OPINION OF ADVOCATE GENERAL TIZZANO delivered on 30 March 2006 [1]

1. By order of 30 March 2004, the Högsta Domstolen (Swedish Supreme Court) referred to the Court of Justice for a preliminary ruling under Article 234 EC four questions concerning the compatibility with the Treaty of Member State rules prohibiting private imports of products the retail sale of which is subject to a monopoly in that State.

2. In particular, the national court wishes to know whether a prohibition of this nature falls to be scrutinised under Article 31 EC, on national commercial monopolies, or under Article 28 EC, which prohibits all quantitative restrictions and measures having equivalent effect, and whether it is compatible with whichever one of those provisions is deemed to apply.

1 — Original language: Italian.

I — Legal framework

A — *Community law*

3. Article 31 EC provides as follows:

'1. Member States shall adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.

...'.

B — *National law*

The Swedish Alcohol Law

4. In order to limit the consumption of alcoholic beverages and to reduce the harm-

ful effects which their consumption has on human health, Sweden enacted the Alkohollag, No 1738 of 16 December 1994 (Swedish Alcohol Law, hereinafter also referred to as 'the Alcohol Law').

5. That law regulates all aspects of liquor production and distribution, including in particular manufacture, import, retail sale, sale in bars, and advertising.

Retail sale of alcoholic beverages

6. A monopoly over the retail sale of intoxicating liquor is held by one company (Systembolaget Aktiebolag; hereinafter 'Systembolaget'), which is entirely State-controlled.

7. Systembolaget has a sales network of 411 'stores' throughout Sweden. In rural areas, it also distributes through around 560 other 'outlets' (grocery shops, newsagents, tobacconists, filling stations and so forth), 56 bus routes and 45 postal rounds, through which the desired liquors may be ordered and collected.

8. It is via that sales network alone that persons over the age of 20 may purchase alcoholic beverages selected from different assortments ('basic', 'provisional' and 'trial' assortments). Products that are not in any of the assortments may be obtained by special order. In the case of products from other Member States, Systembolaget must import them at the customer's request and expense. Customers' special orders and import requests may be refused by Systembolaget 'on serious grounds' (Chapter 5, Article 5).

9. The case-file shows that on 1 January 2005 new legislation came into force abolishing Systembolaget's right to refuse 'on serious grounds' to import alcoholic beverages requested by customers.

The importation of alcoholic beverages

10. Apart from this service of importing at customers' request, Systembolaget does not have the right to import alcoholic beverages into Sweden. That right is reserved under Swedish law to the holders of licences for that purpose.

11. There is also no general right to import liquor privately. According to the second sentence of Chapter 4, Article 2, persons over the age of 20 may import alcohol purchased while travelling abroad into Sweden only for their own or their family's personal use or as gifts for relatives.

II — Facts and procedure

12. The main proceedings concern an appeal brought by Mr Rosengren and other individuals (hereinafter referred to collectively as 'Mr Rosengren') against an order forfeiting a number of boxes of wine imported from Spain.

13. The order for reference shows that Mr Rosengren ordered Spanish wine advertised on a Danish website, some of it by mail order and some direct from the producer.

14. The wine, which was paid for through two Swedish postal giro account numbers, was imported into Sweden by a private carrier engaged by Mr Rosengren without being declared at customs. It was then confiscated in Göteborg.

15. Mr Rosengren challenged the confiscation in Göteborg's Tingsrätt (District Court) (Sweden), which upheld it, however, since the wine had in its view been illegally imported into Sweden contrary to the ban on private imports imposed by the Alcohol Law.

16. Following an unsuccessful appeal against that judgment to the Hovrätten för Västra Sverige (Court of Appeal for Western Sweden), Mr Rosengren then took his case to the Högsta Domstolen. That court had doubts as to the compatibility of the prohibition in Chapter 4, Article 2, of the Alcohol Law with Articles 28 EC and 31 CE and so decided to stay the proceedings and refer the following questions for a preliminary ruling:

'(1) Can it be held that the abovementioned ban on imports constitutes part of the retail monopoly's manner of operation and that on that basis it is not precluded by Article 28 EC and is to be examined only in the light of Article 31 EC?

(2) If the answer to the first question is yes, is the ban on imports in such a case compatible with the conditions laid down for State monopolies in Article 31 EC?

(3) If the answer to the first question is no, is Article 28 EC to be interpreted as meaning that it in principle precludes the current ban on imports despite the obligation of Systembolaget to obtain, upon request, alcoholic beverages which it does not hold in stock?

(4) If the answer to the third question is yes, can such a ban on imports be considered justified and proportional in order to protect health and life of humans?'

17. In the ensuing proceedings, written observations were submitted on behalf of Mr Rosengren, the Swedish, Finnish and Norwegian Governments, the EFTA Surveillance Authority, and the Commission.

18. At the hearing before the Court on 30 November 2005 representations were made on behalf of Mr Rosengren, the Swedish and Norwegian Governments, the EFTA Surveillance Authority, and the Commission.

III — Legal analysis

Preliminary matter: the Franzén judgment

19. As noted above, the national court has referred four questions to the Court. It asks, essentially, whether a ban on private imports of liquor, such as that imposed under the Swedish Alcohol Law, falls to be considered under Article 31 EC, on national commercial monopolies, or under Article 28 EC, which prohibits all quantitative restrictions and measures having equivalent effect (first question), and whether it is compatible with the former provision (second question) or, in the alternative, with the latter provision (third and fourth questions).

20. In their written observations on these questions, all the intervening parties referred extensively to the *Franzén* judgment, in which the Court considered various aspects of the Swedish Alcohol Law, now again at issue. [2]

21. According to the Swedish and Norwegian Governments, *Franzén* in fact disposes

2 — Case C-189/95 *Franzén* [1997] ECR I-5909.

of the very issues raised by the Swedish court. The Court had already decided, in that judgment, that the ban in question falls to be considered under Article 31 EC and that it is compatible with that article. In the present case, therefore, that view had merely to be confirmed.

22. Before going any further, therefore, it first has to be established whether in fact the Court has already answered the questions raised.

23. In *Franzén*, the Court considered first the question of the respective spheres of application of Article 31 EC and Article 28 EC.

24. It laid down a general test whereby '*the rules relating to the existence and operation of the monopoly*' in Sweden are to be examined with reference to Article 31 EC, while 'the effect on intra-Community trade *of the other provisions of the domestic legislation which [were] separable from the operation of the monopoly*' are to be examined with reference to Article 28 EC (paragraphs 35 and 36).

25. Before examining that first group of rules, the Court considered the objectives and content of Article 31 EC:

— the purpose of that provision was 'to reconcile the possibility for Member States to maintain certain monopolies of a commercial character as instruments for the pursuit of public interest aims with the requirements of the establishment and functioning of the common market' and it therefore aims 'at the elimination of obstacles to the free movement of goods, save, however, for restrictions on trade which are inherent in the existence of the monopolies in question' (paragraph 39);

— it does not require 'national monopolies having a commercial character to be abolished' but requires them to be adjusted in such a way 'as to exclude any discrimination between nationals of Member States as regards conditions of supply and outlets, so that trade in goods from other Member States is not put at a disadvantage, in law or in fact, in relation to that in domestic goods' (paragraphs 38 and 40).

26. That premissed, the Court recognised that 'in aiming to protect public health against the harm caused by alcohol, a domestic monopoly on the retail of alcoholic beverages, such as that conferred on Systembolaget, pursues a public interest aim' (paragraph 41).

27. It then went on to examine, as matters pertaining to the existence and operation of the monopoly, the provisions of the Swedish Alcohol Law concerning: Systembolaget's 'product selection system' (including the requirement to import 'at the request and cost of the consumer' any alcoholic beverage not included in the assortments on offer: Chapter 5, Article 5), its 'sales network', and its 'promotion of alcoholic beverages'. The Court concluded that those provisions did not appear to be either discriminatory or apt to put imported products at a disadvantage and were therefore compatible with Article 31 EC (paragraphs 43 to 66).

28. Under the heading of 'other provisions of national legislation bearing upon the operation of the monopoly', the Court then considered, in the light of Article 28 EC, the provisions of Swedish law according to which only holders of production licences or wholesale licences are allowed to import alcoholic beverages. It held that by imposing additional costs ('such as intermediary costs, payment of charges and fees for the grant of a licence, and costs arising from the obligation to maintain storage capacity in Sweden') on beverages imported from other Member States, those provisions constituted an obstacle to imports, which was justified under Article 30 EC by the requirement of protecting human health against the harmful effects of alcohol but disproportionate for that purpose (paragraphs 67 to 77).

29. It seems to me that the EFTA Surveillance Authority is correct in observing that the *Franzén* judgment — while it does lay down the broad criteria for the proper application of Article 31 EC to sales monopolies and while it does consider various aspects of the Swedish Alcohol Law — does not deal with the specific points raised here. This case is concerned with a provision of that law (the ban on private imports of alcohol) which is a different, albeit related, provision to those considered in *Franzén.*

30. I therefore take the view that the ban in question and its compatibility or otherwise with Articles 28 EC or 31 EC require a new and separate analysis, in accordance with the principles laid down in *Franzén*, which I now propose to carry out.

The first question

31. As we have seen, the referring court first seeks to know whether the prohibition in question falls to be considered under Article 28 EC or Article 31 EC.

32. In order to resolve that issue, I am at one with all of the intervening parties that the

point of departure is the test laid down in *Franzén*. In the judgment, as noted above, the Court explained that '[h]aving regard to the case-law', [3] 'it is necessary to examine the rules relating to the existence and operation of the monopoly with reference to [Article 31 EC], which is specifically applicable to the exercise, by a domestic commercial monopoly, of its exclusive rights', while, on the other hand, 'the effect on intra-Community trade of the other provisions of the domestic legislation[,] which are separable from the operation of the monopoly although they have a bearing upon it, must be examined with reference to [Article 28 EC]'. [4]

33. But applying that test to the provision at issue here, in order to bring it within Article 28 EC or Article 31 EC, is anything but a straightforward exercise, as demonstrated by the opposite conclusions reached by the parties with arguments in support.

34. Mr Rosengren, the EFTA Surveillance Authority, and the Commission argue that the ban on private imports of alcoholic beverages falls to be considered in the light of Article 28 EC. The Swedish, Finnish and Norwegian Governments take the opposite view.

35. The former adopt the premiss that Article 31 EC 'relates specifically to state monopolies of a commercial character', [5] and constitutes a limitation of the general prohibition contained in Article 28 EC. For that reason, Article 31 was not amenable to a liberal interpretation.

36. To the same effect, the EFTA Surveillance Authority cites cases on sales monopolies (which are also cited in *Franzén*) where the Court held that Article 31 is 'irrelevant with regard to national provisions which do not concern the exercise by a public monopoly of its specific function — namely, its exclusive right'. [6] From those authorities it can be argued — as Mr Rosengren, the EFTA Surveillance Authority, and the Commission have done — that Systembolaget's exclusive right

3 — The authorities cited are Case 91/75 *Miritz* [1976] ECR 217, paragraph 5, Case 120/78 *Rewe-Zentral* ('*Cassis de Dijon*') [1979] ECR 649, paragraph 7; and Case 91/78 *Hansen* [1979] ECR 935, paragraphs 9 and 10.

4 — *Franzén*, paragraphs 35 and 36.

5 — See *Cassis de Dijon*, paragraph 7.

6 — See *Cassis de Dijon*, paragraph 7, and *Hansen*, paragraph 8.

applies to retail sales of liquor but not to imports of same. If that were so it would mean that a rule concerning liquor imports, such as the ban at issue here, falls to be considered not under Article 31 EC but under the general rule of Article 28 EC alone.

37. The opposite line of argument is no less convincing, however. Indeed it is even more so, to my mind, for reasons I will now endeavour to set out.

38. I would first observe that in the case-law preceding *Franzén* there are judgments which, in relation to the distinction at issue, seem to emphasise not so much the extent of the exclusive monopoly right as the specific function which it is intended to perform. That case-law holds that Article 31 EC concerns not national provisions related to the monopoly's *exclusive right*, but rather those which are 'intrinsically connected with the *specific business*' of the monopoly. [7]

39. In other words, those decisions seem to be based on the fair premiss that a monopoly exists and operates in order to exercise a function. The question as to which rules govern its existence and its activities must therefore be determined in the light of that function.

40. On proper consideration, indeed, *Franzén* too can be read in accordance with this second interpretation. That judgment treated as provisions falling to be examined under Article 31 EC all the provisions relating to the existence and operation of the Swedish monopoly, including those not connected with the exclusive right accorded to the monopoly.

41. It was thus under Article 31 EC that the Court considered not only the provisions concerning Systembolaget's sales network and promotion, but also all the rules concerning the system by which products are selected, including the rule which reserves to the monopoly the task of *importing* at customers' request alcoholic drinks not in the assortments on offer (Chapter 5, Article 5). [8] Thus, despite the fact that it is a provision concerning the importation rather than the retail sale of liquor, it was deemed by the Court to be one of those relating to the operation of the monopoly.

7 — See Case 86/78 *Peureux* [1979] ECR 897, paragraph 35. The same reading can also be given to the judgment in *Miritz* and even that in *Cassis de Dijon*, which is relied upon by the EFTA Surveillance Authority: what matters is not the exclusive right per se but the monopoly function with a view to which the exclusive right is accorded.

8 — See *Franzén*, paragraph 49.

42. That was, I believe, because the Court took the view that the task of importing alcoholic beverages on request is intrinsically connected with the exercise of the specific function assigned to Systembolaget by the national legislation. This function, as the Swedish and Norwegian Governments have observed, is not simply that of selling the alcoholic beverages that are available on the Swedish market, but that of creating a single and controlled channel of access for the purchase of such beverages.

43. If that analysis is correct, however, then the provision prohibiting the private import of liquor, which is the subject of the present proceedings, must be deemed to be a provision relating to the operation of the Swedish monopoly and hence falling to be considered under Article 31 EC.

44. That prohibition too is calculated to ensure that private persons wishing to purchase alcoholic beverages in Sweden have access to same only through Systembolaget's shops and sales outlets. As a consequence of that ban, if they wish to purchase and import liquor from other Member States they cannot do so directly but must go to the said shops and sales outlets and select from the products in the assortments or request importation in the case of products not available there.

45. According to this approach, as the Norwegian Government observed, the rule governing liquor imports by Systembolaget (already held by the Court to be inherent in the operation of the monopoly) and the rule banning private imports (at issue here) are complementary and indivisible: both of them are designed to channel demand for alcohol on the part of Swedish consumers into the exclusive sales system controlled by Systembolaget.

46. In that light, it is of no avail to argue — as do the EFTA Surveillance Authority and the Commission — that in another Member State (Finland) the retail sales monopoly in alcoholic beverages exists and operates even without the prohibition in question.

47. According to the approach I have taken, it does not have to be ascertained whether a monopoly can ever operate in the absence of the prohibition in question. Nor is it necessary to determine whether the function that a Member State assigns to a monopoly established by it may be pursued with less restrictive schemes than those used by a different Member State. Under this approach, what has instead to be established is whether or not the ban is intrinsically linked to the exercise of the specific function that the national legislature has decided to

assign to its monopoly. As noted above, it seems to me that in the instant case such an intrinsic link exists and that that therefore justifies the application of Article 31 EC.

48. I therefore take the view that a ban on private imports of alcoholic beverages, such as that imposed by the Swedish Alcohol Law, must be considered, in the specific scheme established by that law, to be a rule concerning the operation of a retail sales monopoly in the products in question and, as such, falling to be examined under Article 31 EC.

The second question

49. By its second question, the national court asks whether the disputed ban on private imports of alcoholic beverages is compatible with Article 31 EC.

50. The first point here is that while Article 31(1) EC 'does not require national monopolies having a commercial character to be abolished', it does require them to be adjusted 'in such a way as to ensure that no discrimination ... exists between nationals of Member States'. [9] In particular, 'as far as sales monopolies are concerned', the Court has held that 'monopolies are not allowed if they are arranged in such a way as to put at a disadvantage, in law or in fact, trade in goods from other Member States as compared with trade in domestic goods'. [10] The Court has also ruled that a sales monopoly is contrary to the Treaty not only if it 'does in practice place [goods from other Member States] at a disadvantage' but also if is potentially 'liable to place [such goods] at a disadvantage'. [11]

51. In the present case, which is indeed concerned with a sales monopoly, it therefore has to be established whether a prohibition on private imports, such as that ordained by the Swedish legislation, places or even potentially places alcoholic beverages from other Member States at a disadvantage, in law or in fact. [12]

9 — See *Franzén*, paragraph 38. See also Case 59/75 *Manghera and Others* [1976] ECR 91, paragraphs 4 and 5; *Hansen*, paragraph 8; Case 78/82 *Commission* v *Italy* [1983] ECR 1955, paragraph 11; Case C-387/93 *Banchero* [1995] ECR I-4663, paragraph 27; and Case C-438/02 *Hanner* [2005] ECR I-4551, paragraph 34.

10 — *Franzén*, paragraph 40, and *Hanner*, paragraph 36.

11 — See *Hanner*, paragraph 38.

12 — It may be noted that the Court takes a different and stricter line on import monopolies. It has held that in such cases what has to be determined is whether the national rules 'directly affect the conditions under which goods are marketed only as regards operators or sellers in other Member States' (see *Manghera*, paragraph 12, Case C-347/88 *Commission* v *Greece* [1990] ECR I-4747, paragraph 44, and Case C-158/94 *Commission* v *Italy* [1997] ECR I-5789, paragraph 23).

52. According to the Commission, a disadvantage exists in so far as the ban prevents Swedish consumers from dealing directly with producers in other Member States and purchasing the products they desire in those States.

53. I share that view only in part.

54. As described above (point 44), the import ban means that in Sweden persons over the age of 20 wishing to purchase alcoholic beverages from other Member States can do so only through Systembolaget's shops and sales outlets. Systembolaget will import products that are not available in the assortments 'at the customer's request and expense', 'unless there are serious grounds precluding it' (Chapter 5, Article 5).

55. It seems to me that, in the context of this system, the private import ban does not of itself place goods from other Member States at a disadvantage. On the contrary, it places them on exactly the same footing as home-produced goods. Both may be purchased by private individuals only in the Systembolaget shops and sales outlets. If they are not available in the assortment on offer there, they have both to be ordered through Systembolaget.

56. If one considers the system as a whole, however, then one sees that in reality the ban can, at least potentially, place alcoholic beverages from other Member States at a disadvantage.

57. Let me explain. When a private party orders a product (be it a domestic product or one from another Member State) which is not available in the assortment on offer, Systembolaget fulfils the customer's request by procuring him that product elsewhere, 'unless there are serious grounds precluding it' (Chapter 5, Article 5 of the Alcohol Law). However, as the EFTA Surveillance Authority pointed out, the Swedish legislation gives Systembolaget total discretion as to whether or not a request is to be refused on 'serious grounds'. There is nothing, therefore, to prevent the discretion being exercised in a discriminatory fashion so as to refuse, in particular, orders for liquor products available in other Member States and accordingly more difficult for the monopoly to obtain.

58. And if the discretion is exercised in that manner then there is no means by which private parties can obtain the alcoholic beverages they choose, since because of the import ban imposed by the Alcohol Law they

are also unable to import them directly. The import ban then no longer constitutes a means of channeling liquor demand into the Systembolaget system but becomes an insurmountable obstacle to the purchase of alcoholic beverages from other Member States, with the result that such beverages are placed at a disadvantage in relation to domestic ones.

59. Moreover, the Swedish Government has not cited any objective reason capable of justifying the disadvantage at which goods from other Member States may be placed, as we have just seen, as a result of the cumulative effect of Systembolaget's power of refusal and the ban on private imports. It merely pointed out that legislation entered into force on 1 January 2005 abolishing that power of refusal, so that the monopoly is now obliged to supply all alcoholic beverages requested by customers which are not already present in the assortments, even if that means having to import them.

60. The potential disadvantage described above has thus been eliminated as from that date, but that is irrelevant for the purposes of this case, since the facts material to the main proceedings predate the entry into force of the new law.

61. I am therefore minded to conclude that where there is a retail sales monopoly in alcoholic beverages, such as that established by the Alkohollag, Law No 1738 of 16 December 1994 (Swedish Alcohol Law), which has discretion to refuse orders from private parties that entail importing the products in question from other Member States, the imposition by that law of a ban on private parties importing those products themselves is contrary to Article 31 EC.

The third and fourth questions

62. By the third and fourth questions, the national court asks whether, where there is a retail sales monopoly in alcoholic beverages, to which the law assigns the task of importing from other Member States, at the request of private parties, alcoholic beverages which are not included in the assortments offered, the imposition by that law of a ban on private parties importing the products themselves is contrary to Articles 28 EC and 30 EC.

63. Since I have concluded that the ban is indivisible from the operation of the monopoly and that it therefore falls to be scrutinised by reference to Article 31 EC, there is no need to answer these two questions.

64. That notwithstanding, I propose to analyse the questions none the less, in order to provide the Court with a complete treatment of the case. With the proviso, however, that my analysis will follow a completely different course to that taken in relation to Article 31 EC.

65. It is now no longer a matter of ascertaining whether the prohibition of private imports of liquor places goods from other Member States at a disadvantage. What has to be established is instead: (i) whether, having regard in particular to the system of imports on request operated by Systembolaget, the ban amounts to a quantitative restriction on imports or a measure having equivalent effect within the meaning of Article 28 EC; (ii) if so, whether the ban is justified on grounds of the protection of human health which, according to Article 30 EC, Member States may protect even at the expense of the principle of free movement; [13] (iii) and, finally, whether the ban is in conformity with the principle of proportionality, in other words whether it is 'appropriate for securing the attainment of that objective and does not go beyond what is necessary in order to attain it'. [14]

66. As regards the first point, I would observe firstly that within the meaning of Article 28 EC, according to well-settled case-law, quantitative restrictions are any measures 'which amount to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit', [15] while measures having equivalent effect are 'all trading rules which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade'. [16]

67. In that light, I believe that Mr Rosengren, the EFTA Surveillance Authority, and the Commission are correct in arguing, without being contradicted by the Swedish Government, that the prohibition of private imports of alcoholic drinks constitutes in part a quantitative restriction and in part a measure having equivalent effect.

68. It constitutes a quantitative restriction inasmuch as it constitutes an absolute ban on private imports into Sweden of alcoholic drinks from other Member States which are already available from the monopoly or which are not available from the monopoly but which the monopoly refuses to import.

13 — See Case 215/87 *Schumacher* [1989] ECR 617, paragraph 18; Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior and Publivía* [1991] ECR I-4151, paragraph 13; *Franzén*, paragraph 76; and Case C-405/98 *Gourmet International Products* [2001] ECR I-1795, paragraph 26.

14 — Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 15, Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 35; Case C-58/98 *Corsten* [2000] ECR I-7919, paragraph 39, and Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 33.

15 — Case 2/73 *Geddo* [1973] ECR 865, paragraph 7, and Case 34/79 *Henn and Darby* [1979] ECR 3795.

16 — Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5.

In both cases, it is impossible for private parties, whether directly or with the assistance of Systembolaget, to import the products in question into Sweden. There is thus an out-and-out 'restraint of imports' as far as those products are concerned.

69. The ban also constitutes a measure having equivalent effect, however, in so far as it requires private parties to request the monopoly (and the monopoly to agree) to import alcoholic drinks not included in the assortments on offer. As the Swedish Government acknowledged, Systembolaget charges — in addition, of course, to the price applied by the producer of the liquor ordered and the carriage costs incurred — a further sum by way of fair consideration for its services. It is therefore the case that liquor imports from other Member States, while possible, entail a greater outlay for private parties (this 'fair consideration') than if they could import directly.

70. Turning to the possible grounds justifying the prohibition of private imports and the proportionality of same, I note that according to the Swedish Government, supported on this point by the Norwegian Government, the purpose of the ban is to protect public health against the harm caused by alcohol, in particular the health of those under the age of 20 whom the Swedish legislature intends to have no access to the purchase of intoxicating liquor.

71. On that ground, the Swedish Government argues, the system is organised in such a way that liquor purchases go through the retail system operated by the monopoly, which systematically checks the ages of customers in its shops and sales outlets and refuses to serve persons under age. There were also regular inspections of those shops and sales outlets involving simulated requests for liquor by persons of underage appearance to ensure that sales staff actually carry out the prescribed age-checks.

72. An entirely different view is taken by the EFTA Surveillance Authority and the Commission. Both maintain that the prohibition in question cannot be justified by the objective of protecting public health and that it is in any event disproportionate to that objective.

73. According to the Commission, this is first of all demonstrated by various inconsistencies apparent in the Swedish policy for the protection of public health. In particular:

— unlike liquor, tobacco products are not subject to any prohibition in Sweden as to their importation and distribution;

— persons over the age of 20 returning from travel abroad may bring substantial quantities of alcohol into Sweden;

— persons over the age of 20 may also, unless obviously intoxicated, purchase liquor in unlimited quantities from the monopoly;

— the monopoly itself has promoted consumption by extending its shops' opening hours.

74. In other words, the Commission is arguing that a Member State that reduces the level of protection of its citizens' health by allowing them to consume freely some products harmful to human health (tobacco products) and by making the consumption of others (liquors) easily accessible in unlimited quantities, cannot then invoke the protection of health, of all things, as justification for particular provisions, such as the prohibition in question, which go in the opposite direction.

75. In any event, the Commission continues, even if the ban were to be considered on its merits, it would still be illegitimate since it was disproportionate to the Swedish Government's stated objective. In the view of the EFTA Surveillance Authority and the Commission, in order to prevent persons under the age of 20 from purchasing alcohol it is not necessary to ban all imports but simply to require customs authorities, postal services and private delivery companies to check the ages of the consignees of products ordered outside Sweden.

76. For my part, I readily concede that some of the decisions made by the Swedish legislature may indeed appear questionable. In particular, there is no doubt but that allowing *persons over the age of 20* to purchase unlimited quantities of alcohol, even if only in Systembolaget's shops and sales outlets, may diminish the impact of the State's action to protect public health.

77. It does seem to me, however, that those decisions to some extent fall within the freedom of Member States to 'to decide on the degree of protection which they wish to afford to public health and on the way in which that protection is to be achieved', [17] and are therefore, in that respect, among the options available to Member States for attaining that objective. By contrast, what falls outside the discretion of the Member States, in my opinion, and thus within the

17 — *Aragonesa*, paragraph 16; Case C-262/02 *Commission* v *France* [2004] ECR I-6569, paragraph 24.

purview of the Court is the appropriateness and necessity of such decisions in relation to attainment of the declared objectives, given that only compliance with those conditions can justify the restrictions deriving from those decisions. [18]

78. Accordingly, what must be ascertained is not which measures would be feasible and more effective in abstract terms but whether the actual measures adopted by Sweden are appropriate for achieving the degree of protection of public health pursued by that State and do not go beyond what is necessary for that purpose.

79. It seems to me that, on that basis, the import ban and the associated Systembolaget sales system have to be regarded as proportionate to the Swedish Alcohol Law's objective of protecting the health of *persons under the age of 20.*

80. As has also been seen above (see points 44 and 54), the ban obliges anybody wishing to purchase alcoholic beverages from other Member States to do so through the sole retail sales channel available in that State, namely the shops and sales outlets of Systembolaget. In other words, one has to go through a sales network in which customers are systematically required to give proof of age and especially one in which regular checks are carried out to ensure that that requirement is strictly observed. This in fact represents an effective means of achieving the legitimate objective pursued by the Swedish legislature of preventing persons under the age of 20 from purchasing alcoholic liquor.

81. Contrary therefore to what the EFTA Surveillance Authority and the Commission have argued, I do not believe that without the ban *this very objective* could be pursued with the *same degree of effectiveness* by requiring customs authorities, postal services and private delivery companies to check the ages of consignees of alcoholic liquor ordered outside Sweden.

82. Whereas it is possible with a single, limited sales network to ensure that staff always ask customers for proof of age, the same obviously cannot be done if there are numerous different suppliers delivering alcoholic beverages from other Member States. In other words, in the absence of the ban it would not be possible to check — as

18 — See *Commission* v *France*, paragraph 24 et seq., and Case C-429/02 *Bacardi France* [2004] ECR I-6613, paragraphs 33 et seq., and my Opinion in *Commission* v *France* (points 78 to 80).

currently happens in Sweden — that *all* carriers or other agents importing on behalf of private parties do not deliver intoxicating liquor to persons under the age of 20.

83. That said, I must add however that the rationale on which these arguments are based does not apply to the restriction on imports of goods from other Member States resulting from the concurrent existence in the Swedish law of the ban on private imports of liquor and the power of Systembolaget to refuse, 'on serious grounds', to fulfil private orders.

84. As has also been seen above (see points 57 to 58), where a private request to import liquor is refused the import ban no longer constitutes a means of channeling demand for liquor into the system controlled by Systembolaget, but becomes for everybody (whether underage or not) an insurmountable obstacle to the purchase of alcoholic beverages from other Member States. In respect of that restriction, therefore, as the Swedish Government has in any case conceded (see point 59 above), the justification considered above on the ground of preventing persons under the age of 20 from purchasing alcohol does not apply.

85. It follows, in my view, that to the extent I have just described, the import restriction in question must be regarded as contrary to Articles 28 EC and 30 EC.

IV — Conclusion

86. In the light of the foregoing considerations, I therefore propose that the Court should reply to the Högsta Domstolen as follows:

(1) A ban on private imports of alcoholic beverages, such as that imposed by the Alkohollag, Law No 1738 of 16 December 1994 (Swedish Alcohol Law), must be

considered, in the specific scheme established by that law, to be a rule concerning the operation of a retail sales monopoly in the products in question and, as such, falling to be examined under Article 31 EC.

(2) Where there is a retail sales monopoly in alcoholic beverages, such as that established by the said law, which has discretion to refuse orders from private parties that entail importing the products in question from other Member States, the imposition by that law of a ban on private parties importing those products themselves is contrary to Article 31 EC.