OPINION OF ADVOCATE GENERAL ELMER
delivered on 4 March 1997 *

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1. In the present reference for a preliminary ruling the Court is requested to rule on the compatibility with Articles 30 and 37 of the EC Treaty of the Swedish legislation governing the retail sale of alcoholic beverages.

The national legislation and its background

2. The exclusive right to produce and sell alcoholic beverages in Sweden was previously held by two State undertakings. V&S Vin & Sprit AB (hereinafter 'V&S') enjoyed the exclusive right to manufacture and export spirits and to import beer, wine and spirits. Systembolaget AB enjoyed the exclusive right to sell by retail and by wholesale to restaurants.

3. Following the entry into force of the EEA Agreement, concluded between, *inter alia*, Sweden and the Community, on 1 January 1994, a Finnish court referred a question to

* Original language: Danish.

the EFTA Court for an advisory opinion on the compatibility with Articles 11, 13 and 16 of the EEA Agreement (which correspond in substance to Articles 30, 36 and 37 of the Treaty) of a statutory system which conferred on a monopolistic State undertaking the exclusive right to import alcoholic beverages from other Member States of the EEA or, in the case of trade between the EEA States, required authorization from the monopolistic State undertaking to import such products and place them on the market. In Case E-1/94 *Restamark* [1] the EFTA Court held, in particular:

'1. Article 11 EEA must be interpreted as precluding a national measure which confers on a statutory State monopoly the exclusive right to import alcoholic beverages falling within the product coverage of the EEA Agreement and originating in the Contracting Parties, or the application to intra-EEA trade of national provisions which require the authorization of the statutory State monopoly for the importation and putting into free circulation of such products, even if such an authorization is granted automatically. Neither can such measures be justified under Article 13 EEA merely because they form part of an alcohol policy aimed at minimizing the injurious effects to health of consumption of alcoholic beverages, since this objective can be achieved by measures which are less restrictive of the free movement of goods.

2. Article 16 EEA must be interpreted as meaning that, as from 1 January 1994, every State monopoly of a commercial character not covered by Protocol 8 EEA must be adjusted so as to eliminate the exclusive right to import the goods the subject of the monopoly into a Contracting Party from other Contracting Parties.'

4. In the negotiations concerning Sweden's accession to the European Union, correspondence on the Swedish alcohol monopolies was exchanged between the Commission and the Swedish Government before that judgment was delivered. [2] It was apparent from that exchange of correspondence that the Commission — subject to future judgments of the Court of Justice and its own role as guardian of the Treaty — did not consider it appropriate to take measures of its own initiative against the retail monopoly, provided that the production, wholesale and import monopolies were dismantled and any discrimination against products from other Member States was precluded. [3]

1 — See *Report of the EFTA Court*, 1 January 1994-30 June 1995, p. 17.

2 — See the letter of 20 December 1993 sent by Commissioner H. van den Broek to the Minister for European Affairs, U. Dinkelspiel.

3 — It is apparent from the minutes of an exchange of views between Sweden and the Commission on 21 December 1993 that the Commission attached particular importance to the publication of rules on the purchase and sale of alcoholic products, to the objectivity and transparency of those rules and to the provision of consumer information on new products so that those products might attract consumers.

The Act of Accession contains no specific provisions on trade in alcoholic beverages. Finland and Sweden made a unilateral declaration, [4] according to which the Conference at ministerial level was informed of the abovementioned exchange of letters with the Commission.

5. With effect from Sweden's accession to the European Union on 1 January 1995, V&S's exclusive rights to produce and export spirits and to import beer, wine and spirits were abolished, as was Systembolaget's exclusive right to sell alcohol beverages by wholesale to restaurants.

Those rights were replaced by a system under which traders may import and sell by wholesale spirits, wine and beer, provided that they have a licence to do so, and resell those products to Systembolaget or to holders of serving licences.

However, Systembolaget's exclusive right to retail alcoholic beverages was maintained.

6. That reform of the Swedish legislation on alcohol was effected by the Alkohollag of 16 December 1994 [5] (Law on Alcohol, hereinafter 'the Law'), which entered into force on 1 January 1995. The statement of reasons in the draft law [6] states, *inter alia*, the following:

'Excessive consumption of alcohol creates considerable social, medical and socio-economic problems. This is why Sweden has for a long time had a restrictive policy on alcohol.

At the same time, far-reaching changes taking place in the outside world are having an impact on the alcohol policy pursued up to now. According to the committee responsible for alcohol policy, having regard to the process of integration going on in Europe and the foreseeable intensification of social and cultural exchanges, strong action in the matter of alcohol will be necessary in future in order to limit consumption, reduce alcoholism and combat the injurious effects of alcohol.

Current Swedish policy on alcohol is based on a balance between high taxation, restric-

4 — OJ 1994 C 241, p. 398.

5 — SFS 1994: 1738.

6 — See Regeringens proposition 1994/95: 89, Förslag til alkohollag, p. 48.

tions, information and opinion-forming and efforts in relation to treatment. The conditions for using pricing as a means of alcohol policy will change. The weighting between the various means will therefore have to change and information, opinion-forming and other preventive measures will acquire increased importance in efforts to bring about new drinking habits in our country.

...

The fundamental aim of Swedish alcohol policy throughout the twentieth century has been to limit the effect of market forces, namely competition and private profits. The reason for this was the conviction that competition and private profits encourage active marketing and active selling, which lead to increased consumption. The greater the number of undertakings having an interest in increased alcohol sales, the better alcoholic beverages will fare in the competition for consumers' money. In the case of a sector which society does not wish to see expand, market mechanisms such as competition and profit are not particularly suitable as means of control.

In the Government's view, the principle of limiting private profits in the alcohol trade remains valid and must guide the State when it draws up rules on the marketing of alcoholic beverages and guidelines for retail sales of these beverages. In the sectors in which monopolies in alcohol must be abolished, that is to say, the manufacturing, import and wholesale sectors, the principle takes on a new meaning. Previously, State action was intended to preclude private interests from the alcohol trade. From now on, the guiding principle will be the control of market forces through a system of licences, supervision and sanctions which will be administered by a new alcohol authority.'

7. The Law refers to 'alkoholdrycker' (hereinafter 'alcoholic beverages'), defined in Article 3 of Chapter 1 of the Law as beverages having an alcoholic strength of more than 2.25% by volume. The beverages referred to are classified as 'sprit', 'vin', 'starköl' and 'öl'. 'Sprit' (hereinafter 'spirits') is defined in Chapter 1, Article 2, as any liquid of more than 2.25% alcohol by volume, with the exception of 'vin', 'starköl' and 'öl'. 'Vin' (hereinafter 'wine') means a fermented beverage based on grapes or other fruit with an alcoholic strength of not more than 22% by volume, see Chapter 1, Article 5. According to Chapter 1, Article 6 of the Law, 'starköl' (literally 'strong beer') is a fermented beverage made from malt having an alcoholic strength of more than 3.5% by volume. Where the alcoholic strength by volume is higher than 2.25% but below 3.5% the product comes within the category 'öl' (literally 'beer', hereinafter 'light beer').

Imports

Article 2 of Chapter 4, on imports, is worded as follows:

'Spirits, wine and beer may only be imported into Sweden by a trader holding a production or wholesale licence for such products ...'.

Questioned on this provision at the hearing, the Swedish Government confirmed that Article 2 of Chapter 4 means that a producer or intermediary who is established and exercises a lawful activity in another Member State can only sell his products on the Swedish market via an intermediary holding a Swedish wholesale licence or if the producer himself has obtained a wholesale licence from the Swedish authorities and paid the associated charges, of which more below.

Neither Systembolaget nor holders of serving licences are authorized to import alcoholic beverages but under the Law requires that they purchase only from traders who hold a Swedish production or wholesale licence.

Manufacturing and wholesale licences

8. Under Chapter 2, Articles 1 and 2, of the Law, only traders in possession of a special licence (manufacturing licence) are authorized to produce alcoholic beverages.

9. Under Article 1 of Chapter 4 of the Law, special authorization (a wholesale licence) is required to engage in wholesale trade in spirits, wine and beer. However, a manufacturing licence automatically entitles the holder to engage in wholesale trade in the corresponding products.

Under Article 5 of Chapter 4, a person holding a manufacturing or wholesale licence may (only) sell his goods to Systembolaget, to other persons holding manufacturing or wholesale licences covering the same products or to the holders of serving licences relating to such products.

Charges payable for licences

10. Article 4 of Chapter 7 deals with licences. The applicant must pay a charge when submitting his application and the holder of a manufacturing or wholesale licence must also pay an annual monitoring charge intended to finance the permanent monitoring of compliance with the conditions of the grant of the licence and the application of the Law. The authority responsible for administering licences and for control is the Alkoholinspektion (Alcohol Inspectorate). The procedures are laid down in the 'Alkoholförordningen' (Alcohol Regulation). [7] Article 10 of the Alcohol Regulation provides that the charge payable on submitting an application is to be SKR 25 000 (approximately ECU 3 000).

The permanent monitoring charge (see Articles 13, 14 and 15 of the Alcohol Regulation) consists of a basic charge and a variable surcharge. The charge corresponds to production bands and the overall charge per litre decreases as volume increases. For example, the basic charge (with no surcharge payable) for wine in the 0-50 000 litres band is SKR 10 000 (approximately ECU 1 165), so that the overall charge where the band is fully utilized comes to SKR 0.2 per litre. In the 1 001 000-5 000 000 litres band, the basic charge is SKR 79 000 (approximately ECU 9 200) and the surcharge is SKR 50 (approximately ECU 5.8) per 1 000 litres, so that the overall charge comes to SKR 0.056 per litre where the whole band is utilized.

Retail trade

11. Chapter 5 of the Law covers the retail sale of spirits, wine and beer.

Article 1 of Chapter 5 is worded as follows:

'A company limited by shares (a retail company), owned by the State, [8] shall be formed specifically for the purpose of retailing spirits, wine and beer.

The retail company shall not import, export or manufacture the alcoholic beverages referred to in the preceding paragraph.

7 — See SFS 1994: 2046, as most recently amended by SFS 1995: 1215. Following the 1995 amendment, Article 18 provides that the charge is to be calculated provisionally at the beginning of each calendar year on the basis of the estimated volume of sales. At the end of the year the licensee must declare actual sales. According to the available information, however, it is not clear whether a refund is made where sales are lower than forecast.

8 — This is the company known as Systembolaget.

If it has a wholesale licence, the retail company may sell to the holders of serving licences. [9]

The provisions relating to the activity and operation of the retail company and its specific control by the State shall be adopted in an agreement between the company and the State.'

Article 2 of Chapter 5 provides as follows:

'Spirits, wine and beer shall only be retailed by the retail company.

The retail company shall determine the location of points of sale in accordance with the guidelines laid down in the agreement between the State and the company.'

Article 5 of Chapter 5 provides that spirits, wine and beer which are not stocked are to be supplied upon demand by the retail company, unless it does not consider it possible to supply them.

Under Article 6 of Chapter 5, food stores, Systembolaget and producers in possession of a manufacturing licence are authorized to retail light beer.

12. The agreement referred to in Chapter 5, Article 1, of the Law between the State and Systembolaget, [10] of which the State is sole shareholder, provides that Systembolaget is to conduct its activities in such a way as to prevent, as far as possible, the harmful public, social and medical consequences associated with the consumption of alcohol.

Paragraph 4 of the agreement is worded as follows:

'Products shall be selected by the company in such a way that national products are not favoured. Selection must be based only on an evaluation of the quality of the product, the

9 — Systembolaget has a wholesale licence and is therefore able to sell to the holders of serving licences. It is apparent from page 3 of the report the Konkerrensverket (Competition Authority) of 7 November 1996 submitted to the Commission on the situation of alcoholic beverages in the Swedish market, that the market in sales of wine and spirits to restaurants in 1995 represented 7% of the total market in wine and spirits and that Systembolaget was the dominant supplier for that year in that market (too).

10 — See Tillkännagivande av avtal mellem Systembolaget Aktiebolag och Staten, SFS 1994: 2049.

particular risks of injurious effects of the product, customer demand and other commercial and ethical considerations.

Upon application by a supplier whose product has not been accepted or has been dropped from the company's range, the company shall inform him in writing of the reasons for its decision. The supplier shall be informed of the remedies available before the Alkoholsortimentsnämnd against the company's decisions.

The range referred to in this agreement is the range in the company's ordinary price list.'

The agreement also establishes that Systembolaget's marketing is to be impartial and that, within the limits of the Law and the restrictions which it imposes on the advertising of alcoholic products, the company is to take steps to ensure that its customers are acquainted with new products.

Lastly, the agreement provides that Systembolaget's trading margin is to be determined according to the objective criteria applicable to both domestic products and imported products and that Systembolaget is to pursue its retail activities in accordance with the Law, to act reasonably, to provide a quality service to its customers and to ensure that the State receives a reasonable return on its capital without making the products unnecessarily expensive.

Serving licences

13. Chapter 6 of the Law concerns serving licences. Article 5 of Chapter 6 provides: 'Holders of serving licences may purchase the spirits, wine and beer necessary for their activities only from holders of wholesale licences relating to such products'.

Penalties

14. Pursuant to Article 2 of Chapter 10 of the Law, anyone who sells alcoholic beverages, whether intentionally or negligently, without authorization is liable to a fine or to a sentence of up to two years' imprisonment.

Marketing

15. The marketing of spirits, wine, beer and light beer is governed by the Lag (1978: 763) med vissa bestämmelser om marknadsföring av alkoholdrycker (Law enacting certain measures governing the marketing of alcoholic beverages). [11] This law provides that advertising and other marketing measures are not to be pressing or insistent and are not to encourage the consumption of alcoholic beverages. The Law generally prohibits the advertising of alcoholic products on television or radio or in newspapers or other periodicals.

Systembolaget's activity in practice

16. In 1995 Systembolaget and holders of serving licences sold a total of approximately 336 million litres of wine, beer and spirits, representing 38 litres per inhabitant. Systembolaget's share was approximately 248 million litres (30 million litres of spirits, 110 million litres of wine and 108 million litres of beer). Sales by holders of serving licences were principally of beer (approximately 78 million litres in all), while their share of the wine and spirits market came to approximately 7% (corresponding to some 10 million litres). In 1995 Systembolaget was the dominant supplier of wine and spirits to serving outlets. [12]

17. Systembolaget offers its selection of products to consumers in 384 shops, which represents one shop per 23 039 inhabitants or one shop per 1 172 km^2. In the shops the customer is served personally at the counter and only a few products are on display. The shops are all open from Monday to Friday from 9.30 a. m. until 6.00 p. m. The majority of shops are also open until 7.00 p. m. on Thursdays. All the shops are closed on Saturdays and also on Sundays and public holidays. Apart from Systembolaget's shops there are approximately 550 delivery points, for example food stores, where products can be ordered from Systembolaget's catalogue and delivered later. The products can also be ordered along 56 bus routes and on 45 rural post rounds.

18. All Systembolaget's purchases for resale are centralized. A particular shop cannot therefore purchase its stock independently. It

11 — As amended by the Lag om ändring af lagen (1978: 763) med vissa bestämmelser om marknadsföring av alkoholdrycker (Law amending the law enacting certain measures governing the marketing of alcoholic beverages) of 20 December 1994, SFS 1994: 1740.

12 — The majority of these figures are taken from pages 3 and 4 of the report referred to in footnote 9. The others have been inferred from the figures provided in the report. See also the letter of 19 August 1996 from A. L. Galatius, Primeur Vin AB, in which it is stated that the serving outlets' share of the wine market was 6%.

follows in particular from paragraph 8.2 of the 'Sammanställning av bestämmelser vid försäljning till Systembolaget' (hereinafter the 'conditions of sale and supply') that: 'Any producer, supplier or agent thereof who attempts to influence sales by contact with Systembolaget's staff shall be prosecuted. Wholesalers, manufacturers and their agents shall not normally have any contact with shops other than when delivering goods or making purchases in such shops in their private capacity. Fact-finding visits to shops, for example with guests from abroad, shall be notified beforehand to Systembolaget's commercial department.'

19. Systembolaget purchases products from traders who hold a manufacturing or wholesale licence. [13] On 7 October 1996 a total of 223 licences for the manufacture and/or wholesale of spirits, wine and/or beer had been issued. [14]

20. However, in September 1996 Systembolaget had a total of only 149 suppliers.

21. There are therefore 74 holders of manufacturing or wholesale licences who do not supply Systembolaget. Either they sell to holders of beverage outlet licences in competition with Systembolaget, which is the dominant supplier to restaurants and similar establishments, or they have a licence without selling anything, for example because they have applied for a licence in order to be able to submit offers to Systembolaget but have not succeeded in selling their products to Systembolaget. [15]

22. 130 of Systembolaget's suppliers (87%) together delivered less than 1% in volume of Systembolaget's products. Having regard to the criteria of sales figures for a product which determine whether it remains in Systembolaget's basic assortment or in its trial assortment (see my observations below on the various assortments), it must be presumed that these suppliers' products are mainly in the temporary assortment and are only sold for a short period through Systembolaget's sales network or that they are in the 'available to order' assortment, which is not stocked by Systembolaget. It is not clear from the evidence before the Court to what extent these 130 suppliers are able to sell the same products to holders of beverage outlet licences; moreover, in this market they

13 — It is apparent from a Government decision of 5 October 1995 that foreigners operating from their own countries are not required to have a permanent establishment in Sweden in order to obtain wholesale and import licences. However, it is apparent from a survey carried out by the Alkoholinspektion on 7 October 1996 that all holders of wholesale licences were undertakings established in Sweden. The Commission stated at the hearing that it was investigating, *inter alia*, whether representation was required.

14 — See the Alkoholinspektion's list of undertakings with wholesale and manufacturing licences.

15 — It may be the case that licensed manufacturers export their products. It is apparent from the papers before the Court that there are actually some products of Swedish manufacture, e. g. Absolut Röd 50% vodka, which are not included in Systembolaget's various assortments.

compete with Systembolaget to sell the products which they succeed in selling to Systembolaget. [16]

23. Out of the 223 licence-holders and the 149 suppliers to Systembolaget, therefore, only 19 suppliers remain. These 19 suppliers represent 8.5% of the 223 licence-holders and 13% of the 149 suppliers to Systembolaget. However, it is these 19 suppliers who supply more than 99% in volume of the products sold to Systembolaget. [17] Having regard to the sales figure criteria described below, it must be presumed that it is mainly or exclusively the products of these 19 suppliers which are in Systembolaget's basic assortment and which are therefore permanently on offer.

Among these 19 suppliers who make 99% of the deliveries to the monopoly which supplies the entire retail market in Sweden, the main supplier is the State-owned company V&S, which, as I have already said, previously had a statutory monopoly for the import and export of spirits, wine and beer and the manufacture of spirits. In September 1996, V&Shad a 35% share of the market in wine and a 66.6% share of the market in spirits. [18]

In the same period the overall retail-market share of the 10 largest suppliers of wine and spirits was 71.8% for wine and 96% for spirits. [19]

In the period January-September 1996 the retail-market share of Swedish-manufactured spirits and beer was 51.3% for spirits and 83.1% for beer. [20]

24. Systembolaget's total range consists of a basic assortment, a trial assortment, a provisional assortment and a 'by order' assortment.

The basic assortment consists mainly of products in the low and medium price categories. [21] Only some 35 shops carry the full basic assortment, but it is available to order

16 — Apparently, Systembolaget does not undertake to purchase a specific product from the wholesaler who is the official distributor of that product. However, I am unaware whether Systembolaget imposes obligations of exclusivity on wholesalers, prohibiting them from competing with Systembolaget by supplying a product that they sell to Systembolaget to holders of serving licences.

17 — See page 3 of the report referred to in footnote 9.

18 — See Annex 1(c) to the report referred to in footnote 9 on the situation of alcoholic beverages on the Swedish market, from which it is also apparent that the share of the retail beer market held by the three largest Swedish breweries is 72%.

19 — See Annex 1(c) to the report referred to in footnote 9.

20 — See tables 2A and 2D in the report referred to in footnote 9.

21 — See paragraph 2.2.1 of the conditions of sale and delivery.

in all shops. The trial assortment is made up of some of the products which are not immediately purchased as part of the basic assortment. As explained in paragraphs 30 and 31 below, where a prospective supplier's offer is refused by Systembolaget he may request that the product be tested according to a special procedure, following which it may be included in the trial assortment and then, provided certain conditions as to quantity are met, in the basic assortment.

According to paragraph 2.2.1 of the conditions of sale and supply, the provisional assortment consists of '... brands of limited availability, often only for a month or two, for example vintage wines, seasonal drinks or types of goods of which customers demand a varied supply.'

The 'by order' assortment consists of products which Systembolaget does not stock but which are stocked by licensed wholesalers. Products in this assortment appear in a special price list. Products which are ordered are subsequently delivered to the Systembolaget shop where the order was taken. Finally, there is an import service: at the customer's request, Systembolaget will import a particular product which is not in any of its assortments. The minimum quantity which can be ordered is one case, or ten cases of beer. The purchaser pays the handling and transport charges and the duty. The papers before the Court give no indication of whether significant use is made of this possibility in practice.

25. The basic assortment, the trial assortment and the provisional assortment appear in an overall price list published approximately seven times a year. It is aimed at consumers, who are able to obtain copies in the shops, and it is also sent to the 9 000 restaurants and other outlets in possession of a serving licence, which are also able to purchase their alcoholic beverages from Systembolaget. Consumers can take out an annual subscription to the price list, at a cost of SKR 100 (approximately ECU 11.65). Each shop also has a list of the products which it stocks.

26. Systembolaget draws up an annual purchase plan, which is revised every quarter. Purchases take the form of an invitation to licensed manufacturers and wholesalers to tender for delivery of products of a specific type and possibly from a particular production region, [22] for example: Beaujolais, red, fleurie; Italy, red, vino nobile; Rioja, red, reserva. Traders without a manufacturing or wholesale licence are unable to tender.

22 — See paragraph 2.3.2 of the conditions of sale and delivery and Systembolaget's 1997 product plan.

27. The tenders received are first dealt with by Systembolaget's buyers, who examine whether the price is favourable and assess previous experience with the production region and type of products concerned. Following this initial examination approximately half the products offered are rejected.

28. The remaining half then undergo a 'blind' test by members of Systembolaget's staff. The products receiving the highest points in each category are then placed in the basic assortment or in the provisional assortment.

29. If a product is to remain in the basic assortment, its sales in each 52-week period must reach a minimum amount expressed in both market share and volume, failing which it is taken out of the assortment (dropped from the list). [23] For wine, the thresholds currently applicable are a minimum volume of 27 000 litres, corresponding to 36 000 bottles, and a market share of 0.5% (red wine) or 1% (white wine) in one of the following price categories: (1) under SKR 60 (under ECU 7.1), (2) SKR 60-79 (ECU 7.1-9.3), (3) SKR 80-119 (ECU 9.4-14.1) and (4) SKR 120 and over (ECU 14.2 and over).

30. Where a product is not placed in the basic assortment, the licensee who offered it may, within two months from the decision rejecting it, register the product with a view to a trial sale. [24] The product is then tested with other products registered in the same category and the same price range by a panel of 13 consumers chosen from a list of approximately 400 consumers selected beforehand by Jordbrukets provkök, a company owned by the agricultural unions.

As an example of how such a tasting procedure may go we can take the tasting of a Riesling Kaefferkopf (vintage and producer not indicated) on 24 September 1996 by nine women and four men who, according to the record, often buy/drink dry white wine costing around SKR 100. The tasting provoked the following comments: 'light and clear in colour, delicate bouquet, very good'; 'fresh and light, fruity taste, floral bouquet'; 'excellent!!'; 'pleasant, fruity bouquet, average taste, will add nothing'; 'too anonymous'. Following the tasting this wine, which connoisseurs rank among Alsace's finest, [25] obtained a score of 8-5.

23 — See paragraph 2.3.4 of the conditions of sale and delivery and Annex 2: c Sortimentsutvärdering — Regelverk, which is set out in Annex 4(b) to the report referred to in footnote 9; see p. 5 et seq. of that report.

24 — See paragraph 2.5.1 of the conditions of sale and delivery.

25 — Kaefferkopf from Ammerschwihr, Alsace, France, was classified as a *Grand Cru* in 1983, see Raymond Dumay, *Guide du Vin*, p. 98. Wines from here are not only well known but also very highly thought of, see Hugh Johnson, *Wine '97*, p. 60.

31. Where the product obtains a majority of positive votes it is placed in the 'trial' assortment appearing in Systembolaget's overall price list. The price list does not state that it is a 'trial' product. However, only a limited number of special 'trial' shops stock the 'trial' product. [26] Where sales of the product over 26 weeks reach a certain threshold, a minimum volume of 13 500 litres for wine, corresponding to 18 000 bottles, and a market share in the price category in question of 0.5% for red wine or 1% for white wine, the product is transferred to the basic assortment and thereby made subject to the conditions relating to sales figures described in paragraph 29. The criteria applicable during the trial period are therefore actually the same as those applicable to the basic assortment, since the sales period is reduced by half, to six months, with a corresponding reduction in the volume criteria, the only difference being that 'trial' products are only stocked in a limited number of shops. It the trial sales fail to reach the minimum thresholds mentioned above the product is dropped from the list and the remaining stocks are returned to the licensee at his expense. [27]

32. It is apparent from the report of the Konkurrensverket, [28] p. 8, that a product is not automatically dropped from the list where the thresholds are not reached; in practice, circumstances are taken into account, to a certain extent. For example, increasing sales of a product are taken into account, so that the product may, depending on circumstances, be included in the basic assortment even where sales are lower than the minimum thresholds, or the sales period may be extended.

33. Paragraph 2.3.4 of the conditions of sale and delivery provides, in particular, as follows:

'A product which has been dropped from the basic assortment or the "trial" assortment cannot be reconsidered until two years have elapsed.'

34. New products are presented in *Vare Nytt*, which appears monthly. A subscription to the price list also covers that publication, in which each new product is depicted, together with a brief description of its taste, suggested accompaniments and a brief description of the region of production and the producer.

35. The October 1995 price list included 2 454 products, including 1 584 wines (660 red wines, 748 white wines, 52 rosé wines and 124 sparking wines, including 50 champagnes).

26 — According to paragraph 2.5.2 of the conditions of sale and delivery, there are two groups of 'trial' shops, each consisting of 30 shops spread throughout the country. Each group represents approximately 20% of total sales.

27 — See p. 6 of the report of the Konkurrensverket referred to in footnote 9.

28 — See footnote 9.

These 2 454 products were made up as follows: 1 288 products in the basic assortment, 930 in the temporary [provisional?] assortment and 236 in the trial assortment.

36. Systembolaget received 12 576 offers during the first eight months of 1996. [29] Examination of 5 159 of these offers had not yet been completed when the Konkurrensverket delivered its report on the situation on the Swedish market in alcohol on 7 November 1996. It is to be presumed that of the 7 417 offers whose examination had been completed, 3 608 (approximately 49% of the offers whose examination had been completed) were rejected in the preliminary examination, since it is stated that only 3 809 of these offers (approximately 51% of the offers whose examination had been completed) reached the tasting stage. Of the 3 809 offers tested, 2 700 (70% of the offers tested and 36% of the offers whose examination had been completed) were rejected. The remaining 908 offers (12% of the offers whose examination had been completed) which were accepted by Systembolaget and the products to which they related were purchased as part of the basic assortment, the 'trial' assortment or the temporary [provisional?] assortment.

In all, 6 509 offers, or 88% of the 7 417 offers whose examination had been completed by the reference date, were therefore rejected by Systembolaget.

It is impossible to ascertain from the available evidence whether the offers submitted by the public companyV&Swere rejected to the same extent as those submitted by other holders of wholesale licences.

37. The four principal wine-supplying countries during the first eight months of 1996 were Spain (30.8%), Italy (12.9%), Germany (10.7%) and France (9.6%). [30]

Facts

38. At the beginning of April 1994 Harry Franzén, who at the time owned a food store in Röstånga, purchased a quantity of wine in Denmark which he imported into Sweden. After selling most of this wine in his shop on 7 April 1994, he again sold wine in his shop on 1 January 1995, which was the day of Sweden's accession to the European Union. He had purchased some of that wine from Systembolaget and some came from the wine which he had previously imported from Denmark.

39. The Public Prosecutor prosecuted Harry Franzén for unlawfully selling and keeping alcoholic beverages. Mr Franzén was charged

29 — See p. 5 of the report of the Konkurrensverket referred to in footnote 9.

30 — See Table 2B of the report referred to in footnote 9.

with, *inter alia*, selling 20 bottles of wine and 5 litres of wine in cartons and with keeping 12 other bottles of wine and 1 litre of wine in a carton, contrary to Chapter 3, Article 1, and Chapter 10, Articles 2 and 5, of the Swedish Law on Alcohol.

40. Harry Franzén denied having committed an offence and claimed, in particular, that the charge, in so far as it related to the sales on 1 January 1995, was based on rules of law which were contrary to Article 30 of the Treaty, which prohibits quantitative restrictions on imports and all measures having equivalent effect, and Article 37, which provides that Member States are to adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.

Questions referred to the Court

41. By order of 14 June 1995 the Landskrona Tingsrätt (District Court, Landskrona) stayed the proceedings and asked the Court to answer the following questions:

'1. Is a statutory monopoly such as that of Systembolaget compatible with Article 30 of the Treaty of Rome?

2. Is a statutory monopoly such as that of Systembolaget contrary to Article 37 of the Treaty of Rome and, if so, must the monopoly be abolished or is an adjustment possible?

3. If a monopoly such as that of Systembolaget is to be regarded as being contrary to Article 37, is any period of adjustment available or should it have been abolished or an adjustment made by 1 January 1995?'

42. The national court stated as follows in the order for reference:

'Examination of the proceedings brought by the public prosecutor raises the question whether a person can be sentenced for having acted in breach of a rule of law which is contrary to Community law. The Law on Alcohol is structured in such as way as to enact a basic prohibition of selling alcoholic beverages. As far as retail is concerned, a derogation from that prohibition gives Systembolaget the exclusive right to engage in such trade. It can indeed be argued that even if Systembolaget's monopoly position were to be regarded as being contrary to Community law, this still does not mean that ordinary persons have a right to sell alcoholic beverages anywhere they wish, since a basic prohibition of sale still subsists. However, it was not the legislature's intention to enact a total prohibition on retailing alcoholic beverages but the aim of the Law is to give Systembolaget an exclusive right in this regard.

The Court considers that, in order to be able to give judgment in the case, it must be determined whether Systembolaget's monopoly is contrary to Community law.'

It follows that there is a close link between the statutory prohibition on the sale of alcoholic beverages and the monopoly conferred on Systembolaget, so that the national court considered that in order to be able to give judgment in the main proceedings it was necessary to determine the question whether Systembolaget's monopoly is contrary to Community law.

43. The national court also described the characteristics of the monopoly which result from the Law and the agreement between the State and Systembolaget. That description is, moreover, consistent with the account given above. It follows from those characteristics that the purpose of Systembolaget is to limit sales of alcoholic beverages. There is a centralized system in which a single undertaking owns and exploits all points of sale and also takes decisions relating to purchases and marketing. The effect of this statutory link between Systembolaget and the points of sale is to create an indivisible whole. In order to answer the questions referred, it is therefore necessary, in the opinion of the national court, to consider the system in its entirety and not merely as it relates to the various points of sale.

44. By the questions which it has referred to the Court, the national court seeks in effect to ascertain whether Articles 30 and 37 of the Treaty are to be interpreted as precluding a statutory arrangement for the retail of alcoholic beverages such as the one described. Answering these questions will entail in this case examining if there is a transitional period for the Kingdom of Sweden such as that referred to in Article 37 of the Treaty and whether the arrangement may be justified under Article 36 on grounds of the protection of health and life of humans.

45. The wording of the questions appears to indicate that the national court is also asking the Court to consider whether the national scheme in question must be abolished, or whether it might be adjusted. In that regard, I would observe that in the context of the cooperation procedure established by Article 177 of the Treaty, the Court only has jurisdiction to rule on the interpretation of Community law and, as regards the specific case, to provide the national court with the information which may enable it to determine whether the national scheme is contrary to Community law and, accordingly, must not be applied. The Court has consistently held that both Article 30 and Article 37 of the

Treaty have direct effect, [31] so that it is for the national court to ensure that it does not apply any national provision which is incompatible with those articles.

46. I consider that all the questions referred by the national court should be dealt with together. In what follows I shall first summarize the observations submitted to the Court. I shall then examine, more generally, the substance of Articles 30 and 37 of the Treaty, before addressing the question whether the national statutory system for the retail of alcoholic beverages described above is compatible with those provisions and if not whether it can be justified under Article 36 of the Treaty. Finally, I shall devote some argument to the question whether there is a transitional period and to the effect of incompatibility with Articles 30 and 37 of the Treaty.

Observations submitted to the Court

47. Mr. Harry Franzén maintains that the Law is contrary to Article 30 in several respects. First, it constitutes an obstacle to access of imported products to the Swedish market. Systembolaget is the sole sales channel to consumers. The limitation of the number of shops, the majority of which only stock a small proportion of the total range, the minimum thresholds in market share and quantity, the opaque and subjective selection procedure and the requirement for a wholesale licence, which also applies to exporters from other Member States who seek access to the Swedish market, have the cumulative effect that it is difficult for products from other Member States to penetrate the Swedish market.

The Law is also contrary to Article 37 of the Treaty. Article 37 is designed to ensure that the prohibition in Article 30 is not circumvented by national monopolies of a commercial character.

Lastly, Mr Franzén maintains that the restriction on the free movement of goods which results from Systembolaget's statutory monopoly cannot be regarded as justified under Article 36 of the Treaty. In Mr Franzén's view it is legitimate to seek to limit alcohol consumption but Systembolaget is not the appropriate instrument for doing this. Rather, the monopoly increases the consumption of illegal home-distilled alcohol, which represents a greater risk to health. Official alcohol consumption in Sweden, which amounts to 5.3 litres of alcohol per inhabitant (1993), is much lower than the corresponding figure for Denmark, for example, where it stands at 10 litres per inhabitant. However, it is necessary to add secret consumption, which covers both

31 — See, for example, Case 74/76 *Iannelli* v *Meroni* [1977] ECR 557 and Case 45/75 *REWE* v *Hauptzollamt Landau* [1976] ECR 181.

private imports and illegal home-distilled alcoholic beverages and amounts to approximately 40% of recorded consumption. Moreover, the monopoly is contrary to the principle of proportionality, since less restrictive measures, namely a system of approval of private traders, would allow sales to be kept low. Nor, in so far as it applies to Article 37, is Article 36 of the Treaty able to justify a derogation from Article 37 of the Treaty.

48. The Swedish Government, supported by the Finnish Government and the Norwegian Government, which has intervened pursuant to Article 20 of the Rules of Procedure as a Member State of the EEA, claims that Articles 30 and 37 of the Treaty do not prohibit a system such as the Swedish system, provided that all discrimination, in law or in fact, between imported products and national products is precluded. That condition is met. The national retail monopoly is an essential ingredient of Swedish policy on alcohol, which aims to limit sales and, accordingly, consumption of alcoholic beverages.

In the opinion of the Swedish, Finnish and Norwegian Governments, a system such as the Swedish system must in any event be regarded as justified on grounds of the protection of public health, as provided for in Article 36 of the Treaty.

49. The French Government considers that a retail monopoly which does not hinder access to the market by imported products and which does not make their access more difficult than for domestic products does not fall within the scope of Article 30 of the Treaty. To determine whether that is the position it is necessary, in the French Government's view, to take into account criteria such as the number of points of sale, their opening hours, the choice of products offered by the monopoly, the way in which these products are distributed throughout the shops and the way in which the monopoly markets competing products. A retail monopoly which does not discriminate against products from other Member States or hinder the access of such products to the market is compatible with Article 37 of the Treaty.

50. The Commission maintains the point of view which it expressed during the negotiations on access with the Swedish Government, but at the hearing it explained that it had sent the Swedish Government a formal letter in which it expressed doubts as to the compatibility with Article 30 of an alleged condition of representation, of the charge payable on submitting an application, of the condition that holders of serving licences must have an import licence and, finally, of the prohibition on sending alcoholic beverages to Sweden from another Member State as gifts.

General observations on Article 30 of the Treaty

51. Article 30 of the Treaty prohibits quantitative restrictions on imports and any measure having equivalent effect between Member States.

52. The Court has consistently held that any measures which are capable of hindering, directly or indirectly, actually or potentially intra-Community trade are to be regarded as measures having an effect equivalent to quantitative restrictions. [32]

53. The Court has consistently held that this condition is met by obstacles to free movement of goods which, in the absence of harmonization of legislation, are the consequence of applying to goods coming from other Member States where they are lawfully manufactured and marketed rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging), even if those rules apply without distinction to all products unless their application can be justified by a public-interest objective taking precedence over the free movement of goods. [33] As was made clear in the '*Cassis de Dijon*' judgment, Case 120/78 *Rewe-Zentrale* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, this case-law is based on the principle of mutual recognition. Products which have been lawfully produced in one Member State must be able to be marketed in other Member States without having to satisfy the requirements in force in those Member States.

54. In *Keck and Mithouard* [34] the Court held that the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder, directly or indirectly, actually or potentially, trade between Member States, so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States.

55. On the basis of that case-law, the Court has accepted, in particular, that the following national provisions are provisions relating to certain selling arrangements which are not covered by Article 30 of the Treaty, provided that they do not have the effect of discrimi-

32 — See Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837 and Case C-313/94 *Graffione* v *Ditta Fransa* [1996] ECR I-6039, paragraph 15.

33 — See Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraph 15, and Case C-315/92 *Verband Sozialer Wettbewerb* v *Clinique* [1994] ECR I-317, paragraph 13.

34 — See Joined Cases C-267/91 and C-268/91, cited in footnote 33, paragraphs 16 and 17.

nating against products from other Member States: provisions governing the opening times of shops; [35] a measure prohibiting pharmacists from advertising outside the pharmacy products commonly sold in pharmacies; [36] the exclusion of the distribution sector from televised advertising; [37] a prohibition on the marketing of processed milk for infants outside pharmacies; [38] and a prohibition on the sale of tobacco by traders other than specially authorized retailers. [39]

56. In the light of the *Keck and Mithouard* judgment and subsequent decisions, it might be asked whether, in the light of the observations submitted in the present case, Article 30 has been reduced to a provision which prohibits discrimination.

To my mind, however, the case-law of the Court cannot be interpreted in this way. Such an interpretation of Article 30 would in practice reduce that provision to a mere repetition of the general prohibition of discrimination in Article 6 of the Treaty, which would not be consistent with the wording of Article 30, which refers to measures having equivalent effect to quantitative restrictions on imports. Such an interpretation would undermine the provision which up to now has been one of the cornerstones of European integration.

57. In my view, *Keck and Mithouard* did not have a particularly wide scope; it merely established that the purpose of Article 30 is to prohibit obstacles to the free movement of goods throughout the common market and thereby to ensure that the products of one Member State have access to the market in other Member States. On the other hand, Article 30 is not designed to prohibit Member States from adopting general trade regulations applicable to traders in the Member State concerned where such regulations do not bar or impede access to the market by products of other Member States, which may be the case where the Member State discriminates between the products of other Member States and domestic products. In line with the foregoing, the Court expressly affirmed in *Keck and Mithouard* and in subsequent decisions that the application to products from other Member States of national provisions restricting or prohibiting, within the Member States of importation, certain selling arrangements is not such as to hinder trade between Member States, since their application to products from other Member States is not to be regarded as preventing access by those products to the

35 — See Joined Cases C-418/93, C-419/93 C-420/93, C-421/93, C-460/93, C-461/93, C-462/93, C-464/93, C-9/94, C-10/94, C-11/94, C-14/94, C-15/94, C-23/94, C-24/94 and C-332/94 *Semeraro Casa Uno* v *Sindaco del Comune di Erbusco* [1996] ECR I-2975 and Joined Cases C-401/92 and C-402/92 *Tankstation 't Heukske and Boermans* [1994] ECR I-2199.

36 — See Case C-292/92 *Hünermund* [1993] ECR I-6787.

37 — See Case C-412/93 *Leclerc-Siplec* v *FF1 Publicité and M6 Publicité* [1995] ECR I-179.

38 — See Case C-391/92 *Commission* v *Greece* [1995] ECR I-1621, the '*Babymilk*' case.

39 — See Case C-387/93 *Banchero* [1995] ECR I-4663.

Member State of importation or as impeding such access more than it impedes access by domestic products. [40]

58. Consequently, according to the Court's case-law, what matters is whether the measure in question is apt to hinder trade between Member States. The words '*certain* selling arrangements' [41] used in paragraph 16 of *Keck and Mithouard* support this view by suggesting that certain other provisions relating to selling arrangements might be caught by Article 30 even if they do not entail discrimination against products from other Member States.

59. That interpretation of Article 30, to the effect that it is intended to ensure the access to the market of products from other Member States, is also consistent with the most recent decisions of the Court. In Case C-391/92 *Commission* v *Greece* (the *Babymilk* case), [42] which concerned Greek legislation allowing processed milk for infants to be sold only in pharmacies, the Court held, in paragraph 20, that the Greek legislation was confined to limiting the places where the products concerned might be distributed by regulating the marketing of those products, *without thereby preventing access to the market* of products from other Member States or specifically placing them at a disadvantage.

60. Similarly, in paragraph 44 of its judgment in *Banchero* [43] the Court held that Italian legislation which reserved the retail of manufactured tobacco products to distributors with special authorization, but *without thereby barring access to the national market by products from other Member States* or not impeding their access to the market more than it impeded access for domestic products to the distribution network, was not caught by Article 30 of the Treaty.

The Court held that the legislation in issue did not have such a restrictive effect on trade; it relied, among the evidence, on the fact that retailers, some 76 000 in number, could freely choose how to stock their outlets according to the state of the market and that the legislation concerned did not therefore constitute a *de jure* or *de facto* centralization of purchases.

It is hard to understand the judgment as meaning anything else than that the Court

40 — This reason for allowing provisions concerning certain selling arrangements to escape the application of Article 30 of the Treaty has, in my view, been expressed most clearly in Case C-384/93 *Alpine Investments* v *Minister van Financien* [1995] ECR I-1141, paragraph 38. See also paragraph 17 of the *Keck and Mithouard* judgment, cited above.

41 — The wording of the French version of the *Keck and Mithouard* judgment would in fact suggest that certain other provisions relating to selling arrangements might be contrary to Article 30 of the Treaty, even if they do not discriminate against products from other Member States.

42 — See Case C-391/92, cited in footnote 38.

43 — See Case C-387/93, cited in footnote 39.

assumed that such a *de jure* or *de facto* centralization would bring the legislation within the scope of Article 30. Criticism of the *Banchero* judgment by academic writers [44] seems to forget that the conclusion of the judgment results solely from that assessment of the probative value of the evidence before the Court as to the practical effects of the legislation and that it must therefore be presumed that the Court found in its judgment that a *de jure* or *de facto* centralization of trade is likely to hinder trade between Member States and in which case is covered by the prohibition laid down in Article 30 of the Treaty. [45]

61. That interpretation is confirmed by a comparison between the decisions in the *Babymilk* and *Banchero* cases and the judgment of the Court in Case C-323/93 *Crespelle*. [46] In that judgment the Court held that rules of a Member State which required private economic operators importing into its territory quantities of bovine semen from another Member State to store it, subject to a charge, in an authorized centre which enjoyed an exclusive concession with regard to the storage of the semen and insemination *constituted a barrier to imports within the meaning of Article 30, since that requirement applied at the stage immediately following importation and imposed an economic burden on importers which was likely to restrict the volume of imports*. The determining factor was therefore not a comparison with the situation of comparable national products but the fact that the legislation was likely to restrict imports.

62. In recent decisions the Court has applied a uniform interpretation of the various provisions of the Treaty on the free movement of goods, freedom of movement for persons and the free movement of services and capital, see, *inter alia*, Case C-55/94 *Gebhard*. [47] Whether the proposed interpretation of Article 30 is right may therefore also be ascertained by examining the most recent decisions of the Court on freedom of movement for persons and the free movement of services.

63. In *Bosman* [48] the Court had to rule on the applicability of Article 48 of the Treaty, on freedom of movement for workers, to the football federations' transfer system, under which transfers between clubs were subject to payment of a transfer fee by the new club. The Court held in paragraph 103 that, although the transfer rules in issue applied also to transfers between clubs within the

44 — See F. L., *Juris-Classeur, Europe*, 1996, p. 15, and C. J. Berr, *Journal du droit international*, 2 1996, p. 495.

45 — See, in this regard, my Opinion in that case, in which I considered — although the Court disagreed — that it had been sufficiently established that there was in fact, if not in law, such a centralization of trade and that the legislation therefore came within Article 30 of the Treaty.

46 — Case C-323/93 *Centre d'Insémination de la Crespelle* v *Coopérative d'Élevage et d'Insémination Artificielle du Département de la Mayenne* [1994] ECR I-5077, paragraph 29.

47 — Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1994] ECR I-4165, paragraph 37.

48 — Case C-415/93 *Union Royale Belge des Sociétés de Football Association* v *Bosman* [1995] ECR I-4921.

same Member State, they still directly affected players' access to the employment market in other Member States and were thus capable of impeding freedom of movement for workers. The transfer rules could not thus be deemed comparable to the rules on selling arrangements which, according to the *Keck and Mithouard* judgment, fell outside the ambit of Article 30 of the Treaty.

64. The *Alpine Investments* case [49] concerned the applicability of Article 59 of the Treaty, on the freedom to provide services, to a prohibition of the practice of making unsolicited telephone calls, known as 'cold calling', for the purpose of selling various financial services. The prohibition in question applied not only to the 'cold calling' of customers in the Member State concerned but also to the 'cold calling' of customers in other Member States in connection with such services. It was not, therefore, the service itself that was prohibited but a certain arrangement for selling the service. The Court expressly refused to apply the criterion of discrimination established in the *Keck and Mithouard* judgment. In paragraphs 35 and 38 the Court stated that, whilst the prohibition in issue was general and non-discriminatory and neither its object nor its effect was to put the national market at an advantage over providers of services from other Member States, it could none the less constitute a restriction on the freedom to provide cross-border services, since it directly affected access to the market in services in the other Member States.

65. An interpretation of Article 30 of the Treaty to the effect that the prohibition it lays down covers measures which are capable of barring or impeding access to the market by goods manufactured in another Member State is also necessary to prevent lacunae in the protection of the free movement of goods where there is no domestic production of the goods in question. In such cases there cannot by definition be discrimination against products coming from other Member States in comparison with domestic products and a Member State might therefore be encouraged to impose charges on such products, since it can do so without having to impose comparable charges on domestic products. There would be nothing to preclude such obstacles to trade if Article 30 were understood as only containing a prohibition of discrimination against products of other Member States in comparison with domestic products. In that regard, reference can be made to Case C-47/88 *Commission* v *Denmark*. [50] The Court there held that it was not permissible for the Member States to impose on products which, in the absence of comparable domestic production, escaped the application of the prohibitions contained in Article 95 charges of such an amount that the free movement of goods within the Common Market would be impeded as far as those goods were concerned and that such a question must be appraised by reference to Article 30 of the Treaty. [51] The Court stated

49 — See Case C-384/93, cited in footnote 40.

50 — Case C-47/88 *Commission* v *Denmark* [1990] ECR I-4509.

51 — See paragraphs 12 and 13.

in the *Babymilk* case [52] that whether Article 30 was applicable could not depend on the existence of national production.

Paragraph (3) of Article 37 provides that the timetable for the measures referred to in paragraph 1 is to be harmonized with the abolition of quantitative restrictions on the same products provided for in Articles 30 to 34.

General observations on Article 37 of the Treaty

66. Article 37(1) of the Treaty is worded as follows:

'Member States shall progressively adjust any State monopolies of a commercial character so as to ensure that when the transitional period has ended no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States. [53]

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.'

67. Article 37 does not require the outright abolition of national monopolies having a commercial character. [54] According to Article 37(1), however, they must be adjusted in such a way as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States. Such an adjustment may mean that it is necessary to abolish certain monopoly rights. [55]

68. Article 37(1) is designed to preclude any discrimination between nationals of Member States regarding the conditions under which goods are procured and marketed. It does not therefore prohibit, as, for example, Article 95 of the Treaty does, the imposition on *products* from other Member States of charges in excess of those imposed on domestic products, but refers generally to the *nationals* of the Member States. It follows, to my mind, that Article 37 of the Treaty refers to the traders who supply the market in products. That provision therefore differs from Article 30 of the Treaty, first by being limited to discrimination and secondly by not protecting the free movement of

52 — See paragraph 17 of Case C-391/92 *Commission* v *Greece*, cited in footnote 38.

53 — The transitional period expired on 31 December 1969.

54 — See paragraph 27 of Case C-387/93 *Banchero*, cited in footnote 39.

55 — See Case 59/75 *Pubblico Ministero* v *Manghera* [1976] ECR 91, where an import monopoly was held incompatible with Article 37 of the Treaty.

goods as such but by protecting the traders of the other Member States who participate in the free movement of goods. [56]

69. That was confirmed in Case C-347/88 *Commission* v *Greece*, [57] where the Court held that to maintain in force the State's rights with regard to the importation and marketing of petroleum products gave rise to *discrimination* within the meaning of Article 37(1) *against exporters established in other Member States*. Presumably, the determining factor in that case was that the State's monopoly was of such a kind as to prevent certain traders, in particular those with whom the Greek State's monopoly did not have commercial relations, from exporting to the Greek market. There was therefore discrimination between nationals of the Member States, as mentioned in Article 37(1).

70. I could also refer to the *Manghera* judgment. [58] In that judgment the Court, after stating that the exclusive right to import manufactured tobacco products enjoyed by the monopoly of the Italian State constituted, in respect of Community exporters, discrimination prohibited by Article 37(1) of the Treaty, held that that provision must be interpreted 'as meaning that as from 31 December 1969 every national monopoly of a commercial character must be adjusted so as to eliminate the exclusive right to import from other Member States'. That finding is quite general and must be interpreted as meaning that the Court accepted that national import monopolies in themselves constitute discrimination between nationals of the Member States [59] and that it is therefore unnecessary to ascertain on a case-by-case basis whether such import monopolies actually lead to discrimination between nationals of the Member States.

71. The wording of the Treaty provides no support for the assumption that Article 37 of the Treaty derogates from the fundamental rule on the free movement of goods laid down in Article 30 of the Treaty. On the other hand, Article 37(3) shows that Article 37(1) is designed to *supplement* the rules laid down in Articles 30 to 34. Article 37(3) provides that the timetable for the measures referred to in paragraph 1 is to be harmonized with the abolition of quantitative restrictions 'on the same products' provided for in Articles 30 to 34. Moreover, the Court has also held [60] that it follows from the wording of Article 37 and also from its position in the general scheme of the Treaty that the article is designed to ensure compliance

56 — Unlike Article 37, Article 30 is designed to protect the free movement of goods, not the operators participating therein.

57 — Case C-347/88 *Commission* v *Greece* [1990] ECR I-4747, paragraph 44.

58 — See paragraphs 12 and 13 of the judgment, cited in footnote 55.

59 — I also refer in that regard to the Court's reasoning in paragraph 34 of Case C-202/88 *France* v *Commission* [1991] ECR I-1223 (hereinafter the '*telecommunications terminals* judgment'), where it is stated that the existence of exclusive importing and marketing rights deprives traders of the opportunity of having their products purchased by consumers.

60 — See paragraph 9 of the *Manghera* judgment, cited in footnote 55, paragraph 42 of the *Commission* v *Greece* judgment, cited in footnote 57, and paragraph 27 of the *Banchero* judgment, cited in footnote 39.

with the fundamental rule of the free movement of goods throughout the common market, in particular by the abolition of quantitative restrictions and measures having equivalent effect in trade between Member States, and thereby to maintain normal conditions of competition between Member States where a given product is subject, in one or other of those States, to a national monopoly of a commercial character. [61]

72. Furthermore, in its decisions the Court has sometimes applied Articles 30 and 37 concurrently to a national monopoly of a commercial character and sometimes applied only Article 30 to exclusive rights conferred on a national monopolistic undertaking. Thus in Case C-347/88 *Commission* v *Greece*, cited above, the Court held that the exclusive right to import and market finished petroleum products was contrary to both Article 30 and Article 37(1). In the *telecommunications terminals* judgment [62] the Court held that exclusive rights to import and market terminal equipment constituted a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 30 of the Treaty. On the other hand, the Court did not consider it necessary to examine the matter under Article 37, which may be regarded as confirmation of the fact that Article 37 supplements Article 30.

61 — In Case 91/78 *Hansen* v *Hauptzollamt Flensburg* [1979] ECR 935, paragraph 13, the Court expressed this in the following words: Article 37 is intended to render the sales policy of a State monopoly subject to the requirements of the free movement of goods and of the equal opportunities which must be accorded to products imported from other Member States.

62 — See footnote 59.

73. Consequently, national monopolies of a commercial character are prohibited following the expiry of the transitional period in so far as they are capable of barring or impeding, in law or in fact, access to the market by products from other Member States (Article 30) or constituting discrimination between nationals of Member States as regards the conditions under which goods are procured or marketed (Article 37).

Is the Swedish statutory system applicable to the retail of alcoholic beverages caught by the prohibitions laid down in Articles 30 and 37 of the Treaty?

74. As stated above, the national court has described the characteristics of the monopoly which result from the Law and the agreement between the State and Systembolaget and which, moreover, are consistent with what I have said on the matter. It follows that the purpose of Systembolaget is to limit sales of alcoholic products. There is a centralized system in which *one* undertaking owns and manages all points of sale and itself takes purchasing and marketing decisions. The existence of this statutory link between Systembolaget and the various points of sale means, in the national court's opinion, that there is an indivisible whole. In order to answer the questions which it has referred to the Court, it is necessary, in the national court's view, to evaluate the system in its entirety and not merely as it relates to a particular point of sale.

75. In what follows I shall examine the various characteristics of the Swedish statutory system in order to determine to what extent it falls under Articles 30 and 37 of the Treaty. I shall then ascertain whether the system is necessary on grounds of the protection of the life and health of humans and whether the system meets the requirement of proportionality: in that regard, reference will be made to Article 36 of the Treaty.

76. As I have already mentioned, the national court points out that the purpose of the Swedish system governing the retail of alcoholic beverages is to limit sales and thereby limit consumption of alcoholic products. That point is confirmed by the observations submitted by the Swedish Government during the procedure and by the statement of the reasons on which the Law is based, to which I referred in paragraph 6 above.

77. All the information available in the present case indicates that that objective has actually been achieved in practice. The statistical information to which Mr Franzén referred in his observations shows that recorded alcohol consumption in Sweden is significantly lower than that in other Member States of the Community, namely 5.3 litres of alcohol per inhabitant in 1993 compared with, for example, 10 litres per inhabitant in Denmark, which, like Sweden, is unable to produce grape-based wine and traditionally consumes less wine than other Member States. Similarly, the figures from the Konkurrensverket report set out in paragraph 16 above confirm that sales of alcoholic beverages are relatively low in Sweden, since total sales during the period considered (including sales by holders of serving licences) came to only approximately 1.75 litres of beer and approximately 1.13 litres of wine and spirits per inhabitant per month. [63]

78. In my opinion, it may therefore be presumed that sales of alcoholic beverages in Sweden would be significantly higher if it were not for the limited accessibility and supply of such products brought about by the statutory system centred on Systembolaget.

79. Although the Swedish statutory system governing the sale of alcoholic beverages does not completely prohibit the sale of alcoholic beverages or directly introduce quantitative restrictions on imports of those products and cannot therefore be described as a quantitative restriction in the strict sense, the objective sought and the effect produced by the system amount to the same thing in practice, that is to say, it significantly limits sales of a particular group of products. There is, therefore, a strong presumption that the Swedish statutory system hinders intra-Community trade and, accord-

63 — It is not possible to give the exact figures for wine and spirits. Sales of spirits probably account for approximately 20 to 25% of total sales of wine and spirits.

ingly, constitutes a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty.

80. If the methods which the Swedish statutory system uses to achieve its purpose are examined, it is significant that the Law confers on Systembolaget, which is entirely State-owned, the exclusive right to retail alcoholic beverages in Sweden, which, as stated in paragraph 17, it does through the 384 specialist shops and other outlets. This limitation of the number, *inter alia*, of shops makes it harder to obtain alcoholic beverages.

81. In paragraph 52 et seq. above I considered the Court's most recent decisions on Article 30 of the Treaty. As I pointed out in paragraph 57, in *Keck and Mithouard* and in subsequent decisions the Court clarified the purpose of Article 30, which is to prevent obstacles to the free movement of goods within the common market and thereby to ensure that products from one Member State have access to the markets of the other Member States. On the other hand, Article 30 is not intended to prohibit Member States from undertaking a general regulation of trade in relation to the traders of the Member State concerned where such regulation neither prevents nor hinders access to the market of products coming from other Member States, which may be the case where, for example, the Member State distinguishes products coming from other Member States in relation to domestic products.

82. The judgments in the *Babymilk* case and in *Banchero* [64] are entirely consistent with that reasoning. In the latter judgment the Court held that a system which reserved the retail of manufactured tobacco to specially-authorized distributors without affecting the marketing of products from other Member States differently than domestic products was not covered by Article 30 of the Treaty. The explanation for that finding, however, lies in the fact that the Court considered that the system in issue in the case before it did not have such a restrictive effect on trade. The Court found that the evidence showed that each operator of a tobacco outlet, of which there were 76 000, was free to make arrangements relating to purchases according to the market situation, so that the system in question did not involve, either in law or in fact, a centralization of purchases. In arriving at that finding the Court implicitly considered that such a centralization, in law or in fact, of purchases for supplying the retail market would have meant that the system would have been caught by Article 30 of the Treaty.

83. A system which reserves the sale of certain specific products to operators having

64 — See Case C-391/92, referred to in footnote 38, and Case C-387/93, referred to in footnote 39.

special authorization does not therefore of itself come within Article 30 of the Treaty, provided, however, that the system neither prevents nor hinders access to the market of products from other Member States. Whether such a system is likely to prevent or hinder access to the market depends, as the French Government observes, on, *inter alia*, the number of points of sale, the opening hours and the range of products.

84. If the Swedish statutory system applicable to retail sales of alcoholic beverages is examined in the light of those criteria, the question arises, in particular, whether the limitation of the number of points of sale constitutes such an obstacle to the consumption of alcoholic beverages that the limitation constitutes in itself a measure having an effect equivalent to a quantitative restriction on imports within the meaning of Article 30. The limitation imposed on the availability (and therefore on sales and consumption) of alcoholic beverages, which is taken to be the object and effect of the Swedish system, is obtained, in particular, by the existence of only a few very limited number of points of sale, namely one shop per 23 039 inhabitants and per 1 172 km^2. By way of comparison, the city of Luxembourg, with a population of approximately 82 000 inhabitants, would have only three or perhaps four shops where beer, wine and spirits could be obtained if a similar system were in force in Luxembourg. In my view, a number of factors argue in favour of regarding this severe limitation of the number of shops (which must be even more noticeable in rural areas) as a measure having an effect equivalent to a quantitative restriction caught by Article 30 of the Treaty.

85. There is, however, no need for the Court to adopt a definitive position on the question whether the existence of only a limited number of points of sale in itself brings the Swedish statutory system within the scope of Article 30. As the national court states, the system to be assessed by the Court constitutes a whole, and for that reason I shall now turn to a second element, which is doubtless essential for the determination to be made by the Court. Unlike in the *Banchero* and *Babymilk* cases, the Swedish statutory system makes provision for alcoholic products to be sold to consumers not through a large number of independent operators with special authorization — in *Banchero* there were some 76 000 operators able to obtain supplies freely — but through an outright State monopoly which centralizes the purchasing of all the products intended to be sold on the retail market. In economic theory the term 'monopoly' refers to a situation in which there is only one provider or purchaser on the market. [65] In the *Banchero* and *Babymilk* cases there was not a retail monopoly within the proper meaning of the term.

86. The Swedish system does not therefore solely concern the sale of alcoholic beverages to consumers. The system, which has at its heart a monopolistic State undertaking, also entails above all a centralization of all purchases of such beverages for sale on the Swedish retail market. An undertaking

65 — See Scherer & Ross, *Industrial Market Structure and Economic Performance*, Houghton Mifflin Company, Boston, 1990, p. 17, according to which a purchasing monopoly is, apparently, called in English a 'monopsony'.

having a monopoly of sales on a particular market, for example the retail market for alcoholic beverages, [66] will necessarily also have a monopoly in purchases on that market. A purchasing monopoly has the consequence that a particular offeror has only a single possible contracting partner. Either a product will have access to the monopoly holder's sales network or it will be completely excluded from the market in question. The monopoly holder therefore decides what products will be sold and therefore what products will have access to the market.

87. A proper retail monopoly is therefore considerably different, in my view, from a system in which a number of independent retailers are granted the right to sell one or more categories of products which they obtain independently. This distinction is particularly clear on a market such as the retail market in alcoholic beverages, where the range of different products of different brands on offer is extremely wide. It is impossible in practice for the monopoly holder to offer more than a fraction of the overall supply.

88. In that regard, reference may be made to paragraphs 34, 35 and 36 of the judgment in the *telecommunications terminals* case, in which the Court held as follows:

'In that regard it should be noted first that the existence of exclusive importing and marketing rights deprives traders of the opportunity of having their products purchased by consumers.

It should be pointed out, secondly, that the terminals sector is characterized by the diversity and technical nature of the products concerned and by the ensuring constraints. In those circumstances, there is no certainty that the holder of the monopoly can offer the entire range of models available on the market, inform customers about the state and operation of all the terminals and guarantee their quality.

Accordingly, exclusive importation and marketing rights in the telecommunications terminal sector are capable of restricting intra-Community trade.'

89. The fact that even at that time the Court saw a substantial difference between such exclusive rights conferred on monopolies

66 — The Court has held, in connection with Article 85 of the Treaty concerning agreements which restrict competition, that the retail trade and the restaurant sector are separate markets: see Case C-234/89 *Delimitis* v *Henniger Bräu* [1991] ECR I-935, paragraphs 16 and 17. Although case-law on the competition rules is not decisive for the purpose of interpreting Article 30 of the Treaty, it is none the less important to bear that definition of the market in mind when assessing the characteristics of Systembolaget.

and systems which restrict access to retail trade to specially authorized operators is illustrated by the judgment given virtually contemporaneously in Case C-23/89 *Quietlynn*, [67] in which the Court held that a prohibition restraining undertakings other than approved undertakings from selling pornographic material was not caught by Article 30 of the Treaty.

90. The Court therefore considers that a State monopoly affects the free movement of goods differently and much more restrictively than a statutory system of administrative authorization. [68]

91. In the telecommunications terminals judgment the exclusive right related to both imports and marketing. It is therefore reasonable to ask what importance is to be attached to the fact that Systembolaget's monopoly does not extend to the actual import stage.

92. It is apparent from the information provided during the proceedings that 93% of non tax-free sales of wine and spirits on the Swedish market are made through Systembolaget. The remaining 7% are sold by restaurants and other such outlets, to whom, moreover, Systembolaget is the dominant supplier. Therefore, as well as being the sole purchaser on the retail market, Systembolaget is also in fact the only intermediary between producer and consumer on the entire Swedish market.

93. The commercial reality is therefore, in my view, that a product from another Member State will only be imported into Sweden where it is certain that it can be marketed by Systembolaget. What point would there be in holders of wholesale licences importing a product if they were unable to sell it? As far as products' access to the market is concerned, the fact that imports are not themselves in the hands of a State monopoly is therefore irrelevant.

The fact that on paper the Swedish alcohol monopoly does not extend to the right to import strikes me as a purely formal artifice, which does not alter the real position, which is that it is Systembolaget which decides

67 — Case C-23/89 *Quietlynn and Richards* v *Southend Borough Council* [1990] ECR I-3059.

68 — It may seem surprising, therefore, that during the procedure the Commission considered that there was no difference, for the purposes of the free movement of goods, between a retail sales monopoly *stricto sensu* and a system of administrative authorization. That view is all the more surprising because quite recently, in a decision of 20 November 1996, No. IV/M.784 — Kesco/Tuko, the Commission decided that a merger between two Finnish retail chains, which would have had the effect of creating a dominant undertaking with a market share of at least 55%, was incompatible with the common market. According to paragraph 11 of the decision, the transaction also affected intra-Community trade in so far as suppliers from other Member States would in fact have to seek access to Kesco's distribution channels to ensure that their products could be adequately marketed in Finland. It may be, however, that the Commission's attitude is explained by the correspondence referred to above between the Commission and the Swedish Government in connection with the Kingdom of Sweden's accession to the European Union.

which products from other Member States are to be imported into Sweden. The centralizing of purchasing and retailing therefore has the effect that in the case of import monopolies there is only one single channel linking the producer to consumers and it is therefore a monopolistic State undertaking which decides which products from other Member States are to be imported into the Swedish market and which importers are to carry out those imports and profit from them.

It is significant, in that regard, that V&S, whose capital is owned by the State, continues to be the dominant supplier of spirits and wine on the retail market in Sweden: see paragraph 23 above.

94. In my view, a State monopoly on retail trade, such as the Swedish monopoly, therefore directly affects access of goods to the market in exactly the same way as a State monopoly on imports. In that regard, reference may also be made to the fact that in a number of recommendations made on 22 December 1969 pursuant to Article 37(6) the Commission considered it necessary that the Member States should adjust a number of State monopolies of a commercial character so as to ensure State neutrality in relation to retailers and ensure that suppliers from other Member States would be able to set up their own wholesale and retail channels. [69] It may also be observed that in Case C-347/88 *Commission* v *Greece*, cited above, the Court held that a State monopoly on imports could not be distinguished from a State monopoly on the refining of crude oil. The fact that measures which are applied after the import stage may constitute an obstacle to imports within the meaning of Article 30 follows from paragraph 61 of the *Crespelle* judgment, cited above.

95. It is also necessary to bear in mind the relationship between Articles 30 and 90 of the Treaty. Article 90(1) of the Treaty provides that, in the case of public undertakings and undertakings to which they grant special or exclusive rights, Member States are neither to enact nor to maintain in force any measure contrary to the rules contained in the Treaty. Article 30 is one of those rules. Article 90(3) provides that the Commission is to ensure the application of the provisions of Article 90(1) and, where necessary, address appropriate directives or decisions to Member States.

The delimitation of Article 30 is therefore relevant to the scope of the Commission's

69 — See Commission Recommendations of 22 December 1969 to the French Republic concerning the adjustment of the national monopoly of a commercial character in Thomas clinker (*Journal Officiel* 1970 L 31, p. 7), to the Italian Republic concerning the adjustment of the national monopoly of a commercial character in cigarette papers (*Journal Officiel* 1970 L 31, p. 9), to the Italian Republic concerning the adjustment of the national monopoly of a commercial character in flints (*Journal Officiel* 1970 L 31, p. 12), to the Italian Republic concerning the adjustment of the national monopoly of a commercial character in salt (*Journal Officiel* 1970 L 31, p. 14) and to the Federal Republic of Germany concerning the adjustment of the national monopoly of a commercial character in alcohol (*Journal Officiel* 1970 L 31, p. 20).

competence under Article 90(3). [70] Should the Swedish statutory system governing the retail of alcoholic beverages be held to fall outside the scope of Article 30 of the Treaty, the Court would thereby remove from the Commission a competence which, in the *telecommunications terminals* judgment, it had previously recognized it as having, with all the attendant consequences for the prevailing institutional balance and the internal market.

European undertakings and consumers would undoubtedly have had to pay a much higher price for modern telecommunications equipment such as mobile telephones and fax machines if the Commission had not adopted — and the Court, with reference to Article 30, essentially upheld — Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminals equipment. [71]

96. It follows from the judgments in *Manghera* and in Case C-347/88 *Commission* v *Greece* [72] that State import monopolies have in general a discriminatory effect within the meaning of Article 37(1). As I have already stated, I consider that a system such as the Swedish system actually has the same effects as an import monopoly. The second subparagraph of Article 37(1) makes it clear that it is not sufficient to look at how the undertaking in question looks on paper but that it is essential to ascertain whether in practice the body in question has an appreciable effect on intra-Community imports or exports. It must therefore be presumed that a State monopoly governing the retail trade which in practice decides which products from other Member States are to be imported into Sweden and which in practice has the same effects as an import monopoly is also covered by the prohibition in Article 37(1) of the Treaty, since it prevents a large number of traders from other Member States from marketing their products on the Swedish market.

97. A statutory system governing the retail of alcoholic beverages, such as the Swedish system, can therefore in itself hinder intra-Community trade and in practice has the same effect as a State import monopoly, which, in my view, means that the system is caught by both Article 30 and Article 37.

98. Turning now to the way in which the system operates in practice, it is also clear that traders from other Member States have great difficulty in penetrating the Swedish market with an alcoholic product.

— In order to be able to submit an offer at all, the person concerned must have a wholesale licence; on this point, see below, where the effects of this require-

70 — See paragraph 21 of the grounds of the *telecommunications terminals* judgment, cited in footnote 59.

71 — OJ 1988 L 131, p. 73.

72 — See Case 57/95 *Manghera*, cited in footnote 55, and Case C-347/88 *Commission* v *Greece*, cited in footnote 57.

ment, which constitute an obstacle to trade, will be set out in greater detail.

— Then, to be able to submit an actual offer, he must be invited by Systembolaget to submit an offer relating to a particular product, for example, 'Beaujolais, red, Fleurie'. No information is available on what induces Systembolaget to invite undertakings holding wholesale licences to submit an offer for a particular product at a particular time and it is therefore not known to what extent Systembolaget's suppliers and other licensees are able to ask Systembolaget to invite them to submit an offer relating to a particular product.

— When the offer has been submitted, Systembolaget's staff evaluate the quality/price ratio and assess previous experience with the production region and the type of product in question: see paragraph 27 above. This stage seems to me to involve a largely discretionary choice which leads to the exclusion of approximately half of the products offered.

— Systembolaget's staff then conduct a blind test. Taste is by no means objectively measurable. When, for example, does a Châteauneuf du Pape taste sufficiently of raspberry, liquorice, exotic spices and roast nuts, or a Brunello di Montalcino taste sufficiently of red and black fruit, juniper, oak and roast spices, [73] to meet with the taster's approval? It will depend on the actual taster, whose taste is not necessarily the same as that of all other consumers. Following the blind tasting, 70% of the offers not eliminated in the initial discretionary examination, which itself culminated in the exclusion of approximately half of the offers submitted, are rejected.

— Eventually, 12% of the offers submitted (whose examination had been completed by the reference date) can be put on sale: see paragraph 36. However, there is no guarantee that the tenderer will be allowed to sell his product other than to the limited extent implied by its inclusion in the provisional assortment.

— To be included in the basic assortment — which, moreover, only contains cheap products and those in the intermediate price range — a product must satisfy certain minimum requirements in terms of sales, failing which it will be dropped from the list: see paragraph 29 above. From a commercial and administrative point of view, it is not surprising that Systembolaget, as a monopoly covering the entire territory, should require minimum annual sales of 36 000 bottles and a certain market share in the relevant sector if a product is to remain in the basic

73 — The gustatory characteristics mentioned are reproduced in *Parker's Wine Buyer's Guide*, Simon & Schuster, Fourth Edition, 1995, p. 516 et seq. and p. 678.

assortment. That in itself shows, however, that a monopoly such as the Swedish monopoly is apt to hinder access to the market by products from other Member States, since such a limitation would not occur on a free market, where, by definition, products would be able to have much easier access to the market. For a particular producer, the system therefore means a serious restriction, since only products with a certain market share are able to have access to the basic assortment and therefore remain on the market. Moreover, the criteria for exclusion are not completely objective: see paragraph 32.

— When a product is dropped from the list because of insufficient sales it is subject to a quarantine period of two years, and even when that period has expired account is taken of previous experience with the product when products intended to be sold by Systembolaget are subsequently selected; see paragraphs 33 and 27.

— The possibility of having rejected products sold on a trial basis (on this point, see paragraphs 30 and 31 above) does not, in my view, provide unsuccessful suppliers with a real chance of obtaining access to the market. First, the product must pass a tasting test. Secondly, even if it passes that test, the quantities which must be sold and the fact that the 'trial' range is only available in a limited number of shops so that the 'trial' product finds it even more difficult to meet the quantitative requirements than products on the basic list mean, however, that the 'trial' product has no real prospect of obtaining access to and remaining on the market.

99. I would again point out here that 19 suppliers together supply 99% of Systembolaget's wines and spirits and probably supply the entire basic assortment, that it is V&S, which is wholly owned by the State, which dominates the wine and spirits market and that Swedish-manufactured spirits and beer have 51.3% of the retail market in spirits and 83.1% of the retail market in beer.

100. As I mentioned earlier, a particular problem arises from the aspect of both Article 30 and Article 37, namely that traders' access to the Swedish market is even further hindered by the system resulting from Articles 1 and 2 of Chapter 4 of the Law, which make imports subject to possession of a wholesale or manufacturing licence issued by the Alkoholinspektion. As I observed earlier, such authorization is necessary not only to be able to sell to Systembolaget but also, generally, to be able to submit an offer to Systembolaget, which does not itself have the right to import. In my view, this licensing system is indistinguishable from a commercial monopoly, since, as I have already said,

the system determines the categories of persons from whom the monopoly is able to purchase and, accordingly, those who are eventually able to gamble on Systembolaget's choice of the products destined to be sold on the retail market in Sweden. [74] As the Swedish Government acknowledged at the hearing, the system means in effect that traders from other Member States are not entitled to sell alcoholic beverages on the Swedish market save via an intermediary having a Swedish wholesale licence or unless the producer himself has a wholesale licence issued by the Swedish authorities and pays the charges associated with obtaining that licence.

101. However, scarcely any undertakings established in other Member States will wish to take the trouble to apply for a wholesale licence and to pay application and monitoring charges simply in order to have the possibility — should Systembolaget happen to seek an offer relating to a product they can supply — to offer their products to Systembolaget with no guarantee of any kind that they will sell even a single bottle. In practice, an undertaking will therefore normally be obliged to approach a Swedish wholesaler. [75] In contrast, Swedish producers who satisfy the Swedish conditions relating to establishment, in particular the State-owned V&S, will be able to sell directly to Systembolaget and to holders of serving licences.

102. In my view, this part of the State retail monopoly system discriminates against traders from other Member States and is thus contrary to Article 37 of the Treaty. The discrimination is reinforced by the fact that the monitoring charge is on a sliding scale and therefore much higher per litre where turnover by volume is low. Such a system is particularly favourable to a supplier such as the State-owned V&S, which has a 35% share of the wine market and a 66.6% share of the spirit market, in relation to wholesale-licence holders who are only able to sell small quantities, or even no quantity at all, to Systembolaget.

103. Such a system, under which the conditions relating to establishment of an undertaking are extended to cover traders established in other Member States, is in my view liable in itself to hinder the free movement of goods, since it makes imports more expensive and more difficult by requiring those traders either to employ the services of an intermediary or themselves obtain a wholesaler's licence and in so doing pay the associated fees. In my view, such a system is therefore also contrary to Article 30 of the Treaty. Reference can be made here to the fact that

74 — Article 37 only concerns activities intrinsically connected with the exercise of the specific function of the monopoly. It has no relevance to provisions which are generally aimed at the production and marketing of goods, whether or not they come within the monopoly in question: see Case 199/78 *Peureux* v *Directeur des Services fiscaux de la Haute-Saône* [1979] ECR 975, paragraph 28, and the *Banchero judgment*, cited in footnote 39, paragraph 29.

75 — This comes close to being a requirement to have a representative, which is in itself contrary to Article 30 of the Treaty: see Case 247/81 *Commission* v *Germany* [1984] ECR 1111.

in Case 94/79 *Vriend* [1980] ECR 327 the Court held that a system which exclusively reserved the import of vegetable reproduction material such as chrysanthemum plants to persons affiliated to publically approved bodies was contrary to Article 30 of the Treaty.

Can the system be justified under Article 36 of the Treaty?

104. According to the derogations provided for in Article 36 of the Treaty, Article 30 is not to preclude restrictions on imports justified, *inter alia*, on grounds of the protection of health and life of humans. Such restrictions are not, however, to constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

105. By its wording, Article 36 refers only to Articles 30 to 34 and the question therefore arises whether those derogations also apply to Article 37 of the Treaty.

106. Earlier, relying on the case-law of the Court, I applied the interpretation according to which there is a close link between the scope of Article 30 and that of Article 37 and those articles can be applicable to the same factual situations. It is therefore very difficult to make a clear-cut distinction between Article 30 and Article 37. In my view, therefore, Article 36, whose content has been defined in abundant case-law, should also be applied in relation to Article 37.

107. Accordingly, I consider that Article 37 is to be interpreted as meaning that restrictions ensuing from the existence and specific functioning of commercial monopolies but which are justified on, for example, grounds of the protection of health and life of humans may be compatible with Community law, subject to the conditions laid down in Article 36, such as the condition that they are not to constitute a means of arbitrary discrimination. The Court does in fact appear to have implicitly accepted that Article 36 may derogate from Article 37. Thus, in Case C-347/88 *Commission* v *Greece*, cited above, the Court considered whether an exclusive right to import and market petroleum products was justified on grounds of public security, one of the grounds referred to in Article 36, without distinguishing between Article 30 and Article 37.

108. As regards the substance of Article 36, I would observe first that the Court has consistently held that this provision relates only to non-economic considerations. [76] Even though the purpose of Systembolaget and, in particular, of the restriction of the number of points of sale is purported to be connected with alcohol policy, there is scarcely no

76 — See Case 238/82 *Duphar* v *Netherlands State* [1984] ECR 523, paragraph 23.

doubt that the system entails a considerable economic advantage for the Swedish State in that all profits from the retail of alcoholic beverages in Sweden go to the Swedish Treasury and these profits are maximized through the reduction of selling costs due to the limitation of the number of shops. However, under the consistent case-law of the Court, no account is to be taken of any loss of resources which the Swedish State would incur if it were required to abolish or adjust the monopoly on the retail of alcoholic beverages in order to render it compatible with the rules of the Treaty.

109. On the other hand, the Court has consistently held that the health and life of humans rank foremost among the values or interests protected by Article 36 of the Treaty and it is for the Member States to decide, within the limits imposed by the Treaty, what degree of protection they intend to ensure. [77] The Member States have a certain discretion in that regard.

110. The limits imposed on the competence of the Member States ensue, in particular, from the principle of proportionality, according to which the action must be necessary to provide effective protection for the life and health of persons. [78] If they may be protected as effectively by measures which are less restrictive of intra-Community trade, these alternative measures must be chosen. [79] If the measure is not in itself appropriate to achieve that objective or where it is in itself disproportionate, it will no longer be compatible with Community law. [80]

111. The Swedish Government maintained during the procedure that alcohol was injurious to health and that the aim of the Swedish statutory system was to limit sales and thereby limit the consumption of alcohol. The Government referred in that regard to a European Alcohol Action Plan adopted in 1993 by the Regional Committee for Europe of the World Health Organization, which set as an objective for all European States belonging to the WHO a 25% reduction in alcohol consumption by the year 2 000 compared with consumption in 1980.

112. It is primarily for the Swedish legislature to determine whether the protection of public health in Sweden justifies measures aimed at restricting the consumption of alcoholic beverages, and the WHO recommendations constitute weighty documentary evidence. There is no doubt that alcohol abuse can have seriously injurious effects from a social and medical point of view, and measures to prevent abuse might therefore be covered by Article 36. [81]

77 — See Case C-320/93 *Ortscheit* v *Eurim-Pharm Arzeimittel* [1994] ECR I-5243, paragraph 16, and Case 104/75 *De Peijper* [1976] ECR 613, paragraph 15.

78 — See Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior and Publivía* v *Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña* [1991] ECR I-4151, paragraph 16.

79 — See paragraph 17 of Case C-320/93 *Ortscheit*, cited in footnote 77, and paragraph 17 of Case 104/75 *De Peijper*, also cited in footnote 77.

80 — See Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procurati di Milano* [1995] ECR I-4165, paragraph 37.

81 — See the *Aragonesa de Publicidad Exterior and Publivía* judgment, cited in footnote 78.

113. On the other hand, I think that alcohol consumption can hardly be likened to alcohol abuse. New studies indicate that a certain daily consumption of wine has beneficial effects on health. A recent Danish study published in, *inter alia*, the *British Medical Journal* [82] reached the following conclusion: 'Light to moderate consumption of wine (up to three to five glasses a day) is associated with a significant reduction, virtually proportionate to intake, of the risk of dying from all causes, unlike consumption of beer and spirits. This reduction relates to both a reduction in the risk of death from cardiovascular and cerebrovascular disease and also to a reduction of the risk of death from all causes.' According to the study, if the relative risk of death of persons who never drink wine is set at 1.00, the risk for persons drinking three to five glasses a day is 0.51. On the other hand, the corresponding risk of death for those drinking three to five 2-cl glasses of spirits a day is 1.34. As regards beer, no consistent difference was found in relation to the relative risk of 1 for those who never drink beer; the study does not therefore support the assumption that normal consumption of beer is injurious to health.

114. As is apparent from my earlier arguments, I consider that the Swedish system of selling alcoholic beverages, considered as a whole, greatly hinders access to the market by products from other Member States and also leads to discrimination against nationals of other Member States. Taken as a whole, the Swedish statutory system therefore constitutes, in my view, an appreciable restriction of the free movement of goods and this is a factor which must be taken into account when considering whether the system is necessary or whether less restrictive measures would be capable of protecting public health.

115. As I have said, the main problem of a State retail monopoly such as the Swedish monopoly is that it involves a centralization of purchases and that it is therefore the State monopoly which actually decides which products from other Member States will be imported and have access to the market. It is therefore the monopoly as such that restricts trade.

116. On the other hand, it is not the monopoly as such which has a restrictive effect on sales and thereby on consumption of alcohol. That effect is due to the limitation of the number of points of sale. If, in the interest of the protection of public health, it is desired to limit sales of alcoholic beverages, it is not necessary to set up a centralized State monopoly in order to do this, since such a limitation could be achieved by less drastic means, such as a system with a number of independent outlets all obtaining their supplies independently, which would

82 — N. M. Grønbaek, A. Deis, T. I. A. Sørensen, P. U. Becker, P. Schnohr and G. Boje Jensen, *Forskel i dødelighed ved moderat forbrug af øl, vin og spiritus*, Ugeskrift for Laeger 158/16, 15 April 1996, p. 2258. The study, which was also published in the *British Medical Journal* 1995, 310: 1165, is based on the drinking habits of 6 051 men and 7 234 women aged between 30 and 79, who were studied between 1976 and 1988. The study shows, *inter alia*, that deaths from cardiovascular disease in Denmark fell by 30% during the last 15 years, which may be attributed to the fact that in the period 1975-1992 wine consumption increased from 17.3% to 30.2% of total consumption, which remained constant.

not therefore entail any particular obstacles to the free movement of goods.

117. Such independent sales outlets could be required, just like Systembolaget, to observe certain opening hours and not to sell to persons under a certain age. The State could also regulate retail marketing. [83] Furthermore, the public authorities would be able to monitor compliance with the licence conditions by the shop owner or manager. It is precisely this model that is used in Sweden for supervising beverage-serving establishments: apparently, it is possible to exercise effective control over approximately 9 000 independent beverage-serving establishments, a number much higher than the present number of retail shops.

118. A further question is whether the present very low number of sales outlets is necessary or whether it is possible to achieve the desired reduction in abusive consumption of alcohol by means of an increased effort to provide information and social measures, which may in practice be better suited to reducing alcohol abuse without limiting normal consumption. Less restrictive rules on wine, normal consumption of which appears, as I have explained, to have beneficial effects on health, and on beer, normal consumption of which does not appear to be injurious to health, would also be apt to change the drinking habits of the population so that it would consume less spirits, which, even in small daily quantities, apparently have adverse effects on health. However, as I have argued, the Swedish system governing the sale of alcoholic beverages must be considered as a whole, so that in the present case there is no need to give a definitive ruling on that question, which the Swedish legislature will be able to study more closely should the legislation be eventually amended.

119. It is clear, to my mind, that it is not necessary, on the grounds of public health in Sweden, to require traders established in another Member State and lawfully carrying on their activity there who wish to sell on the Swedish market either to employ the services of a Swedish intermediary or themselves hold a Swedish wholesale licence and be subjected to control by the Swedish Alcohol Inspectorate and pay the associated charges. From the point of view of health policy, it cannot matter whether the storage premises of such traders outside Sweden comply with the Swedish requirements or whether the conduct of the traders in question satisfies the requirements of the Alkoholinspektion.

120. On the other hand, ensuring that the products are taxed in Sweden and are not sold in a way contrary to Swedish rules on alcohol, for example to minors, does matter. However, it is perfectly possible to meet these conditions without requiring traders in other Member States to have a Swedish wholesale licence if they are to sell their

83 — See the judgment in *Hünermund*, cited in footnote 36, and the judgment in *Aragonesa de Publicidad Exterior and Publivía*, cited in footnote 78.

products on the Swedish market. It is sufficient to impose certain conditions on traders who stock, transport and retail alcoholic beverages in Sweden.

121. In conclusion, I consider that, taken as a whole, the Swedish statutory system governing the retail of alcoholic beverages cannot be justified under Article 36 of the Treaty on the grounds of the protection of health and life of humans. [84]

The question of the transitional period and the consequences of the system's incompatibility with Articles 30 and 37 of the Treaty

122. As I explained in paragraph 4, the Act of Accession of the Kingdom of Sweden makes no provision for any derogation or period of adjustment for the Swedish system governing the sale of alcoholic beverages. The abovementioned declaration relating to the exchange of letters between Sweden and the Commission is a purely unilateral declaration which cannot derogate from the Treaty.

123. As I stated above, Articles 30 and 37 of the Treaty have direct effect. Since 1 January 1995, the date of Sweden's accession to the European Union, those provisions can therefore be relied on by individuals before the Swedish courts, which must refrain from applying any national measure which is incompatible with them.

Conclusion

124. For the foregoing reasons, I propose that the Court should answer the questions referred to it by the Landskrona Tingsrätt as follows:

(1) Articles 30 and 37 of the EC Treaty are to be interpreted as precluding an overall national statutory system governing the retail of alcoholic beverages which has the following characteristics:

— the system is designed to limit sales and thereby limit consumption of such products and it must be presumed to have that effect in practice; and

84 — Purely for the sake of completeness, I would add that the retail monopoly might possibly be maintained for national products, see Joined Cases 80/85 and 159/85 *Nederlandse Bakkerij Stichting* v *Edah* [1986] ECR 3359, paragraph 18, which establishes that Article 30 of the Treaty does not prevent products from other Member States being favoured in comparison with domestic products.

— the law confers on a wholly State-owned company the exclusive right to retail alcoholic beverages, which are sold in a limited number of shops and other outlets; and

— while the retail monopoly in question comes into operation at the stage immediately following the import stage, it is the sole legally authorized purchaser of alcoholic beverages destined for the retail market in the Member State concerned and therefore in practice determines which products will be imported into that market from other Member States; and

— producers and other traders who are established in another Member State and lawfully carry out their activity there are only able to sell such beverages on the market of the Member State concerned through an intermediary in possession of a wholesale licence or only if they themselves have obtained a wholesale licence from the authorities of the Member State concerned and pay the associated charges.

(2) Such a system, taken in its entirety, cannot be justified on the grounds of protection of health and life of humans, as provided for in Article 36 of the Treaty, since that protection can be ensured by measures less restrictive of the free movement of goods.

(3) The provisions of Articles 30 and 37 of the EC Treaty have been applicable in Sweden since 1 January 1995 and have direct effect, so that they may be relied on by individuals before the national courts, which must not apply any provision which is incompatible with them.