in alcoholic goods. It was alleged by Systembolaget that the seller and transporter/importer were one in the same. In other words, Winefinder did not have an independent intermediary or professional transporter in place to do the private import in Sweden. The national court agreed with Systembolaget – the applicant – and found that Winefinder, despite claiming that it was engaging in the private import of goods on behalf of consumers in Sweden, was in fact engaging in the retail sale of goods in Sweden,[74] thereby impinging upon the exclusive right of retail sale held by Systembolaget. Winefinder were fined one million Swedish kronor (SEK) and ordered to pay Systembolaget's legal costs. An appeal against the judgment of the national court has been lodged by Winefinder and is currently pending before the Patent and Market Court of Appeal (*Patent- och marknadsöverdomstolen*) within the Svea Court of Appeal (*Svea hovrätt*).[75] The first instance national court, a lower instance national court, made no reference for a preliminary ruling under Article 267 TFEU, and it remains possible for the appeal court to do so. The case will inevitably end up at the Supreme Court (*Högsta domstolen*).

Separately, the *Vivino* case was taken by Systembolaget against another private company at the same Patent and Market Court.[76] Vivino is a company established in Denmark, and is a subsidiary of a company domiciled outside the EU. Differently from the *Winefinder* case, it is apparent that Vivino had a carrier for the private import of the alcoholic goods that were located in Denmark, and did not actually conduct the private import itself. When orders by consumers in Sweden were made, the orders were packaged individually in Denmark, before the goods were brought into Sweden, as a private import, by a professional transporter. It was apparent that the professional transporter was independent of Vivino, and that consumers in Sweden were offered a choice regarding who the private importer would be in the course of their purchase.

Given that the facts were different, the same national court, with different judges, reached a different outcome from that in the prior *Winefinder* case. In essence, in *Vivino*, the national court determined that such arrangements put in place by Vivino did not amount to the company engaging in retail sale of alcoholic goods in Sweden, but rather was engaging in economic activity in order to facilitate a consumer's possibility privately to import alcoholic goods.[77] Systembolaget lost

[74] PMT 2881-19, *Systembolaget Aktiebolag v Winefinder AB (Bromma, Sverige) and Winefinder ApS (Taastrup, Danmark)*, Judgment of the Patent and Market Court of Stockholm District Court, 22 October 2020, p. 65.

[75] PMT 13055-20, pending.

[76] PMT 2069-20, *Systembolaget Aktiebolag v Vivino ApS (Köpenhamn, Danmark)*, Judgment of the Patent and Market Court of Stockholm District Court, 6 May 2021.

[77] PMT 2069-20, *Systembolaget Aktiebolag v Vivino ApS (Köpenhamn, Danmark)*, Judgment of the Patent and Market Court of Stockholm District Court, 6 May 2021, p. 35. The case has been appealed, PMT 6951-21, pending.

the case it brought, and was ordered to pay Vivino's legal costs. An appeal against the judgment has been lodged by Systembolaget, and is currently pending before the Patent and Market Court of Appeal. Like in *Winefinder*, the lower instance national court made no reference for a preliminary ruling under Article 267 TFEU, and it remains possible for the appeal court to do so.

In both cases, it is the state monopoly itself that has brought proceedings against the respective economic operators offering private imports, rather than the state's investigators and prosecutors bringing the cases for infringement of any law. This implies that the state monopoly is seeking to protect the legal regime surrounding itself, rather than seeking to preserve the claimed interest of protecting public health. One cannot help but notice that the competitors, Winefinder and Vivino, as economic operators on the marketplace, are commercial competitors to Systembolaget, albeit ones operating by way of private imports. The *Winefinder* and *Vivino* cases are examples of Systembolaget trying to make use of the national courts to protect its commercial interests.

The first instance national court, in both cases, can be commended for not reading too much into the *Franzén* judgment, given that the CJEU has *de facto* distanced itself from it. Read together, however, whilst the facts differed, there are some inconsistencies between the two judgments of the first instance national court. Whilst the *Vivino* judgment of the District Court was more in-tune with the applicable case law of the CJEU, namely *Rosengren* and *Commission v Sweden (Private Imports)*, by contrast, the *Winefinder* judgment of the District Court opened up more questions than answers, given that it veered into a questionable reading of the right of Winefinder, as an economic operator, to exercise its right to engage in the freedom of establishment – another freedom protected by the EU Treaties.

Indeed, given the uncertainties at issue, it would be up to the Patent and Market Court of Appeal – the national court to which appeals in both cases have been brought – and perhaps even the Supreme Court (*Högsta domstolen*), if the decisions of the Patent and Market Court of Appeal also end up being appealed – to make a reference for a preliminary ruling under Article 267 TFEU.[78]

4.3 Retail Sale of Domestically Produced Goods Outside of the State Monopoly

Given that Systembolaget possesses the exclusive right of retail sale of alcoholic goods over 2.25% alcohol content in Sweden,[79] this does not allow *producers* of

[78] See chapter 6, 'When Are National Courts Obliged to Refer Questions?' in Morten Broberg and Niels Fenger, *Broberg and Fenger on Preliminary References to the European Court of Justice* (Third Edition, Oxford University Press 2021), pp. 201–248. See also Morten Broberg, 'National Courts of Last Instance Failing to Make a Preliminary Reference: The (Possible) Consequences Flowing Therefrom' (2016) 22 European Public Law 243.

[79] For full clarity on this, see section 2.3 of this report.

alcoholic goods in Sweden to sell their goods directly to consumers – at their sites of production, or otherwise. For such sales, consumers have to be directed to Systembolaget. Given the demands that EU free movement law places on EU Member States, it is clear that states like Sweden sometimes contemplate how they could continue to retain a state monopoly, whilst at the same time, try to make further exceptions to it by allowing the retail sale of certain alcoholic goods, namely domestically produced alcoholic goods, outside of the state monopoly.

In 2020, the Swedish government established a new Inquiry into the possibility of 'farm sales' of alcoholic goods. The mandate of the Inquiry was to explore the possibility of domestic producers of alcoholic goods to sell their goods outside of Systembolaget, whilst at the same time, preserving the exclusive right of retail sale of certain alcoholic goods for Systembolaget.[80] In other words, the governmental aim of the Inquiry was to allow for domestic goods to be sold outside of Systembolaget, whilst ensuring that goods produced in, or coming from other EU Member States would continue to be sold in Systembolaget. This, in effect, was trying to explore ways to differentiate (i.e., positively discriminate) domestically produced goods, and negatively discriminate against goods produced in, or coming as against other EU Member States.

The compatibility of the farm sales concept with the free movement of goods in EU law is highly questionable. The overriding problem is that such national measures, if implemented, would inherently be about favouring the sale of domestically produced goods. This is discriminatory against goods produced in, or imported from, other Member States. That governmental Inquiry delivered its report in late 2021, with consideration being given in Sweden to allow for the retail sale of domestically produced alcoholic goods outside of Systembolaget, thus further loosening the exclusive rights of retail sale possessed by Systembolaget. Farm sales, and their compatibility with EU law, will have to be determined under the general provisions of Articles 34–36 TFEU, given they are separable from state monopolies. This is because it will have an 'effect on trade',[81] and is separable from the state monopoly. Moreover, as demonstrated,[82] the current case law of the CJEU assesses all national measures under the general provisions of Articles 34–36 TFEU.

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[80] 'En möjlighet till småskalig gårdsförsäljning av alkoholdrycker: Betänkande av Gårdsförsäljningsutredningen (SOU 2021:95)' (Swedish Government Official Reports 2021) SOU 2021:95. Author's translation: 'An opportunity for small-scale farm sales of alcoholic goods. Report of the Farm Sales Inquiry'. Note, a previous inquiry from 2010 also examined similar matters, but nothing was ever implemented. 'Gårdsförsäljning: Delbetänkande av Utredningen om vissa alkoholfrågor (SOU 2010:98)' (Swedish Government Official Reports 2010) SOU 2010:98.

[81] Case C-198/14, *Valev Visnapuu v Kihlakunnansyyttäjä (Helsinki) and Suomen valtio – Tullihallitus*, ECLI: EU:C:2015:751, paragraph 87. The CJEU cited it's judgments in *Rosengren*, paragraph 18; and *ANETT*, paragraph 23, as precedent.

[82] See section 3.5 of this report.

Quite surprisingly, when the Inquiry delivered its final report in 2021, it stated that it was possible, in its view, to allow, in connection with a study visit, lecture, or other related visit to a place where alcoholic goods are made, for the sale of domestically produced alcoholic goods over the existing 2.25% alcohol volume threshold.[83] In other words, it said it was compatible with EU law to create a further exception in national law, which was inherently discriminatory against goods produced in, or coming from other EU Member States.

The introduction of farm sales in Sweden, as envisaged, would – in law, and in practice – result in the arbitrary discrimination of producers and sellers of alcoholic goods from other EU Member States, and thus be a restriction on trade, that is unjustifiable. As the CJEU has held in *Visnapuu*, national measures or a regime that allow producers of alcoholic goods to sell their own goods is, in reality, only open to domestic producers, and effectively excludes the sale of goods produced in, or coming from, other EU Member States.[84] Any such national measures would consequently be incompatible with EU law. However, the CJEU in *Visnapuu* left it to the referring national court in that particular case – concerning the farm sale of certain niche berry wines that were domestically produced – to determine whether the national measures in question were compatible with the general provisions of Article 34–36 TFEU. There is no guarantee that the same level of deference would be applied to a more expansive farm sales regime in Sweden concerning beer, or other alcoholic goods.

The Inquiry initiated by Sweden appeared to be at pains to try to ensure compliance with both the governmental intent and EU law. But it could only have been unable to fulfil its assigned task, given that any solution would result in some level of discrimination. With due regard to any intent, it is submitted that it would make no difference if such farm sales were linked with tasting of alcoholic goods, or the touring of factory/production sites. A retail sale, bundled with a service, for example, would still amount to impinging upon the exclusive right of retail sales by the state monopoly, and be discriminatory against non-domestic goods. Any farm sales would be a retail sale, no matter what conditions are attached to it. Limiting quantitative limit of sales that consumers can purchase would also be irrelevant, since there is no *de minimus* rule as regards the free movement of goods. As the CJEU stated in *Bluhme*, national measures that are restrictive have 'a direct and immediate impact on trade, and not effects too uncertain and too indirect for the obligation which it lays down not to be capable of being regarded as being of such a kind as to hinder trade between Member States'.[85]

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[83] See section 2.3 of this report on the 2.25% stipulation.

[84] Case C-198/14*, Valev Visnapuu v Kihlakunnansyyttäjä (Helsinki) and Suomen valtio – Tullihallitus*, ECLI: EU:C:2015:751, paragraph 125.

[85] Case C-67/97, *Criminal proceedings against Ditlev Bluhme*, ECLI:EU:C:1998:584, paragraph 22.

Interestingly, the Inquiry's report already appeared to contemplate the incompatibility of its farm sales proposal with the EU law on the free movement of goods. Specifically, the report anticipated that even if the CJEU were to find farm sales incompatible, it would be the newly framed farm sales measures, if adopted, which would have to be abolished, rather than the exclusive right of retail sale possessed by Systembolaget.[86] This assessment by the Inquiry is not necessarily correct, and rather incomplete. As the CJEU stated in *Hanner*,[87] a retail sales regime can be within the bounds of the special provision of Article 37 TFEU. But where a retail sales regime no longer has exclusive rights, it naturally follows that such an assessment of national measures related to a retail sale regime is therefore no longer subject to the special provision of Article 37 TFEU. As the CJEU stated in *ANETT*, the state monopoly at issue in that case was adjudicated upon under the general provisions of Articles 34–36 TFEU given that the issue 'd[id] not govern the exercise of the exclusive right relating to the monopoly in question'.[88] This perspective is supported by that of the Advocate General in *Visnapuu*. There, he stated that in the case law thus far, 'the [CJEU] has adopted a restrictive interpretation of the scope of Article 37 TFEU, limiting that scope to rules which directly concern the *exclusive right* granted to the monopoly'.[89] Thus, a farm sales regime would have to be assessed under the general provisions of Articles 34–36 TFEU, but would also have broader effects on the exclusive rights of Systembolaget, which itself would have to be reassessed.

It should be recalled that in *Franzén* in particular, Systembolaget was assessed for its compatibility with EU law under the special provision of Article 37 TFEU, at that point in time. Therefore, unlike what was the case in *Visnapuu,* the broad farm sales regime that is being considered in Sweden would have the effect of depriving Systembolaget of its exclusive rights as a state monopoly. If such a regime were to be introduced in Sweden, and subsequently challenged before the CJEU, the entire legal justification of Systembolaget would hang in the balance. In any case, it would be on much more uncertain ground as to its compatibility with EU law. As a matter of national law, Systembolaget would no longer be in possession of exclusive rights, given the discriminatory national measures that farm sales would entail. Thus, Systembolaget, for the first time, would inevitably have to be assessed by the CJEU for its compatibility with the general provisions of Article 34–36 TFEU. To date, as per *Franzén*, it has only been assessed for its compatibility with EU law under the special provision of Article 37 TFEU. For

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[86] En möjlighet till småskalig gårdsförsäljning av alkoholdrycker: Betänkande av Gårdsförsäljningsutredningen (SOU 2021:95) (n 80). p. 97.

[87] Case C-438/02, *Criminal proceedings against Krister Hanner*, ECLI:EU:C:2005:332.

[88] Case C-456/10, *Asociación Nacional de Expendedores de Tabaco y Timbre (ANETT) v Administración del Estado*, ECLI:EU:C:2012:241 (*ANETT*), paragraph 26.

[89] Opinion of Advocate General Bot, Case C-198/14, *Valev Visnapuu v Kihlakunnansyyttäjä (Helsinki) and Suomen valtio – Tullihallitus*, ECLI:EU:C:2015:463, paragraph 128, emphasis added.

the Inquiry to report in 2021 to imply there would be no wider consequence to Systembolaget, as a result of the introduction of farm sales, was a misreading of the state of the law.

Whilst there is already an exception to the exclusive right of retail sale in Sweden held by Systembolaget – in that alcoholic goods below a certain level of alcohol content can be sold in other stores – it is the effect of that national measure that must be examined, and distinguished. For example, alcoholic goods with low alcohol content – below 2.25%[90] – that are sold in retail stores outside of Systembolaget, are not subject to restrictions. In other words, domestically produced goods and goods produced in, or coming from other EU Member States are treated the same – in law, and in practice – by the current exception.

By contrast, if national law in Sweden were amended to create a further exception, to allow domestically produced goods with alcohol content above that threshold to be sold as part of farm sales, then the result of such a change would be to create a restriction, caught and prohibited by Article 34 TFEU, because domestically produced goods would be given more favourable treatment in national law – in law, and in practice. Further, it would be lawful under EU law that other retail sellers would be able to sell alcoholic goods in competition with Systembolaget. If such litigation ended up before a national court in Sweden, there would be an obligation upon the national law to set aside any national legal provision that would interfere with the rights of economic operators that would be contrary to the free movement of goods provisions in the EU Treaties.

The deference to national courts, as seen in *Visnapuu*, to decide whether the national measures in Finland were, on the facts of the case, disproportionate or not, is no guarantee it would apply it to farm sales in Sweden, if it were to be introduced. For example, farm sales would not just be about niche berry wines, but rather would involve more widely consumed alcoholic goods such as beer. In Finland, the selling of niche berry wines still meant consumers in Finland would have to visit the state monopoly to purchase popular alcoholic goods. By contrast, if farm sales were to be introduced in Sweden, a broader range of domestically produced alcoholic goods, such as beer, would be available for sale in both the state monopoly of Systembolaget, and at places designed as being allowed to engage in farm sales. By contrast, alcoholic goods produced in, and coming from, other EU Member States would be available for sale in Systembolaget only. This would give rise to an unjustifiable restriction, and discriminatory treatment, and thus be incompatible with EU law.

Farm sales in Finland allow the sale of special berry wines and similarly related goods outside of the state monopoly. The Commission has made clear to Finland that this is not in conformity with the free movement of goods provisions

[90] See section 2.3 of this report.

contained in the EU Treaties. However, the Commission has not proceeded with launching an infringement action under Article 258 TFEU on the basis that there are no apparent sellers of such goods in other Member States. Admittedly, this is a poor reason not to launch an infringement action; but in any event, it would be unfair to state that Finland has general farm sales, owing to the fact that the retail sale of alcoholic goods outside of the state monopoly is extremely limited to niche goods, and not alcoholic goods in general. It is likely that the introduction of farm sales in Sweden, which would be more comprehensive than that in Finland – given that in Sweden it would be aimed at a broader category of alcoholic beverages including beer, wine, and spirits – would result in discriminatory results and a differentiated market between domestically produced alcoholic goods, and alcoholic goods produced in, or coming from other EU Member States. The disadvantage for the latter would be an obstacle captured by Article 34 TFEU, and not saved by any grounds of exception written in Article 36 TFEU, or any mandatory requirement, or any overriding reason of public interest. In any event, directly discriminatory measures cannot be saved by unwritten grounds of possible justification.

Before Sweden makes any changes to national law concerning alcoholic goods, it must duly notify draft technical measures to the Commission, as required by EU secondary law.[91] Without question, the Commission will pay particularly close attention to any proposed changes that Sweden plans to make. But even if the Commission were not to respond to proposed changes, any changes to national law in Sweden relating to alcohol, to allow farm sales, will likely lead to legal challenges before the national courts. Depending on the instance, and the issues raised, these courts may or must make a reference for a preliminary ruling to the CJEU under Article 267 TFEU.[92] Such a referral would not only raise questions regarding the compatibility with EU law of the rules surrounding farm sales, but also the legality of the entire state monopoly, which is already on shaky ground, and would have to be reassessed. No changes to national law that introduce any form of farm sales can guarantee the preservation of the exclusive right of retail sales by Systembolaget. The final say on whether any farm sales measures, or the continuation of Systembolaget, is compatible with the free movement of goods provisions of the EU Treaties, lies with the CJEU.

[91] L 241/1. Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 Laying down a Procedure for the Provision of Information in the Field of Technical Regulations and of Rules on Information Society Services (Codification) (Text with EEA Relevance). Official Journal of the European Union. 17 September 2015.

[92] See, Broberg and Fenger (n 78).

5 Conclusion

The type of alcoholic goods which consumers drink in Sweden, like anywhere, evolves over the course of time. Going back a generation or two, most households in Europe today, especially non-wine-producing states, did not have wine as part of its culture of alcohol consumption. Instead, beers and spirits dominated the alcoholic goods market. Today, wine culture in the Nordic states is just as normal as it is in broader European society. Change has also been afoot elsewhere regarding the marketplace of the twenty-first century. Today, the sale of goods, by whatever means, is not just about getting goods sold, but also with economic operators trying to develop broader relationships with consumers beyond single transactions.

As stated in the introduction to this report, three overarching issues have arisen in the context of alcohol, the EU law of the free movement of goods, and Sweden. First, in the case law of the CJEU, there is the demise of the special provision of Article 37 TFEU and the 'public interest aim'. This is a highly relevant development for Sweden (Section 5.1). Second, the fact that private imports are compatible with EU law, and that EU Member States cannot restrict private imports, is also a development that affects Swedish policy (Section 5.2). And, finally, the incompatibility of farm sales with EU law is highlighted (Section 5.3), in light of consideration being given, domestically, to discriminating against alcoholic goods produced in, or coming from other EU Member States. In conclusion, this report points out that any legal or material changes in Sweden concerning alcohol will open up wider litigation, and will have to be carefully scrutinised for their compatibility with EU law (Section 5.4).

5.1 The Demise of the Special Provision of Article 37 TFEU and the 'Public Interest Aim'

The case law of the CJEU regarding state monopolies has changed over time.[93] As the case law has evolved, ever more national measures concerning state monopolies are being captured by the general provisions in Articles 34–36 TFEU. In the same vein, therefore, the number of national measures being assessed under the special provision of Article 37 TFEU has decreased. Today, the CJEU *de facto* ignores the special provision of Article 37 TFEU. This could have significant repercussions for the legal design and operation of Systembolaget.

[93] See Butler, 'State Monopolies and the Free Movement of Goods in EU Law: Getting Beyond Obscure Clarity' (n 6).

For the CJEU simply to ignore the special provision of Article 37 TFEU is only sustainable for so long, and it would certainly be optimal that the EU Treaties, when next revised, should see Article 37 TFEU deleted in its entirety.[94] In such a scenario, the exclusive right of retail sale for Systembolaget would have to be assessed for its compatibility with the general provisions of Articles 34–36 TFEU, taking into account broader general principles of EU law, such as that of proportionality. Such a deletion of the special provision of Article 37 TFEU would not, however, result in the automatic end of state monopolies in EU Member States. On the contrary, they would be found in breach of the general provision of Article 34 TFEU,[95] and, should an EU Member State wish to retain a state monopoly, it would then be up to the EU Member State in question to attempt to justify such a state monopoly as an exception under Article 36 TFEU.

There is an immense level of unpredictability in the CJEU's case law when it comes to state monopolies. The case law has fluctuated over time, and the *Franzén* judgment was certainly a surprise in terms of its understanding of the special provision of Article 37 TFEU at the time.[96] Long before *Franzén* was decided, it was even pondered that, 'one wonders whether the [CJEU] has consciously changed its mind … or simply acted without an over close analysis of its previous decisions',[97] in the case law concerning state monopolies. Accordingly, in light of this unpredictability, it would be prudent in future for any national court or tribunal dealing with state monopolies and the free movement of goods to make a reference for a preliminary ruling under Article 267 TFEU at first instance level,[98] or alternatively, at higher instance, where an obligation to make a reference could arise. Such a referral would serve the interests of legal certainty.

The CJEU saved the retail sale part of Systembolaget with its *Franzén* judgment. State monopolies amount to clear restrictions upon the free movement of goods, and any public interest aim amounts to a clear derogation from such. That odd judgment, so out-of-kilter and poorly reasoned, has never been explained.[99] Not only that, but it created immense confusion.[100] Confusion, it should be added,

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[94] See ibid.

[95] Article 34 TFEU concerns imports. If any state monopolies concerned exports, they would come under Article 35 TFEU.

[96] It is submitted that the Opinion of the Advocate General was much more convincing. See, Opinion of Advocate General Elmer, Case C-189/95, *Criminal proceedings against Harry Franzén*, ECLI:EU:C:1997:101.

[97] Wyatt (n 30), p. 218.

[98] See, Graham Butler, 'Lower Instance National Courts and Tribunals in Member States and Their Judicial Dialogue with the Court of Justice of the European Union' (2021) 4 Nordic Journal of European Law 19.

[99] As one former President of the EFTA Court put it, '[i]f you believe in the teachings of legal realism and of legal hermeneutics, the first thing to do when confronted with such a phenomenon is to look at the names of the judges who were sitting on the bench'. Carl Baudenbacher, *Judicial Independence: Memoirs of a European Judge* (Springer 2019), p. 132.

[100] Peter Oliver, *Free Movement of Goods in the European Community: Under Articles 28 to 30 of the EC Treaty* (Fourth Edition, Sweet and Maxwell 2003). pp. 437–440.

that has never been clarified. It was so odd that an Advocate General went on to state in *Hanner* that the CJEU, in a subsequent case, should 'reverse the *Franzén* judgment'.[101] That Advocate General had already declared that, '[l]ike the majority of legal writers, … I take the view that the solution identified by that judgment is not a correct interpretation of the provisions of the Treaty',[102] and later in that Opinion stated: 'the reasoning set out in … *Franzén* … is based on a misinterpretation of Article [37 TFEU]'.[103] One observation from a former President of the EFTA Court, was that, 'one has to remember that…[in]…the early 1990s, the [CJEU] has shown an increasing unwillingness to interfere with the policies of the Member States in other areas of European Community law as well',[104] specifically citing *Franzén* as one of these cases.

Just because Systembolaget was saved once, that does not mean it would be saved twice. In fact, it is submitted that if a case relating to Systembolaget were ever to reach the CJEU again through a national court referring questions on matters of EU law, the CJEU would reason and rule quite differently from how it did over a quarter of a century ago. The CJEU has significantly moved on from *Franzén*. In fact, as argued following the delivery of the *Rosengren* judgment, the 'pendulum has swung back again',[105] with the special provision of Article 37 TFEU falling out of favour, and instead, adjudication taking place on the basis of the provisions of Articles 34–36 TFEU. Furthermore, it has been argued by this author that, 'the *Rosengren*, *ANETT*, and *Visnapuu* judgments can collectively be construed as the [CJEU] de facto overturning *Franzén* on the public interest aim stated there'.[106] *Franzén*, and its adjudication based on the special provision of Article 37 TFEU was a poorly reasoned and ill-thought-through judgment, and can no longer be considered good law. *Franzén*, on points of substance, deserves re-litigation, to demonstrate that the 'public interest aim' can no longer stand, and must be consigned to the history books.

In light of all this, it is time to look back at what the Landskrona District Court (*Landskrona tingsrätt*), the referring national court in *Franzén*, actually asked the CJEU. It asked for an interpretation of the applicable issues under both

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[101] Opinion of Advocate General Léger, Case C-438/02, *Criminal proceedings against Krister Hanner*, ECLI:EU:C:2004:317, paragraph 46.

[102] Opinion of Advocate General Léger, Case C-438/02, *Criminal proceedings against Krister Hanner*, ECLI:EU:C:2004:317, paragraph 45.

[103] Opinion of Advocate General Léger, Case C-438/02, *Criminal proceedings against Krister Hanner*, ECLI:EU:C:2004:317, paragraph 56.

[104] Carl Baudenbacher, 'Trademark Law and Parallel Imports in a Globalized World – Recent Developments in Europe with Special Regard to the Legal Situation in the United States' (1998) 22 Fordham International Law Journal 645, p. 692.

[105] Stefan Enchelmaier, 'Measures Having Equivalent Effect II: Specific Measures' in Peter Oliver (ed), *Oliver on Free Movement of Goods in the European Union* (Fifth Edition, Hart Publishing 2010), p. 171.

[106] Butler, 'State Monopolies and the Free Movement of Goods in EU Law: Getting Beyond Obscure Clarity' (n 6), p. 300.

the general provision of Article 34 TFEU, and the special provision of Article 37 TFEU. This way of referring the matters at hand was wise, as it sought comprehensive answers under both potentially relevant provisions of the free movement of goods in the EU Treaties. The free movement of goods provisions in the EU Treaties remain somewhat of a mystery when state monopolies are in the frame. Long ago, it was stated, with some regret, that, 'it is impossible to give a clear answer to the question … namely in what cases Article 37 [TFEU] ousts Article[s] [34–36] and whether it leads to a different result'.[107] What is quite striking is that such a statement is as valid today as when it was made over forty years ago. National courts in Sweden that are seized of questions on Systembolaget today would do well to refer similar or identical questions to the CJEU again, to better understand the compatibility of Systembolaget with EU law, in light of the evolving case law of the CJEU.

5.2 The Rise of Private Imports under the General Provision of Article 34 TFEU

There are now a number of economic operators, through online platforms, which sell goods to consumers in other EU Member States than their own, and which allow such goods to be privately imported into Sweden on behalf of consumers. The *Rosengren* and the *Commission v Sweden (Private Imports)* judgments confirmed that private imports of goods is guaranteed by the general provision of Article 34 TFEU. Such private imports do not have to be done by consumers themselves accompanying such alcoholic goods. Rather, 'independent intermediaries and professional transporters'[108] may also do so. Furthermore, it is unlawful for an EU Member State to restrict private imports of alcoholic goods, given that the CJEU has determined that the grounds for possible exception contained in Article 36 TFEU do not apply. Indeed, the argument made by Sweden, time-and-again, that any national law relating to alcoholic goods, by design, is to reduce the consumption of alcoholic goods, in the name of protecting health, increasingly falls flat, just as it did in *Commission v Sweden (Private Imports)*. This is because national law allows the consumer to purchase as many alcoholic goods as it wants in Systembolaget, without limit.

The two pending cases before the Patent and Market Court of Appeal in *Winefinder* and *Vivino* raise novel contemporary questions, both as regards the underlying judgments which are being appealed, but also on the grounds of the initial claims raised by the applicant – Systembolaget – in both cases. The national court should absolutely vindicate the right of economic operators acting in line with the right of consumers to private import goods, in line with the case law of the CJEU. At the very least, the Patent and Market Court of Appeal, deciding on the two cases, should deliver judgments that are consistent with one

[107] Peter Oliver, *Free Movement of Goods in the E.E.C.: Under Articles 30 to 36 of the Rome Treaty* (First Edition, European Law Centre 1982), p. 230.
[108] Case C-186/05, *Commission v Sweden*, ECLI:EU:C:2007:571 (*Private Imports*), paragraph 26.

another, and in compliance with the current case law of the CJEU. That means that the national court should pay no regard to the special provision of Article 37 TFEU whatsoever, and instead should look to the general provisions of Articles 34–36 TFEU alone. If in doubt, the national court should make a reference for a preliminary ruling in one or both cases under the reference for a preliminary ruling procedure in Article 267 TFEU. If either or both of the cases were to end up at the Supreme Court *(Högsta domstolen)*, there would be an obligation for that court to make such a reference, given the uncertainties.

5.3 The Incompatibility of Discriminatory Farm Sales with EU Law

The continued existence of Systembolaget possessing exclusive rights would be on a fragile footing in any proposal that would be brought in by Sweden to legislate for allowing domestically produced alcoholic goods to be sold outside the state monopoly, while alcoholic goods produced in or coming from other EU Member States would not. Farm sales, as a general idea, when a state has a state monopoly in place possessing the exclusive right of retail sale, are highly questionable as to their compatibility with the free movement of goods in EU law. And when it comes to the details, it only gets worse. As the farm sales Inquiry of 2021 proposed, it wanted to have its cake and eat it too. It stated, in essence, that it was possible to allow for domestically produced alcoholic goods to be sold outside of the state monopoly, yet insisted that alcoholic goods produced in, or coming from other EU Member States could continue to be only be sold in the state monopoly. Any proposition of that sort would give effect to a sales regime that expressly favours domestically produced goods. Such legislative changes, if they were followed through, would be directly discriminatory, which is prohibited by all provisions of the free movement of goods as contained in the EU Treaties.

The *Visnapuu* judgment of the CJEU should provide no comfort for any proposed changes to alcohol laws in Sweden, given the change in direction seen in the CJEU's case law over time.[109] In fact, the only changes that would indeed not raise suspicion are measures adopted to achieve the overall liberalisation of the retail sale of alcoholic goods, given that consumers in Sweden can already now avail, lawfully, of private imports. The Commission was of the view that the national measures introduced in Finland were contrary to the free movement of goods, despite not taking the case itself through an infringement procedure. And Finland got off lightly before the CJEU in *Visnapuu*, given that the assessment at issue was left to the referring court in that case to make a determination. Indeed, given that the farm sales proposal in Sweden is more drastic than anything put forward in any other EU Member State, it is very likely that: the Commission would open infringement proceedings against Sweden; or, alternatively, if and

[109] See Butler, 'State Monopolies and the Free Movement of Goods in EU Law: Getting Beyond Obscure Clarity' (n 6).

when a dispute were to come before a national court and inevitably end up before the CJEU, the CJEU would rule against Sweden, resulting in far-reaching ramifications.

Legislating to provide for farm sales runs a risk. When Sweden lost the *Hanner*[110] case concerning the state monopoly on pharmacies,[111] the state chose to liberalise the retail trade of pharmacies, rather than merely adjust it into a non-discriminatory regime under the special provision of Article 37 TFEU. Since any changes that might have been made under Article 37 TFEU could also have been subject to a later assessment under the general provisions of Articles 34–36 TFEU, there was no certainty that any such changes would have been compliant with EU law. Similarly, it would serve consumers in Sweden and the internal market well if the state were to now take similar measures as regards the retail trade in alcoholic goods, rather than run the risk of having a CJEU judgment find against any legislative change concerning the sale of alcoholic goods in Sweden, which could have significant repercussions.

As the farm sales Inquiry of 2021 correctly noted, with a faint level of scepticism, it could never be guaranteed that any changes made to national law in light of the Inquiry would be compatible with the EU Treaties. However, there would naturally be wider ramifications for Systembolaget. It would no longer be in possession of the exclusive right of retail sale. Accordingly, the entire legal justification for Systembolaget, which currently rests on the special provision of Article 37 TFEU, would have to change to the general provisions of Articles 34–36 TFEU.[112]

In any event, any legislative change made to national laws in Sweden would have to be pre-notified to the Commission, which would in turn scrutinise whether the proposed changes would conflict with EU law. The views of the Commission here would be crucial, but not determinative. In any event, and regardless of the Commission's position, if the proposed legislative changes were implemented, it would remain open to any consumer, or economic operator, to challenge the legality of the changes before the national courts, which in turn would eventually be obligated to seek a reference for a preliminary ruling from the CJEU.

5.4 The Future of Private Imports, Retail Sale, and the State Monopoly

Europe has largely seen the demise of state monopolies. A testament to this is the smaller amount of case law of the CJEU that has arisen in the past two decades, as compared to the case law of the 1970s, when the transition period ended and

[110] Case C-438/02, *Criminal proceedings against Krister Hanner*, ECLI:EU:C:2005:332.

[111] Officially, the national law at the time concerned retail trade in prescription and non-prescription medicinal goods by the state, or, alternatively, legal entities over which the state exercised considerable/dominant influence.

[112] See section 3.5 of this report.

state monopolies in the original EU Member States had to undergo significant adjustment or be abolished altogether. Today, the practical relevance of state monopolies is confined to a minority of EU Member States, of which Sweden is one.

Consumption patterns of alcoholic goods have changed immensely in Sweden. More broadly, the culinary and libation tastes and preferences of consumers have transformed over time, in Sweden as well as in Europe as a whole. Whilst any changes to national law in Sweden are a matter for the political institutions, any such changes must be in conformity with EU law. Moreover, given that EU law has evolved as regards assessing obstacles to trade concerning the free movement of goods in the EU, involuntary amendments might have to be made to national law to bring national rules into line. But in addition to such involuntary amendments, there are also voluntary amendments, which could indeed see Sweden embrace liberalised trading rules on alcoholic goods, just like the vast majority of contemporary Europe. In such a scenario, Sweden would be joining the broader European trend of de-monopolisation, and embracing the economic rights of economic actors and consumers.

Systembolaget, despite being a state monopoly in possession of the exclusive right of retail sale of certain alcoholic goods, is slowly changing with the times. It now sells not just alcoholic goods, but also alcohol-free goods in its stores. Moreover, it now also offers drop-off points and home delivery – neither of which is conducive to reducing alcohol consumption. It must be the case that other economic operators should also be able to compete on a level-playing field with Systembolaget, which they do, in part, through offering intermediaries to undertake private imports on behalf of consumers in Sweden, by sourcing and storing such goods in other EU Member States. Lastly, since consideration is being given to a farm sales regime in Sweden, meaning that that Systembolaget would no longer possess exclusive rights of retail sale, Sweden would be introducing discriminatory and restrictive practices of allowing domestic alcoholic goods to be sold through retail sales, to the detriment of alcoholic goods produced in, or coming from other EU Member States – a clear violation of EU law on the free movement of goods.

The current regime concerning the way in which alcoholic goods are imported into Sweden is protected by EU law. Similarly, the current regime concerning the way in which alcoholic goods are sold in Sweden is regulated by national law, theoretically, until decided otherwise by the CJEU, in compliance with EU law. The current and future legal regime concerning alcoholic goods is a heavy regulatory burden, both on the state and economic operators, but also to the detriment of consumers in Sweden. What the future holds will be a matter of choice, but such developments will see on-looking lawyers following carefully, to ensure that economic actors and consumers are not any more detrimentally affected than they currently are.

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Sammanfattning på svenska

Sverige är en EU-medlemsstat som historiskt har haft en strikt reglering av försäljning och köp av varor och produkter som innehåller alkohol (alkoholhaltiga varor). Framför allt har Sverige länge haft ett statligt monopol, Systembolaget, som enligt nationell lag har haft den exklusiva rätten till detaljhandel med vissa alkoholhaltiga varor inom landet. Under 1990-talet, inför Sveriges EU-inträde, behövde viktiga aspekter av den nationella rätten ändras för att svensk lag skulle överensstämma med EU-fördragens bestämmelser om fri rörlighet för varor (artiklarna 34–36 samt artikel 37 i fördraget om Europeiska unionens funktionssätt, funktionsfördraget). Då ändrades delvis regleringen av Systembolagets verksamhet i syfte att åstadkomma överensstämmelse med EU-rätten. Inom Sverige kvarstår än idag Systembolagets exklusiva rätt till detaljhandel med visa alkoholhaltiga varor.

När avtalet om Europeiska ekonomiska samarbetsområdet (EES-avtalet) undertecknades i början av 1990-talet – vilket Sverige anslöt sig till kort före EU-inträdet 1995 – hade man kunnat hävda att den nationella rättsliga grunden för Systembolagets fortsatta verksamhet inte var förenlig med EU-fördragens bestämmelser om fri rörlighet för varor. Men i och med EU-domstolens avgörande i *Franzén*-målet 1997 kunde Systembolaget fortsätta att betraktas som i grunden lagenligt, vad gäller den exklusiva rätten till detaljhandel med vissa alkoholhaltiga varor. Förutsättningen var att ordningen innebar respekt för de villkor som i övrigt följer av EU-rätten.

I den här rapporten analyseras aktuella rättsliga förhållanden kring nationella bestämmelser om alkoholhaltiga varor i Sverige i ljuset av gällande EU-rätt om fri rörlighet för varor. Först kommer denna rättsliga analys emellertid att framhålla *Franzén*-domens stora brister. I EU-domstolens rättspraxis efter denna dom har domstolen i själva verket avstått från att använda grunderna för sitt resonemang i det fallet, och den drar sig över huvud taget för att avgöra mål på grundval av artikel 37. EU-domstolens nuvarande rättspraxis kan närmast beskrivas som ett avståndstagande från *Franzén*-domen. Sverige och Systembolaget skulle kunna stödja sig på detta beryktade avgörande för att upprätthålla status quo, men det vore således att betrakta som en felaktig tolkning av gällande EU-rätt. Den rättspraxis som EU-domstolen har utvecklat sedan *Franzén* utgår nämligen från ett väsentligt annorlunda synsätt på den fria rörligheten för varor i avseenden som gäller privatimport, detaljhandel, exklusiva rättigheter och statliga monopol.

Rapporten belyser ett antal utvecklingstendenser. För det första har EU-domstolen ändrat inriktning när den bedömer lagligheten av nationella bestämmelser om statliga monopol. ”Mål av allmänintresse”, som EU-domstolen utan vidare

nämner i *Franzén*, tycks inte längre utgöra en acceptabel rättlig grund för att ett statligt monopol ska kunna bestå. Just denna grund är ett starkt stöd för Sverige och Systembolaget när de motiverar den exklusiva rätten till detaljhandel med vissa alkoholhaltiga varor och rättfärdigar förekomsten av ett statligt monopol och dess rättigheter enligt nationell lag. Nu tycks EU-domstolen istället fokusera på de allmänna bestämmelser som avser restriktioner för rörlighet för varor. I framtiden kommer därför artiklarna 34–36 i funktionsfördraget att behöva användas som grund för att bedöma huruvida statliga monopol och allmänna nationella lagar om försäljning av alkoholhaltiga varor är förenliga med EU-rätten.

För det andra har EU-domstolens senare rättspraxis gjort det uppenbart att privatimport av alkoholhaltiga varor till Sverige från andra EU-medlemsstater är laglig, tillåtlig och förenlig med EU-rätten. Varje nationell åtgärd som Sverige eller Systembolaget vidtar som syftar till att förhindra privatimport av alkoholhaltiga varor från andra EU-medlemsstater till Sverige är följaktligen inte förenlig med EU-rätten. En sådan typ av åtgärd är inte heller berättigad med hänvisning till försök att skydda människors hälsa och liv eller om tvingande hänsyn så som allmänintresset åberopas. Det är lagligt att mellan EU-medlemsländer bedriva handel med alkoholhaltiga varor genom privatimport, och detta måste nationella domstolar i Sverige försvara. EU-domstolens rättspraxis är vidare tydlig vad gäller privatimport av alkoholhaltiga varor som bedrivs av oberoende mellanhänder och yrkesmässiga transportföretag: de får också hantera privatimport av alkoholhaltiga varor för svenska konsumenters räkning. Systembolaget är därmed inte längre den enda plats där konsumenter i Sverige kan införskaffa alkoholhaltiga varor.

För det tredje framförs argumentet att ändringar av svensk lag som syftar till att tillåta försäljning av fler alkoholhaltiga varor utanför Systembolaget, till exempel inhemskt producerade alkoholhaltiga varor, skulle vara såväl rättsligt som i praktiken diskriminerande gentemot alkoholhaltiga varor som produceras i och kommer från andra medlemsstater inom EU. Sådana nationella lagändringar skulle stå i strid med EU-fördragens bestämmelser om fri rörlighet för varor, och skulle inte kunna rättfärdigas. En partiell avreglering som syftar till att tillåta försäljning av inhemskt producerade alkoholhaltiga varor utanför Systembolaget skulle således leda till att andra ekonomiska aktörer, exempelvis detaljhandelsbolag i allmänhet, också ges möjlighet att sälja alkoholhaltiga varor, inhemskt producerade eller producerade i andra EU-medlemsstater, genom egna försäljningsställen i Sverige och i konkurrens med Systembolaget. Enligt rapporten påverkar detta även förslaget om gårdsförsäljning i Sverige. Det statliga monopolet, Systembolaget, skulle då inte längre vara ett statligt monopol. Ett system för gårdsförsäljning – hur det än utformas – skulle således kunna riva upp den nu gällande ordningen för försäljning av alkoholhaltiga varor i Sverige.

Rapporten avslutas med synpunkter på framtidens alkoholreglering i Sverige i ljuset av överväganden som följer av EU-rätten. Här framhålls att flera rättsliga

aktörer kommer att nagelfara den nuvarande regleringen av alkoholhaltiga varor – liksom framtida regleringar efter nationella lagändringar. Det kan handla om aktörer i Sverige (marknadsaktörer, konsumenter, nationella domstolar och rättsinstanser) och om EU:s institutioner (Europeiska kommissionen och EU-domstolen), och frågan kommer att vara huruvida alkoholregleringen är förenlig med den fria rörligheten för varor.

'[A]ny legal or material changes in Sweden concerning alcohol will open up wider litigation, and will have to be carefully scrutinised for their compatibility with EU law.'

Graham Butler

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