



INTERNATIONELLA HANDELSHÖGSKOLAN
HÖGSKOLAN I JÖNKÖPING

The redefinition of private import of alcohol

With focus on products purchased on the Internet and the Swedish legislation

Master's Thesis within EC Law

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Titel:	Utvidgningen av privat import of alkohol med tyngdpunkten på varor köpta via Internet
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Sammanfattning

Den fria rörligheten av varor utgör en grundstomme inom den Europeiska Unionen, vilken erkänner varor från medlemsstaterna tillträde till den gemensamma marknaden. Sverige hade fram till 1995 fem olika monopol som reglerade importen, exporten, tillverkningen, distributionen och försäljningen av alkohol, men var tvungen som ett led i inträdet till EU att avveckla fyra av dessa. Kvar återstod försäljningsmonopolet, Systembolaget, vilket än idag är strikt reglerat genom begränsat antal butiker och öppettider. Systembolaget utgör in viktigt beståndsdel i den svenska alkoholpolitiken, vilken har till syfte att begränsa alkoholen och dess skadeverkningar i Sverige. Ett viktigt mål är också att motverka att alkoholen når ut till ungdomar under 20år, varvid strikta kontroller av ålder sker vid köp på Systembolaget.

På senare tid har det diskuterat huruvida det svenska förbudet mot privat införsel av alkohol skall anses vara förenligt med den fria rörligheten av varor och den uppställda artikel 28 i EG-fördraget. Där stadgas det att inga importrestriktioner skall hindra varor tillträde till den gemensamma marknaden. Det uppställda undantaget i artikel 30 berättigar medlemsstaterna att behålla en sådan restriktion om det kan anses nödvändigt till skyddet för den allmänna hälsan. Kommission har i ett motiverat yttrande upplyst Sverige att förevarande förbud utgör en sådan restriktion som avses i artikel 28 och att förutsättningarna att behålla ett sådant förbud inte kan anses uppfyllda. Den svenska regeringen anser att förbudet fyller en viktig funktion genom att begränsa tillgängligheten av alkoholen på den svenska marknaden, samt upplyser att en konsument som önskar importera särskilda produkter kan göra detta genom Systembolaget. Att tillåta konsumenter att importera fritt skulle försvaga det ursprungliga syftet med Systembolaget, vilket är att skydda den allmänna hälsan och minska risken för att alkohol blir tillgänglig för ungdomar.

Enligt Alkohollagen kan en person som har fyllt 20 fritt importera alkohol till Sverige under förutsättning att denne reser in med varorna till Sverige och att dessa varor är för hans personliga nyttjande. En föreslagen utvidgning av definitionen privat import kan komma att inkludera varutransporter vilka sker för köparens räkning, ofta kallade distans köp. Detta skiljer sig då nämnvärt från distansförsäljning där säljare står för transporten, och är skyldig att betala punktskatt i destinationslandet för dessa varor. Vid distans köp skall ingen beskattning ske i destinationslandet, under förutsättning att dessa avgifter har betalats i varans ursprungsland.

En utvidgning av definition av privat import till att innefatta varutransporter organiserade av köparen kan skapa problem då inget riktigt kontrakt föreligger mellan säljaren och transportbolaget. Svårigheter kan då uppstå för säljarens då denne saknar möjlighet att kontrollera att köparen är av påstådd ålder och att alkoholen är avsedd för dennes personliga konsumtion.

Master's Thesis in EC Law

Title:	The redefinition of private import of alcohol with focus on goods purchased via the Internet and the Swedish legislation
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Abstract

The free movement of goods constitutes one of the fundamental principles of the European Union and entitles goods entrance to the internal market. Sweden had before 1995 few monopolies concerning the import, export, manufacturing, distribution and retail on alcohol, and had to as a result of entering EU abolish four of these. The monopoly on retail, Systembolaget, was retained, and is still today strictly controlled by limited number of stores as well as restricted openly-hours. Systembolaget contributes an important part of the Swedish Alcohol Policy, which main purpose is to limit the accessibility of alcohol in Sweden. Another essential purpose is to prevent alcohol to reach people under the age of twenty, and this is upheld by strict age-controls when purchasing alcohol from Systembolaget.

Lately it has been argued that the Swedish prohibition of private import of alcohol constitutes a restriction of the free movement of goods and in breach of Article 28 EC. The exception of such restriction is presented in Article 30 EC and allows Member States to obtain national trade barriers if a justification based on the protection of the public health could be made. The Commission is of the opinion that the Swedish prohibition constitute such a restriction referred to in Article 28 and is not willing to accept the justification to protection of the public health. The Swedish government however, is reluctant to remove the prohibition and argues that consumers that require a certain product can import alcohol through Systembolaget. An elimination of the ban would undermine the core purpose with Systembolaget which is to protect the public health and prevent alcohol to be distributed to people under the age of twenty.

According to the Alcohol Act a person who has turned twenty can legally import alcohol to Sweden when he is travelling with the goods if those products are for his personal use. A proposal has been presented to a redefinition of private import, which would include situation where the buyer is not personally travelling with the goods, yet the transportation is carried out on the buyer's behalf. Such purchases are often referred to distance purchase, and in those situations should the excise duty be laid down in the country where the good was released for consumption. In distance sales the seller is responsible for the transportation of the goods but also to pay excise duty on the products in the country of destination.

A redefinition of private import to include transportation made on the buyer's behalf could create problems since there is no actual contract between the seller and the transporting-company. Problems can then arise since the seller has no possibility to control that the buyer is of the legal age or guaranteeing that the alcohol is for that person's use.

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Abbreviations

B2B	Business to Business
B2C	Business to Consumer
CISG	United Nations Convention on International Sales of Goods
EC	European Community
EC Treaty	Treaty establishing the European Community
EEC	European Economic Community
EEC Treaty	Treaty establishing the European Economic Community
ECJ	The European Court of Justice
EU	The European Union
MEQR	Measures having equivalent effect (Article 28 EC.)
VAT	Value-added tax

1 Introduction

With the growth in consumer purchasing via the Internet a new type of market has developed. This is a global market where national borders no longer matters the way they used to do. The term free movement of goods has been around for quite a while, yet in practice there are still barriers to overcome to a complete free movement of goods on the internal market. One of them is the Swedish prohibition of private import of alcohol. It can almost be seen as a bit contradictory since the Swedish export of alcohol the past ten years has been very successful. Their biggest success “Absolut Vodka”, with increasing sales volume of 9% last year, is distributed through Vin&Sprit AB, wholly owned by the Swedish State.¹ To have a prohibition on privately imported alcohol with an argument of protecting the (Swedish) public health but gladly be exporting to other countries and exposing these consumers to the “harmful” products is in this author’s opinion a matter of double standards. Another example is the ongoing commercial on television where the consumers are informed that special wine, which is not part of Systembolaget’s ordinary product range, can be ordered through Systembolaget. By allowing marketing of alcoholic beverages and by that encourage to consumption the justification of banning private import in order to protect the public health could be seen as a bit contradictory. So should it really acceptable to have a prohibition on private import of alcohol whilst Systembolaget can promote its own import-service and the export of alcohol to foreign markets is flowing?

1.1 Background

One of the fundamental principles of the European Union (EU) is to create a single market for persons, services, capital and goods.² The free movement of goods implies that no national obstacles³ or any discrimination based on nationality⁴ are allowed. Before Sweden’s admission to the EU they had a strict regulated monopoly on alcohol, which basically meant that the state-owned Systembolaget had monopoly on import, export and wholesale. When Sweden entered the EU in 1995, the country had to give up some of its national sovereignty. With that they had to start adjusting their alcohol monopoly so it would not be incompatible with the EU legislation.⁵ The state owned monopoly on alcohol in Sweden was considered a national obstacle for the common market⁶ and had to be adjusted to comply with the EC Treaty.⁷ Some of the changes meant

¹ Annual report of 2005 from V&S Group.

² Article 3 (c) EC.

³ Article 28 EC.

⁴ Article 12.1 EC.

⁵ Holder, H.D. Sweden and the European Union: Changes in National Alcohol Policy and Their Consequences (2000) p. 29.

⁶ A common market is a market where there is free movement of goods within the union, but also free movement of factors such as production, labour, enterprise and capital.

⁷ Articles 28 and 31 EC.

that the Swedish government had to give up the monopoly on import, export and wholesale on alcohol, even though they could still retain the monopoly on off-premise retail^{8,9}.

In 2004 the European Commission brought Sweden before the European Court of Justice (ECJ) with the argument that the Swedish legislation forbids private import of alcohol, and that this legislation is to be seen as an obstacle for the free movement of goods.¹⁰ Since a decision has not yet been settled the situation on the matter is still unclear. The Swedish government is of the opinion that the legislation is not a breach of the free movement of goods, and their strongest argument is the safety of the public health.¹¹

According to the Swedish government it is necessary to obtain the ban on purchasing alcohol from a foreign supplier when a retail monopoly on alcohol exists. A change of this would result in a growth of Swedish consumers purchasing alcohol from other distribution channels than Systembolaget to avoid controls of legal age or being taxed in Sweden. These alternative channels of distribution that would appear can not be seen as in harmonisation with the well-developed system of retail on alcohol in Sweden. A potential development like this is hard to predict what affects it will have in Sweden, but clearly it will create a significant change in the legal system. New actors on the Swedish market would undermine Systembolagets exclusive right to retail on alcohol, and that would damage the fundamental purpose of protection of the public health.¹²

Today it is possible to order alcohol on the Internet, but one as a buyer has to bring it home from the country where the good have been released for consumption. This is the only option to avoid being taxed in one's home country¹³, with the assumption that the good has been taxed in the sellers' country. Pure distance selling of alcohol on the Internet, that is when the seller organises the transport of the goods to the buyer¹⁴, is by Swedish law prohibited.¹⁵

Even though purchasing alcohol over the Internet is legal, assuming that person buying is of the legal age and is travelling with the goods, some parts of the import get seized in customs. Last years about 1000 people got their orders seized in custom with a total vo-

⁸ On-premise retail concerns restaurants and bars that carry a special document that entitles them to sell alcohol as part of their business.

⁹ Holder, H.D. Estimates of Harm Associated with Changes in Swedish Alcohol Policy (2005) p.11.

¹⁰ IP/04/896 (<http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/896>).

¹¹ Svar på motiverat yttrande om privat införsel av alkohol (KOM:s ref. SG(2003) D/232444, ärendenr.2000/2267. (Answer to motivated statement about private import of alcohol).

¹² Ibid.

¹³ The Act on tax on alcohol (SFS 1994:1564) Section 8a.2. (Lag om alkoholskatt)

¹⁴ Zetterström, C, Skatt vid distansförsäljning, www.eu-upplysningen.se, available 2006-03-10.

¹⁵ According to Chapter 4 Section 2 in the Alcohol Act (Alkohollagen SFS 1994:1738) only people with manufacturing or wholesale agreements are allowed to import alcohol, with the exception of people travelling with the goods and who have turned 20 years old.

lume of 8000 litre spirits, 4000 litre beer and 30 000 litre wine. This year 400 people so far have got their orders seized.¹⁶ Some of the people turn to the court to get justice, but the verdicts differ, and the judicial situation is still unclear. Due to this people refrain from purchasing via the Internet, even though this could be seen as a contradiction to the values of European Community Law and the free movement of goods.

Now there is a proposal from the Commission¹⁷, and an opinion raised by the first advocate general¹⁸, which might lead to a change of the definition of private import. This suggests that transportation by a third party on the behalf of the buyer, yet the buyer is not travelling with the goods, could be equivalent with private import. It is directive 92/12/EEC that regulates the movement of excisable product, such as alcohol. If this new definition of private import would go through, more people would be purchasing alcohol via the Internet and Systembolaget might face some serious difficulties maintaining their strong position on the Swedish market.

1.1.1 The different point of view on alcohol as a merchandise

A reason to why the situation is so unclear and that the Commission and the Swedish government have so different opinions could be the attitude towards alcohol. The Nordic view is that alcohol should be seen as a product that should be given special treatment and not be treated as other products. The attitude within EU any many southern European countries is however that alcohol should be seen as provisions and is associated with tradition of culture and gastronomy. Many Europeans consider alcohol as having a positive effect on their health, whereas the Nordic countries are of the opinion that alcohol causes great harm to the human body. Distribution of alcohol should be made by state-owned monopolies according to the Nordic countries while EU's attitude is that a common market should exist where no interference on the competition is made.¹⁹

1.2 Purpose

The purpose with this master thesis is to examine if the Swedish legislation concerning private import of alcohol via the Internet, could be seen as in conflict with articles 28 and 30 in the EC Treaty. I will focus on the arguments from the Commission and the defence from Sweden, and in this discussion the possible new definition of private import will be analysed. In examining these arguments, I will also examine the consequences it will have for consumer protection and different legal issues that can arise when dealing with e-commerce.

¹⁶ Ericson, J, EU-rekommendationen om nätsprit idag, www.sr.se, available 2006-03-31.

¹⁷ COM (2004) 227 Proposal for a COUNCIL DIRECTIVE amending Directive 92/12/EEC on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products p.35.

¹⁸ Case C-5/05, proposal to decision by the first Advocate General Francis G. Jacobs.

¹⁹ Roslin, B När slagregnet föll, nordisk alkoholpolitik i den europeiska integrationen (2000) p.61.

1.3 Method

This thesis will be written in accordance with the accepted legal hierarchy. The EC law is of most importance and has therefore been the starting point of this thesis. Within the EC law there is primary legislation, secondary legislation, case-law and non-binding opinions of the advocate general. The EC Treaty is part of the primary legislation, which is the legal base for the Member States actions. Secondary legislation is regulations, directives and decisions. Regulations are basically legislation and lay down general rules which are binding both at Community level as well as national level.²⁰ Directives and decisions are only binding to which it may concern.²¹ Case law from the ECJ is of greater importance than case law developed in Sweden and constitutes precedent, which should be followed.²²

Further on the Swedish legal acts has been studied to see how these fit within EC law. Also the preparations of the acts have been analysed, as well as legal cases and doctrine.

1.4 Delimitation

Due to lack of space issues concerning tax law will not be analysed in depth, although some aspects of it might be mentioned. Neither will the competition law and monopoly issues be discussed in depth. Only the private import concerning alcohol from countries within the EU will be investigated. Even though the line of reasoning could be applied in general to Sweden's monopoly system this thesis will only deal with Internet aspects.

1.5 Disposition

In chapter two the European Community law and directive 92/12/EEC will be discussed. The Swedish legal acts that are of importance for this topic will be explained in chapter three. Chapter four will deal with the new definition of private import. The different legal opinion from the Commission, the first advocate general and the Swedish government concerning a change of the definition of private import will be analysed in chapter five. Here will also some cases be discussed and compared. The consumer protection and issues that can arise when redefining "private import" will be analysed in chapter six. A comparison to Finland and their legal system will be made in chapter seven. Finally the conclusion will be presented.

²⁰ Article 249 EC.

²¹ Ibid.

²² Fritz, M, Hettne, J, Rundegren, H, När tar EG-rätten över? (2001) p.32.

2 European Community Law

Since the Commission is of the opinion that the Swedish ban on private import of alcohol is incompatible with the European Community law and the free movement of goods a deeper examination must be made. Also in order to determine how a possible new definition of private import of alcohol will affect consumers, EC law must be studied.

2.1 Introduction

The thought of a European Union (at the time the European Coal and Steel Community, the European Atomic Energy Community and the European Community) was developed after the Second World War in order to maintain peace in Europe.²³ One of the most fundamental thoughts was to create a common market for people, capital, services and goods.²⁴ The four freedoms have been built up on a similar structure with the common thought of equal treatment and equal possibility to enter the internal market.²⁵ The rules, which are set up to guarantee that the Member States will comply with the four freedoms, have direct effect and can therefore be referred to by individuals before national courts. Essential for applying the provisions of the freedoms is that the consequence of an action taken by a Member State has an effect on the trade between Member States. Cases concerning actions that are only risking the trade (and could be seen as affecting competition) between Member States could also be subject for investigation. If all circumstances suggests that it only concern one Member State's internal trade the provision of the freedoms are not applicable.²⁶

With that a few principles have been developed to maintain order on the internal market. One important principle is the principle of equal consideration²⁷, which states that any kind of discrimination based on nationality is prohibited within the EU.²⁸ The purpose with this principle is, for instance, to ensure inhabitants from another Member State equal treatment and to be seen as equal with that country's own inhabitants, but this principle could also be applied on goods.

The principle of mutual recognition²⁹ lay down that goods that have legally been produced and have been released for consumption in one Member State should not be refused admission to other Member State's markets. This is to be seen as a tool to create fair competition on the internal market but also to uphold to free flow of goods between Member States.

²³ Craig, P, De Búrca, G, EU LAW (2003) p.7.

²⁴ Article 3(c) EC.

²⁵ Bernitz, U, Europarättens grunder (1995) p. 187.

²⁶ Ibid p.188.

²⁷ In Swedish known as *likabehandlingsprincipen*.

²⁸ Article 12.1 EC.

²⁹ Also known as the Cassis-principle, which also will be covered more in section 2.2.1.

In article 5.3 EC the principle of proportionality is presented as the Community shall not take any action beyond what is necessary to fulfil the goals in the Treaty. The actions taken by the Community to achieve a certain goal must be appropriate and necessary in relation to the aimed goal. There should be a balance between goal and action and a guarantee that the goal can be achieved by the action presented. If there is a possibility to choose, the action least onerous should be selected. A test involving three steps can be done in order to determine if an action is to be seen as proportionate:

- *If the action is set up to fulfil the goal?*
- *If the action is necessary to achieve the goal or is there less intervening alternative?*
- *Is the advantage of action in a proportionate relation to the harm that might affect the one's concerned?*

This principle is often crucial when determine when a Member State has legitimate reasons for keeping a restriction that can be seen as a trade barrier for import from other countries within the EU.³⁰

When Sweden entered the EU the country had to give up some of its sovereignty. With the incorporation of EC law with Swedish law a new legal order was created. EC law shall be directly applicable³¹ and have direct effect³² in Sweden. It shall also have the right to precedence over Swedish law when national legislation could be seen as in conflict with EC law.³³ Here it is noticeable what influence EC law has on the Swedish legal system. Since to country had to give up some of its sovereign power, they are forced to comply with the EC law.

2.2 The EC Treaty³⁴

The articles of the EC Treaty can form rights and obligations not only for the Member States but also for individuals. These rights can be used by individuals and companies before national courts and other public authorities.³⁵ It is said that the articles can have direct effect, which has been laid down in the *Van Gend & Loos* case³⁶. The ECJ's conclusion in that case was that the EC Treaty should be applicable not only between Member States, but also between individuals and a Member State.

³⁰ *Bernitz, U*, Europarättens grunder p. 116.

³¹ Article 249 EC.

³² The regulations shall be applicable between Member States as well as between an individual and a Member State. Case 26/62 NV Algemene Transport- en Expeditie Van Gend en Loos v. Nederlandse Aministratie der Belastingen (1963) ECR1.

³³ *Bernitz, U*, Sverige och Europarätten (2002) p.24.

³⁴ Originally known as the Rome Treaty, but in this thesis the term EC Treaty will be used.

³⁵ *Fritz, M, Hettne, J, Rundegren H*, När tar EG-rätten över? p.174.

³⁶ Case 26/62 NV Algemene Transport- en Expeditie Van Gend en Loos v. Nederlandse Aministratie der Belastingen (1963) ECR1.

2.2.1 Article 28

The purpose with this article is to secure the free movement of goods, and with that guarantee goods from other Member State access to the internal market. This article has a possibility to eliminate national obstacles that otherwise might affect the free movement of goods in a negative way. It states that:

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

An example of quantitative restrictions is when a country applies different kinds of quotas or prohibitions on import and similar restrictions.³⁷ Actions taken by a Member State that can be caught by this article are, for example, discriminatory actions that create a negative image of foreign products.³⁸ Another one is when national restrictions somehow affects the trade on the internal market in a negative way, even though they might not be discriminatory.³⁹

Article 28 also prohibits measures having equivalent effect (MEQR⁴⁰). In the oft-discussed *Dassonville*⁴¹-case the court laid down that a MEQR is “all rules of trade accepted by Member States that can make an obstacle, direct or indirect, actual or potential, concerning the trade within the Community”. The size of that measure having negative effect on the trade between Member States is unimportant since Article 28 does not lay down any minimal limit. All measures having negative effect on the trade within the Community, no matter how small, are prohibited.⁴²

The Court has developed a basic pattern in which Articles 28 and 30 should be tested. First, it has to be considered whether the challenged action constitutes a trade barrier, and if a justification by the regulatory authority is required. Secondly, if it is concluded that there action constitutes a trade barrier, is the justification under Article 30 fulfilled.⁴³ So basically there is a two-part judicial inquiry; is there a trade barrier? Is it justified?

The principle of mutual recognition has been further developed from the judgement of the case *Cassis de Dijon*⁴⁴. It states that “Member States must respect the trade rules of

³⁷ *Bernitz, U*, Europarättens grunder p. 189.

³⁸ Case 259/81 Commission v. Ireland (“Buy Irish”) (1982) ECR 4005.

³⁹ *Bernitz, U*, Europarättens grunder p. 196.

⁴⁰ Abbreviation taken from Woods, Lorna, Free Movement of Goods and Services within the European Community.

⁴¹ Case 8/74, *Procédure du Roi v. Dassonville*.

⁴² *Bernitz, U*, Europarättens grunder p. 197.

⁴³ *Weatherill, S*, European Union Law, Free movement of goods, International and Comparative Law Quarterly, October 2003, p. 1025.

⁴⁴ Case 129/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* known as *Cassis de Dijon*.

other states and not seek to impose their own rules on goods lawfully marketed in another Member State". In that case the ECJ argued that Article 28 can be applicable when national rules, even though these are not discriminatory against imported products, but they are different from the rules which are applied in the country of the products origin. So the fact that the trade in some way are affected in a negative way is enough to be able to use Article 28. The purpose is that once a product has been legally marked in one Member State that product should be admitted to the internal market without any restrictions.⁴⁵

However, it was further stated in the Cassis de Dijon that Article 28 should not be applicable on national rules where an interest worth protection exists, which would not fall under the scope of Article 30. The interest was called "mandatory requirements" and introduced a way to justify national rules, which would be restricting the movement of goods between member States, but which were not included in Article 30. Only important and certain grounds for protecting the public interest should be excluded from the abolishment of national obstacles restricting the free movement of goods. Differences in Member States national rules could only be excluded when the protection of the public interest could be set above the interest of upholding the free movement of goods on the internal market.⁴⁶ This reasoning is allowed as long as the national restrictions are applied without distinction and are necessary and proportionate, and until further secondary legislation is developed on the matter.⁴⁷

It has been argued⁴⁸ that Sweden's ban on private import of alcohol can be seen as a quantitative restriction since it limits products from other Member States to enter the Swedish market, beside through Systembolaget. It is clear that the prohibition is a limitation of the free movement of goods, the question is only if Sweden can justify it by arguing protection of the public health. The exceptions when allowing a country to have quantitative restrictions or measures having equivalent effect are presented in Article 30.

2.2.2 Article 30

Article 30 allows Member States to some extent to make an exception from Article 28. A Member State can by using this article justify a discriminatory action based on nationality and with that treat imported products different from domestic ones. With this article Member States are given the possibility to retain restrictions on imports if this is justified by the defence of (for example) public health.

"The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions

⁴⁵ Barnard, C, Scott, J (Paul Craig) The law of the Single European Market (2002) p.7.

⁴⁶ Quitzow, C.M. Fria varurörelser i den Europeiska gemenskapen (1995) p. 303.

⁴⁷ Ibid p.302.

⁴⁸ See for instance Motivated statement sent by the Commission dated 19 October 2003.

shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.”

Since the article makes an exception from one of the fundamental rights of the free movement of goods the article and its exceptions shall be interpreted in a strict way. The national governments have the burden of proof to justify their actions and why these actions should be allowed in order to ensure protection of the common good. Beyond this, the actions must be proportionate and the only way to ensure the protection. If there are other, less discriminatory or restrictive actions, which would create less damage on the trade on the internal market, yet are able to fulfil the same purpose of protection, these actions should be preferred.⁴⁹ Another requirement for using Article 30 is that the actions can not be subject for harmonised legislation. A Member State can not justify its actions based on Article 30 if that action has been subject to harmonised legislation. Consideration to the interest worth protecting must therefore be fulfilled by the legislation of the community.⁵⁰

Notable is that the Article shall not be seen as exhaustive. It was stated in the Cassis de Dijon- case that there are other subjects of protection which are not enumerated in the Article that shall be put before the interest of the free movement of goods.

This is the article that the Swedish government is using to defend their view of a continuing prohibition of private import of alcohol. Their defence is that in order to protect to population and decrease the level of the consumption of alcohol they have to maintain their ban on private import. To be able to protect the public health, to ensure that the control of the legal aged is uphold, and to limit the consumption as well as the diseases related to alcohol Sweden argues that they can not change their legislation.

2.2.3 Article 31

Despite the free movement of goods Member States are allowed to maintain a State monopoly if it can be adjusted so that no discriminating takes place. Article 31 states that

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

The ECJ has in the Franzén-case⁵¹ described the purpose behind the article. It is said to unite the requirements that follows from the establishment of the internal market and that the Member States shall have to possibility to maintain certain State monopolies so the purpose of protection of the public good can be achieved. Further on its aim is to eliminate restrictions on the free movement of goods, with the exception for those restrictions that are a necessary result when such a monopoly exists.⁵²

⁴⁹ Bernitz, U, Europarättens grunder p. 203.

⁵⁰ Ibid. p.204.

⁵¹ C-189/95 Criminal Proceedings against Henry Franzén known as *the Franzén-case*.

⁵² Ibid. section 39.

A Member State is therefore allowed to keep its monopoly assuming that an adaptation has been made so the competition between the Member States is not affected. Merchandise with the origin from one Member State shall not legally be disadvantaged in relation to domestic merchandise.

In the above mentioned *Franzén-case*⁵³ the ECJ concluded that the regulation concerning the Swedish monopoly issues should be examined in the scope of Article 31, whereas its effects should be tested in the light of Article 28. This is also the line that the Swedish government approached, since in their opinion they have adapted their monopoly to be compatible with Article 31. This conclusion as well as other legal and non-legal opinions will be discussed more in depth in chapter five.

2.3 Directive 92/12/EEC⁵⁴

To be able to create a single market and to some extent abolish the control between the borders within the EU a harmonisation on some legislation has been made. This directive covers movement of goods subject of excise duty, such as alcohol, within the EU. The articles of importance for this thesis are Article 7-10, which deals with issues concerning which country is entitled to benefit from the excise duty charged for the product. The purpose behind these articles is to give individuals the possibility to purchase excisable products on the internal market and transport them to another Member State without having to pay excise duty in the country of destination. The Commission has suggested a change of these articles since they have been found confusing and not being update to the current change and development on the internal market. In this section the current version will be covered, whereas the suggested change will be described in chapter four.

2.3.1 Importance of deciding the status of the import

The purpose of deciding the aim behind the import is to determine in which Member State the excise duty should be paid. If the import is to be seen as an import with a non-commercial purpose the excise duty should be charge in the county where the goods have been released for consumption. That in accordance with Article 8 in the directive, as well as the principle of the country of origin⁵⁵. When an import is made for a commercial purpose the excise duty should be paid in the county where the products are held for consumption, in accordance with Article 7 and Article 9. Distance selling is regulated in Article 10 where it is said that the excise duty should be paid in the country of destination when the products are transported by the vendor. This is also known as the principle of destination⁵⁶.

⁵³ Case 189/95.

⁵⁴ Directive on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, in Swedish known as *Cirkulationsdirektivet*.

⁵⁵ In Swedish known as *Ursprungslandsprincipen*.

⁵⁶ In Swedish known as *Destinationslandsprincipen*.

2.3.1.1 Commercial purpose

Import of goods within a business usually takes place with a purpose of making a profit. These kinds of import shall therefore be treated differently than imports made by an individual for a personal purpose. Commercial imports of alcohol could before 1st of January 2000 only be made by someone who had manufacturing- or wholesale agreements. After that date the right to practice commercial activity is no longer based on that kind of agreements.⁵⁷

To be able to determine more easily what is to be seen as an import for commercial purpose Article 9 in the Directive has put up some guidance. When trying to establish the purpose of an import the administration should take to following into consideration:

- *the commercial status of the holder of the products and his reasons for holding them,*
- *the place where the products are located or, if appropriate, the mode of transport used,*
- *any document relating to the products,*
- *the nature of the products,*
- *the quantity of the products.*

In Section 2 (b) the guidelines for the quantity of products are presented. In order to classify an import as having commercial status, the quantity of the import should exceed the guide levels:

- *spirit drinks 10 l*
- *intermediate products 20 l*
- *wines (including a maximum of 60 l of sparkling wines) 90 l*
- *beers 110 l.*

These requirements and quantity limits are merely to be seen as guidance. They should not operate as any kind of exhaustive provision, yet all the circumstances ought to be taken into consideration when determining the status of the import. The criterion of guide levels has created some discussions since it sometimes has led to a reverse burden of proof and problems for the Member State's citizens. It is the responsibility of the national administration to prove up to the guide levels if good imported should be seen as having a commercial purpose. Above the guide levels the individual has to prove in a

⁵⁷ Bergström, M. Lagenlighet av de svenska alkoholförselreglerna, Europarättslig Tidskrift 2004, nummer 4 årgång 7, p.621.

satisfactory way for the authority of control that the good purchased is actually for his personal usage.⁵⁸

Since the criterion of guide levels has caused some problems, the Commission suggests that the limits should be removed.⁵⁹ This will be discussed more in detail in Chapter four. If it is settled that the import has a commercial status the excise duty will be charged in the country where they are held for that commercial purpose.⁶⁰

2.3.1.2 Non-commercial purpose

Broadly speaking an import of non-commercial status is everything else that is not to be seen as having commercial status. Since import with a non-commercial purpose do not require a special document the actual purpose behind the import is crucial. What is to be seen as non-commercial purpose varies from case to case and many factors have to be taken into consideration. In NJA 1999 s.670 the Swedish Supreme Court (HD) found that an import of 315 litres of alcohol (spirits) was to be seen as a private import with a non-commercial purpose whereas the import in NJA 2000 s. 256 concerning 137 litres had a commercial status. What settled the latter case one was the quite large quantity of alcohol in relation to the poor economic situation of the suspect.

Article 8 regulates the import made by private individuals. It states that As regards products acquired by private individuals for their own use and transported by them, the principle governing the internal market lays down that excise duty shall be charged in the Member State in which they are acquired.

When an import has a non-commercial purpose, and is transported by the individual, the excise duty shall be charged in the country where it was released for consumption. The term “transported by them” has led to discussions whether it can be interpreted as transported on their behalf i.e. the private individual is arranging the transport yet it is carried out by a third party.⁶¹ If products are acquired as mentioned in Article 8, yet it is shown that it is for a commercial purpose, the excise duty shall be laid down in the country where the final consumption will take place.

2.4 Conclusion

The EC law discussed in this chapter has a purpose to ensure fair treatment on the internal market. The rules concerning the four freedoms have direct effect and could be referred to before national court by individuals. They create rights, but also obligations to follow. Restrictions on the trade between Member States could be seen as obstacles under Article 28 and should be removed in order to secure the free movement of goods.

⁵⁸ COM (2004) 227 Proposal for a COUNCIL DIRECTIVE amending Directive 92/12/EEC on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, p. 23.

⁵⁹ Ibid.

⁶⁰ Article 7 and 9, which both basically states the same. These are also subject to the change that will be discussed more in chapter four.

⁶¹ This discussion will be more in depth in chapter four.

The only way to justify such a restriction is to refer to Article 30 EC, where the exceptions are presented. One justification is the protection of the public health, which Sweden's government is trying to use to justify their prohibition of private import of alcohol.

In order to intervene against an action taken by a Member State the trade on the internal market must be affected. Even though a monopoly could be seen as a restriction on the free movement of goods, Member States are still allowed to retain it. The requirement is that an adjustment has been made so that no discrimination between Member States takes place. A good legally produced and released for consumption in one Member State shall have the right to enter the internal market.

The principle of proportionality is important. The actions taken by a Member State should be proportionate in relation to the goal to be achieved and the potential harm it might create. If there is a less restrictive action to choose a Member States should be recommended to do that.

With movement of excisable goods the actual purpose must be determined in order to know where the excise duty shall be laid down. An import of commercial purpose usually exists when a large amount of alcohol is imported and other circumstances, such as the economic situation of the importer, suggests that this is not for personal use. When an import has a commercial status, the excise duty shall be paid in the country of destination. A non-commercial import is for personal use and has been transported by the buyer and in that situation the excise duty should be charged in the country where it was released for consumption.

3 The Swedish legislation

A potential new definition of private import could cause a huge impact on the Swedish legislation since it today is somehow a battle between EC law and Swedish legislation. It is therefore important to study the current legislation that affects import of goods to Sweden.

3.1 Introduction

The aim with the Swedish legislation is to control the consumption of alcohol and in that way limit the potential harm on the public health. There are limited numbers of shops as well as strictly controlled service hours. Yet the transition to self-service stores could be seen as a contradiction to the Swedish alcohol policy, since some experience it to be more convenient to buy alcohol today due to the lack of lines. Also the introduction to holding stores open on Saturday could be seen as increasing the availability on alcohol and by that a contradiction to the Swedish alcohol policy.

The Swedish legislation admits only a retail company⁶², Systembolaget, owned by the Swedish State, to practise the retail of alcohol according to the Alcohol Act Chapter 5 section 2. However, ordinary strength beer with an alcohol content of 2,25-3,5 percentage by volume can to be sold in food shops without having any special licence.⁶³ Systembolaget provides a service that allows people to order merchandise, which is not part of the regular range of goods that they provide. Before 1st of January 2005 Systembolaget had the possibility to deny a person this private import if they had legitimate reasons.⁶⁴ Now this section from the Alcohol Act has been withdrawn which obliges Systembolaget to carry out any order on request and at the customer's expense.⁶⁵ Systembolaget will charge the customer with a fee of 10 % of the value of the product, minimal charge of 50SEK. The products will be delivered in store in about one to two weeks after the date of order. Notable is that some types of beer and cider will only be delivered in package, which will result in a minimal order of 24 cans.⁶⁶

This is one of the Swedish government's strongest arguments why the ban on private import of alcohol via the Internet should remain. In their opinion, Sweden through Systembolaget has a well-developed system, which entitles people to import alcohol that is not part of Systembolagets' range of products.⁶⁷

Sweden was allowed through directive 2000/44/EEC to apply certain quantitative restrictions on import of alcohol to Swedish territory without having to pay excise duty.

⁶² *Detaljhandelsbolaget.*

⁶³ *Holder, Sweden and the European Union p.46.*

⁶⁴ The old version of the Alcohol Act Ch.5s.5.

⁶⁵ The Alcohol Act Ch.5 s.5.

⁶⁶ Systembolaget, Beställning av varor, www.systembolaget.se/SokDrycker/bestallningavvaror.htm, available 2006-04-24.

⁶⁷ Svar på motiverat yttrande om privat införsel av alkohol (KOM:s ref. SG(2003) D/232444, ärendnr.2000/2267. (Answer to motivated statement about private import of alcohol).

The requirements were that the import was made by an individual resident of Sweden and that the transport was carried out personally by the importer. The restriction was settled to 5 litres of spirits, 90 litres of wine and 110 litres of beer and was valid to 31st December 2003. After 1st of January 2004 the guide levels were set to 10 litres of spirits, 90 litres of wine and 110 litres of beer which are the guide levels set up in directive 92/12/EEC concerning determining when an import should be seen as having commercial status. Directive 92/12/EEC, which deals with import of alcohol, has been incorporated into Swedish legislation through, for instance, the Alcohol Act and the Act on tax on alcohol.

3.2 The Alcohol Act⁶⁸

The Alcohol Act came into force in 1995 and was a result of negotiations that took place between Sweden and the Commission before Sweden's entrance into the EU. It contains regulations concerning Systembolaget's monopoly on retail, but also restrictions on import. Alcohol is referred to as beverage containing at least 2,25 per cent per volume, and is divided into spirits, wine, strong beer and beer.⁶⁹

The Act is an important part of Sweden's alcohol policy, which main purpose is to limit the total consumption, reduce the alcohol abuse and counteract the damage caused by alcohol.⁷⁰ The Act also limits the availability of the alcohol by limiting the possibility to import alcohol from other countries. The right to practice wholesale is regulated in Ch.4 s.1 which allows trade with alcohol by someone who is registered as an authorised recipient of goods in accordance with the Act on tax on alcohol section 9 or 12. Chapter 4 s.2 states that only persons that fulfil the requirements in s.1, as well as the Retail Company, are allowed to import alcohol.

Chapter 4 Section 2 lay down the exceptions from the basic rule. According to Section 2.2 a person that has turned 20 years old and is travelling with the goods is allowed to import alcohol if it is intended to be for him or his family's personal consumption. A requirement for this import is that the transportation is made personally by the buyer so that he is actually travelling with the goods. Also a person who has received the alcohol through inheritance or a will, and has turned 20 is allowed to "import" the alcohol without having to pay tax in Sweden.⁷¹ A requirement is that the alcohol is for that person's or his family's personal use. Another situation is when a person has turned 20 and has acquired the alcohol through a single gift parcel from another country. If that alcohol is for him or his family's personal use, no taxation should take place in Sweden.⁷²

⁶⁸ SFS 1994:1738.

⁶⁹ Ch.1s.3.

⁷⁰ Regeringskansliet, Socialdepartementet, Sveriges alkoholpolitik, www.regeringen.se/sb/d/2533, available 2006-04-17.

⁷¹ The Alcohol Act Chapter 4 Section 2.5 and The Act on tax on alcohol Section 8a.4.

⁷² The Alcohol Act Chapter 4 Section 2.6 and The Act on tax on alcohol Section 8a.5.

3.3 The Act on tax on alcohol⁷³

Another part of Sweden's alcohol policy is the tax on alcohol. By keeping it high, it somehow reduces the demand of alcohol, and a direct effect of that is decrease in the consumption. But now with growth on import from countries with lower taxes on alcohol a discussion have started to lower the tax in Sweden. The Act on tax on alcohol provides regulations on when taxation should take place in Sweden. Here again, in accordance with directive 92/12/EEC, the purpose with the import is crucial when determining where the tax should be paid. The Act does not lay down any guide levels, but all the circumstances should be taken into consideration when determining the status of the import.

According to Section 8a.2 a person who has purchased goods in another Member State and who is transporting the goods by himself can avoid being taxed in Sweden as long as the goods is for him or his family's personal usage.

Section 9 states that a person who runs a commercial business can apply for registration at Skatteverket to become an authorised recipient of goods. Registration will be permitted if the applicant's economic situation and further circumstances in general makes the applicant a suitable recipient of goods.⁷⁴ According to Section 6, a person registered as mentioned in section 9 is liable to pay tax in Sweden.

If one is missing a proper document with the right to commercial import, or has the wrong one, there is an obligation to report to custom. By avoiding this a person can be charged with a breach of the Act concerning punishment of smuggling (2000:1225)⁷⁵.

3.4 Conclusion

The Swedish legislation is pretty clear on the subject of private import of alcohol. A consumer is limited to import alcohol only through Systembolaget. Their service admits individuals to import products which are not part of Systembolaget's ordinary product range. However this service could be seen as expensive since there is an administration charge on the request. There might also be a minimal limit on the request since some products, such as beer, only come in a certain package of 24 cans. It can also be seen as time-consuming since it can take up to two weeks before the products arrive to the store.

One exception from the prohibition of private import is when a person over the age of twenty is travelling with goods that has been released for consumption in another Member State and the excise duty has been laid down in that country. The goods have to be for that individual's personal use and be transported by him. An exception from that rule to include transportation made by a third party on the buyer's behalf can not be made, at least not with its current wording. A proposal of change of the directive to in-

⁷³ SFS 1994:1564.

⁷⁴ Section 12.

⁷⁵ In Swedish, lagen om straff vid smuggling.

clude transportation made on the behalf of the buyer has been introduced and will be discussed more in detail in the following chapter.

Another exception from the prohibition is when a person turned 20 has acquired the alcohol through inheritance or a will, or a single gift parcel. These situations should be excluded from taxation in Sweden and could therefore be seen as legal imports of alcohol to Sweden. The requirement in these cases is that the alcohol is for that person's or his family's personal use.

4 Suggested change of directive 92/12/EEC

This chapter will cover the report from the Commission⁷⁶ concerning the change of the directive, unless another source is referred to. It is of importance since it deals with the Commissions opinion on change of the directive, which if it goes through will have a huge impact on the development of purchasing alcohol via the Internet.

4.1 Introduction

It is more than ten years ago since the single market was established and directive 92/12/EEC was introduced. The development of doing business with actors from other Member States and the increase of business over the Internet has lead to a discussion of change of the directive. It is said that the directive has caused some problems with interpretation of the article 7-10 since they can be seen as vaguely formulated. The outcome varies depending on which Member State that shall interpret, some choose to interpret in a more liberal view whereas other interprets in a more restrictive way. The Commission is of the opinion that the problem is not only the vaguely formulated articles, but also that some Member States, in order to protect the interest of the nation, are willing to take every opportunity to limit the scope of the free movement of goods.

4.2 Article 8

The principle governing the single market and Article 8 gives individuals the possibility to acquire excisable products within the EU without having to pay excise duty in the country of destination. Article 8 states that the excise duty shall be laid down in the country where the good was released for consumption. Two requirements shall be fulfilled to be able to rely on article 8; the goods shall have a non-commercial purpose and it shall be transported by the private individuals themselves. This formulation limits or could be seen as a limitation of the principle of a single market. If the individual is not transporting the goods personally, he can be subject for another payment of excise duty in the country that is the final destination. A limitation like this is against the general principle that is applied on value-added tax (VAT). In those cases VAT is only charged in the country of destination when the goods are dispatched or transported by the seller or on his behalf i.e. distance sales. In cases of distance purchase, that is when the buyer or someone on his behalf dispatch or transport the goods, the VAT is laid down in the country of departure.

The Commission's opinion is that such a limitation of the principle of the single market is no longer acceptable. The present formulation of Article 8 only covers the situation where the transport is carried out personally by the individual who has acquired the goods. In conformity with the principle applied on VAT the Commission suggests that movement of goods for a personal use which is transported by an individual or on his behalf and has a non-commercial purpose shall be excluded from excise duty in the state of destination. The Commission hereby wishes to extend the area which Article 8 can be applicable on to include situations where the transportation is carried out on the behalf of the buyer. By being able to broad the interpretation of the phrase "transported by

⁷⁶ COM (2004) 227 Proposal for a COUNCIL DIRECTIVE amending Directive 92/12/EEC on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products

them” to include transportation by a third party organised by the buyer, the limitation of the principle governing the single market is abolished.

However in the *Man in Black*⁷⁷-case (which covered an import of commercial status) the Court stated that the phrase “transported by them” in Article 8 shall be interpreted strictly and only covers the situation when the transportation of the excisable products is carried out personally by the individual. The evidence would suggest that this interpretation has changed since the case is a few years old and there has been a further development on the internal market, such as development with distance purchase via the Internet. A strict interpretation like this can clearly be seen as a limitation of the principle of free movement of goods. A change to broaden the scope of Article 8 is therefore necessary.

4.2.1 The change of article 8

Article 8 should be replaced into the following:

Excise duty on products acquired by private individuals for personal use and transported from one Member State to another by them shall be charged in the Member State in which the products are acquired.

As regards products other than manufactured tobaccos acquired by private individuals, the provisions of the first subparagraph shall also apply in cases where the products are transported on their behalf.

In the article there is a reference to the principle governing the internal market by which follows that goods purchased by individuals for personal use and transported by them from one Member State to another, the excise duty shall be laid down in the country where the goods was acquired. This principle should also be applied on transportation carried out on the buyer’s behalf since these situations are mainly of a non-commercial nature.

4.3 Article 9

The guide levels presented in Article 9 which can provide direction when determining the actual purpose behind the import shall in the Commission’s opinion be removed. A person can never solely rely on avoiding taxation because his imported quantity is below the guide levels. In cases where a person import excisable products the administration is obligated to investigate in at least every requirement presented in the article to be able to determine the purpose of the import. Since a decision could be appealed in court it is crucial that the administration has concrete evidence. Guide levels could be set up by the administration, but that is part of the exclusive authority of each Member State, and shall therefore not be regulated in the directive.

⁷⁷ C-296/95 EMU Tabac SARL v. The Man in Black Ltd.

4.4 Conclusion

The Directive is deciding which country that is entitled to benefit from the excise duty. Article 8 states that private individuals can purchase excisable products within the internal market without having to pay excise duty. The requirement is that the goods are transported by them, it should be a non-commercial import and that it is for that person's individual use. It suggests that the current wording could be seen as a limitation of the free movement of goods. The same line of reasoning which is applied to VAT could also be applied to excisable products. By that, transportations made on the behalf of the buyer, could be included into the Article and the excise duty should only be charged in the country where the good was released for consumption.

The current wording of Article 8 can be seen as a limitation of the free movement of goods. To only include situations where the buyer is personally transporting the excisable products is no longer acceptable. The Commission suggests that situations where the buyer arranges the transportation, yet is not personally travelling with the goods, should be included in the scope of Article 8. The buyer can by that have someone transporting the products on his behalf.

A change of this directive would have huge impact purchase of alcohol via Internet. It would then be possible to the consumer to order products via the Internet and then have a third party carrying out the transportation of the goods. This would be under the assumption that excise duty has been laid down in the country where the god was released for consumption, and that the import would have a non-commercial purpose. Furthermore, the products can only be for that person or his family's personal use.

5 Legal and non-legal opinions

Since there has been a debate going on for quite a while, concerning the legal right of purchasing alcohol via the Internet, many opinions have been raised. The most important ones concerning the Swedish prohibition of private import of alcohol will be covered in this chapter.

5.1 The Commission⁷⁸

The Commission has sent a motivated statement to Sweden dated the 19th October 2003 as a result of correspondence between the Commission and the Swedish government concerning the Swedish prohibition on private import of alcohol. The Swedish response to this motivated statement will be covered in section 5.2.

The Commission has stated that a prohibition of import of alcohol from another Member State to Sweden should be seen as a conflict with Article 28 and 30 EC. In their opinion a prohibition of importing a product is the strongest restriction a Member State can take concerning the free movement of goods within EU. According to Article 28 EC quantitative restrictions and measures having equivalent effect shall be prohibited between Member States. The ECJ has concluded⁷⁹ that all rules applied between Member States, direct or indirect, real or potential, which can affect the trade within the internal market and create a restriction, should be seen as a measure having equivalent effect to quantitative restrictions and should be removed.

According to Swedish legislation, private individuals are prohibited from purchasing alcohol from another Member State and have it transported to Sweden by a third party. The Commission is of the opinion that this constitutes a breach of Article 28 EC and should be removed. This restriction could not be justified on the ground of Systembolaget's obligation to import on a request from a consumer.

The Swedish prohibition on private import of alcohol via a third party could not be in proportion to the argument of the protection of the public health. The Commission has presented some contradicting facts, which shows that the requirement for "protecting of the public health" might not be fulfilled. For instance, a person who has turned 20 years old and is not notable under the influence of alcohol can buy an unlimited amount of alcohol from Systembolaget. A traveller who has turned 20 years old can bring quite a large amount of alcohol in to Sweden. Swedish residents are also allowed to receive alcohol acquired through inheritance or a will, or a single gift parcel from a person in another Member State. Systembolaget by extending the service hours promoted the consumption of alcoholic beverages. In the Commissions opinion a Member State which promotes and avoids a limitation on volume of consumption has a hard time to argue for the public health in a single restriction like the ban in import. Instead the Commission suggests protection of the public health from alcohol-consumption should be achieved in ways that are less restrictive on the trade between Member States.

⁷⁸ COM: s ref. SG (2003) D/232444, nr.2000/2267, Motivated statement from the Commission on private import of alcohol.

⁷⁹ See for instance the *Dassonville*-case.

The protection of the public health and the control of legal age should be able to be upheld even if private import should be allowed. It is not possible to prohibit import of alcohol on the basis of worries of people under 20 years old buying alcohol. Customs and detached transportation-companies should be able to control and uphold the standard of a legal age of 20 to be entitled to buy alcohol.

5.2 The Swedish Government⁸⁰

The Swedish alcohol policy with the Swedish Alcohol Act has for a long time been characterised by protection of the public health and minimising the social effects that alcohol has on a society. Special consideration has been taken to protect children and youth from alcohol and the possibility for them to purchase it. Systembolaget is a state-owned monopoly that has been given exclusive right to retail on alcohol based on the protection of the public health. The monopoly constitutes the foundation in the Swedish alcohol policy.

According to the Swedish government it is necessary to obtain the ban on purchasing alcohol from a foreign supplier when a retail monopoly on alcohol exists. A change of this would result in a growth of Swedish consumers purchasing alcohol from other distribution channels than Systembolaget to avoid controls of legal age or being taxed in Sweden. These alternative channels of distribution that would appear can not be seen as in harmonisation with the well-developed system of retail on alcohol in Sweden. A potential development like this is hard to predict what affects it will have in Sweden, but clearly it will create a significant change in the legal system. New actors on the Swedish market would undermine Systembolagets exclusive right to retail on alcohol, and that would damage the fundamental purpose of protection of the public health.

Since the ban on import of alcohol constitutes an important part of Systembolaget's way of functioning, the ban should be tested in the scope of Article 31. This was concluded in the *Franzén*-case where the Court stated that Article 31 is applicable on State owned monopolies and their way of functioning. According to the Court this article has a purpose to remove all restrictions on the free movement of goods, with the exception of limitation that are necessary when such a monopoly exists. The ban on private import of alcohol is the Swedish government's view such a necessary limitation in order to have a well-functioning monopoly.

Systembolaget has a service that entitles individuals to import products that are not part of their ordinary product range. This is the only import that should be accepted in Sweden in their opinion. Since Systembolaget's service of import on any customer's request is in no way discriminatory nor has a purpose to affects the competition on the market there is no reason to abolish the ban on import. The Commission has not been able to point out any such circumstance where the Swedish regulation, which bans private import of alcohol, has a discriminatory or a negative impact on the competition on the in-

⁸⁰ Mainly from the document COM:s ref. SG(2003) D/232444, ärendenr.2000/2267 Svar på motiverat yttrande om privat införsel av alkohol. (Answer to motivated statement on private import of alcohol).

ternal market. The Swedish government is therefore of the opinion that the regulations in the Swedish Alcohol Act which refer Swedish consumers to Systembolaget's import service when requesting to import to be compatible with Article 31.

The Swedish government is of the opinion that Article 28 and 30 should not be taken into consideration since above-mentioned discussion should be studied in the scope of Article 31. But since the Commission has a different opinion the Swedish government has chosen to state their standpoint and debate some of the important questions that could arise when examine the discussion in the scope of Article 28 and 30.

It is up to each Member States to choose appropriate measurement in order to protect the public health, with the assumption that EC-treaty and the principle of proportionality are taken into consideration. As mentioned before the Swedish legislation on alcohol has a purpose to limit the availability of alcohol to protect the public health. This is done primarily through having Systembolaget as the only retail channel to consumers and strictly control the store hours and limited number of shops. Even though Systembolaget has extended their store hours to include Saturdays, and opening self-service stores, this change could not be compared to what the abolishment of the ban on private import would create in terms of the availability of alcohol. These changes of structure have been done in order to provide the public a good service throughout Systembolaget.

To be able to protect the youth it is important to maintain the legal ages. Systembolaget uphold a strict control of legal ages, and are also able to do that when individuals import through their import-service. The Swedish government is worried that an elimination of the ban on alcohol would create difficulties with upholding the control of legal age. The Swedish government is of the opinion that the current order, which prohibits private import of alcohol, is necessary to limit the availability of alcohol and to protect the public health. This prohibition must therefore to be seen as suitable to achieve the goals that have been set out by the Swedish alcohol policy.

5.3 The first Advocate General Francis G. Jacobs opinion in case 5-05⁸¹

In the case B.F Joustra (further referred to as Joustra) was a part of a group of 70 individuals which annually ordered wine from France. Joustra was the organised of the orders as well as the transport of the wine back to the Netherlands. He paid for the whole order and the transport and would then get money from each individual. The wine was stored in Joustra's garage until the members would be able to collect their part of the import. Joustra had no interest of making any profit from this and was only to be seen as the organiser of the import for the group. The Dutch Tax Authority wanted to charge Joustra with excise duty for the imported products with the argument that it was an import of commercial purpose. However, the Dutch court found that the storage of the wine could not be seen as having commercial purpose and that it was not a commercial import. The Dutch Tax Authority appealed to Hoge Raad, which asked for a preliminary ruling.

⁸¹ C-5/05 Staatssecretaris van Financien v. B.F Joustra.

The questions asked were if the excise duty shall only be laid down in the country where the goods were released for consumption, if a person has bought the goods for personal use and has a company to transport the goods to another Member State? And also if a group of individuals have one person, which acts outside his business and without any purpose of making a profit hires a transporting-company to import the products, should the excise duty only be laid down in the country of origin?

The important part of the case deals with the interpretation of the phrase “transported by them” in Directive 92/12/EEC Article 8. According to the formulation the article should only be applicable when the products are purchased by private individuals, for a personal use and is transported by them. A question whether transportation carried out on the buyer’s behalf could be interpreted into the wording “transported by them” had been raised.

Six Member States have given statements, which all agree that the article should not include situations where the transportation is carried out on the behalf of the buyer. Transported by them should be given a strict interpretation to only include transportation carried out by the individual personally.

The advocate’s opinion was that the current wording of Article 8 could not include transportations made on the behalf of the buyer. Since a proposal for a change of the directive has been presented, where a section has been introduced to include transportation of a third party, the current wording of the article must be seen as not including such transportation. However, since there is a proposal of changing the article, transportation like this could come to be included in Article 8 in a near future.

5.4 The first Advocate General Antonio Tizzano’s opinion in case 170-04⁸²

In this case the Swedish Supreme Court had asked the ECJ for a preliminary ruling concerning if the prohibition of import of alcohol should be tested in the light of Article 31, or in the scope of Article 28 and 30.

It is stated in the case that Article 31 can only be applicable on conditions concerning the special function that a state monopoly fulfils. The advocate general is of the opinion that import of alcoholic beverages on a request from customers is an important part of the special function that a monopoly has. This function is not only to control the retail on alcohol, but also to create a single distribution-channel of alcoholic beverages. The Swedish prohibition on private import of alcohol should therefore be seen as a part of Systembolagets function as a monopoly and examined in the scope of Article 31.

A quantitative restriction that is referred to in Article 28 includes situation where a Member State has set up a prohibition of import. National obstacle that can create ob-

⁸² C-170/04 Klas Rosengren mfl. v. the Prosecutor-General.

struction on the internal market should be seen as measurements having equivalent effect and should be removed. The first advocate general is of the opinion that the Swedish prohibition of import could be seen as both a quantitative restriction and a measurement having equivalent effect. That was when Systembolaget could deny a request from a customer, and that customer would be banned to import the product himself. Since Systembolaget would not import that specific product nor would the consumer be entitled to import it himself, that product would not be able to enter the Swedish market. A prohibition of import on that specific merchandise would therefore appear, which clearly would be in breach of Article 28. Since Systembolaget no longer can deny a request from a customer the likelihood is that such reasoning would no longer hold.

Notable is that the reasoning of why the ban could be seen as a quantitative restriction is based on the old section in the Alcohol Act where Systembolaget could deny a consumer the right to import a product if they had legitimate reasons. Since this section has been removed the writer finds that argumentation no longer of importance.

5.5 Conclusion

The correspondence between the Commission and the Swedish government has basically been concentrated on the Swedish prohibition of private import of alcohol. The Commission is clear on their opinion; the prohibition constitutes a restriction on the internal trade between the Member States and is clearly a breach of Article 28. A justification under Article 30 and defending the prohibition by protection of the public health should not be accepted. The Commission has concluded the fact that no restriction of allowed purchases of alcohol from Systembolaget exists, and that the expanding of open-hours at the stores could not be incompatible with the protection of public health. This could actually be interpreted as having opposite effect, and that is to promote consumption of alcohol. To obtain the prohibition basically on the grounds of concerns with not being able to control the legal age, is not proportionate with keeping the restriction on private import of alcohol. Also, to justify the prohibition by referring to the import-service that Systembolaget provides is not a legitimate reason to maintain the ban.

The Swedish government is of a different opinion and argues that the prohibition is an important part of the Swedish Alcohol Policy to protect the public health. The main purpose behind the prohibition is to limit the accessibility of alcohol and preventing alcohol from being distributed to under-aged people. They state that by removing the ban an alternative distribution-channel of alcohol would be created, and problems with controlling of the legal age would occur. This would not be compatible with the existing system of a monopoly.

However, the Swedish government has realised that the old rule which could deny a customer the possibility to import through Systembolaget was not compatible with EC Law. The fact that the argued section in the Alcohol Act has been removed indicates two things. Number one is that the Swedish government has realised that by denying customers their requested imports a restriction on the free movement of goods is created. The denied products would not be able to enter the Swedish market on any other way, and the Swedish government comprehend that this is not compatible with EC law. They were therefore forced to remove the section which stated that Systembolaget could deny a request of import if they had legitimate reasons.

However, by removing that section, Systembolaget has developed an even stronger position on the Swedish market. By guaranteeing every consumer the possibility to import products through Systembolaget, the Swedish government can now argue that a removal of the prohibition of private import is no longer needed. Since all imports should be executed through Systembolaget and that they have no intentions of making any profit on it, Sweden can provide their citizens a well-functioning system of import of alcohol. By removing the possibility to Systembolaget to deny an import they somehow created a justification for keeping the ban on private import of alcohol.

The opinions raised by the Advocate General Jacobs concluded that the current wording of Article 8 in Directive 92/12/EEC should be interpreted strictly and could not include situations where the transportation is carried out by a third party. Since there is a proposal to include such transportations the current wording of the Article could not be seen as including those situations. The opinion is however of importance since it gives guidelines on how the current formulation should be interpreted, but it also highlights the potential effect that a change of the Article would bring.

Advocate General Tizzano's concluded that the Swedish legislation concerning the prohibition of private import of alcohol could be seen as in conflict with Article 28. This was when the old section in the Alcohol Act still existed, which gave Systembolaget the possibility to reject a request from a consumer to import through them. The opinion is of importance since it highlights the problem with having such a restriction.

A new definition of private import of alcohol to include transportations made on the behalf of the buyer has some support by the opinions raised from different authorities. The Commission as well as Advocate General Jacobs clearly support such development, whereas the Swedish government opposes it with the arguments of protecting the public health.

6 Consumer protection in “Business to consumer” transactions on the Internet

Since there is a proposal for expanding the private import into including transportation carried out on the behalf of the buyer, a closer study must be made on the consumer protection. This will cover an analyse on Internet as a special type of market to do business on, but also potential problems that can arise when purchasing alcohol via the Internet yet a third party carry out the transportation which is organised by the buyer.

6.1 Introduction

Online-shopping has exploded the last couple of years. A new type of market has developed where the consumers can interact with businesses all around the world twenty-four-seven. But this has also developed issues concerning the protection of consumers, and new challenges for the different kinds of legal systems. Transactions between consumers and businesses are often referred to business to consumer (B2C) transactions. The special character of this type of transactions of goods is that an online contract is the foundation of the transaction whereas a physical performance concludes the transaction. Since this is the order in B2C transactions, the national consumer law often upholds the consumer protection.⁸³

In business to business (B2B) transactions the bargain power is often seen to be fairly equal since the companies often have equal ability to accept or reject offers or trading provisions. In a B2C transaction the consumer often need special protection since being the weaker part and not having the same bargain power as a business. Protection for consumers are often provided to prevent businesses from abusing of consumers in situations where they are a weaker part, for instance when consumers fails to discharge the burden of proof in relation to large businesses.⁸⁴

A consumer is often defined as a person who acts with a purpose outside his or hers trade, business or profession.⁸⁵ That could also include situations where individuals act on the behalf of his family or household capacity.⁸⁶

6.2 Applicable law on the contract

When problems occur with transaction made on the Internet the question of which law should be applicable is raised. The seller usually prefers using its own national law, with the reference to the state where the seller has its domicile. But consumers are often the weaker part in a B2C transaction, and are often by that protected through their national legislation. Often standard contracts are applied on transactions made on the Internet, and that can put the consumer in a weaker situation. In standard contracts a reference is often made to the legislation in the seller’s country. It can be hard for the

⁸³ Coteanu, C, *Cyber Consumer Law and unfair trading practices* (2005) p.3.

⁸⁴ *Ibid* p.7.

⁸⁵ Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

⁸⁶ Coteanu, C, *Cyber Consumer Law and unfair trading practices* p.8.

consumer to realise what the legislation of the seller's country really states, and what protection the consumer by that achieve. Likewise, it can be hard for the seller to realise what the legislation of the consumer's country states.

A trend has developed when choosing applicable law to a greater extent ensuring the consumers their important protection as the weaker part. Instead of applying the legislation of the country which the contract has most association to, a preference has developed to choosing the law of the consumer's domicile.⁸⁷ This is an important development since consumers as a weaker party often requires a greater protection in international transactions.

6.2.1 The Rome Convention⁸⁸

The Rome convention is applicable in any situation involving a choice between the laws of different countries.⁸⁹ Article 3.1 in the Convention reflects the cornerstone within private international law which acknowledges the parties the freedom of choosing applicable law on the contract. However, by choosing applicable law on the contract, mandatory rules of the law which otherwise would have been applicable could be set aside.⁹⁰ As long as the law chosen by the parties provides equal or higher consumer protection, the reference to chosen law should be valid. To ensure that the consumer protection is not set aside, Article 5.2 entitles the consumer the protection of the law where he has his domicile. A consumer should not be derived his mandatory protection which he is entitled to according to his national legislation. This is a crucial article since it really entitles the consumers protection in accordance with his national legislation. A requirement to be able to rely on the Article is that the contract was preceded by a specific invitation addressed to him in the country where he has his domicile, or by advertisement in that same country if the consumer had taken all the necessary steps on his part to conclusion of the contracts.⁹¹ Situations where a specific offer is addressed to the consumer personally should not be so hard to distinguish since there should be a personal "invitation" to the consumer to enter a contract.⁹² An e-mail sent to the consumer's e-mail address should be seen as an offer specially addressed to him.⁹³ Problems often arise with advertisement since it can be hard to distinguish to whom the actual advertisement is addressed to. If the advertisement is in Swedish and as well as the prices, an assumption could be made that the advertisement is addressing Swedish consumers.⁹⁴ The fact that an advertisement is placed on the Internet should conclude that it will reach a wide potential number of consumers. However, it can not be expected that the adverting seller

⁸⁷ Larsson, M, Konsumentkyddet över gränserna – särskilt inom EU (2002), p. 130.

⁸⁸ Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (80/934/EEC).

⁸⁹ Article 1.1 the Rome Convention.

⁹⁰ Larsson, M, Konsumentkyddet över gränserna – särskilt inom EU p. 132.

⁹¹ Article 5.2.1 Rome Convention.

⁹² Larsson, M, Konsumentkyddet över gränserna – särskilt inom EU p. 176.

⁹³ Ibid p. 250.

⁹⁴ Ibid p.181.

should acknowledge every potential consumer's mandatory legislation.⁹⁵ The Rome Convention distinguishes between a passive and active consumer. The passive consumer⁹⁶ could rely on the mandatory legislation of his national legislation. The active consumer would however be deprived the consumer protection in Article 5.2.

6.2.2 Distance and Doorstep Sales Act⁹⁷

The purpose with this Swedish Act is to ensure consumers protection when purchasing products on distance, for instance via the Internet. It is applicable on contracts entered by a consumer which is acting outside his or hers business.⁹⁸ A distance contracts is in this act referred to as a contract which is entered within the limits of the seller's organised system for such contracts and that the communication between seller and buyer mainly occurs on distance.⁹⁹ However, the basic rule of distance sales is that the seller is providing the transportation of the goods.¹⁰⁰ This thesis is concentrated on the change of the definition of private import to include transportation made on the buyer's behalf, and this Act can not be applicable on such situations. This referred situation a distance purchase and is not included in the Distance and Doorstep Sales Act. Since distance sales of alcohol are strictly prohibited according to Swedish legislation, no guidance concerning the whole transaction can be received.

The Act can though be applied on the actual contracts between the seller and the buyer, but since the transportation is carried out by a third party, that special part can not be tested in the scope of the Act.

6.2.3 The International Sales of Goods Act¹⁰¹

The International Sales of Goods Act incorporate the United Nations Convention on Contracts for the International Sale of Goods (CISG) into Swedish legislation. The purpose with the convention is to create unified material rules on international sales of goods.¹⁰² It is applicable on international transactions where the parties have domicile in different states. However, it is stated in the Act that it is not applicable to purchase made by an individual for his or his family's personal use according to Article 2. Since this thesis focus on consumer transactions and their protection in transaction over the Internet, and the Act is not applicable on consumer transactions, no guidance from the Act can be collected.

⁹⁵ *Larsson, M*, Konsumentskyddet över gränserna – särskilt inom EU p.254-255.

⁹⁶ *Ibid* p.250..

⁹⁷ SFS 2005:59.

⁹⁸ Chapter 1 Section 2 para 4.

⁹⁹ *Ibid* para 1.

¹⁰⁰ See for instance Chapter 1 Section 6.4.

¹⁰¹ Lag (1987:822) om internationella köp.

¹⁰² *Larsson, M*, Konsumentskyddet över gränserna – särskilt inom EU, p.64.

6.2.4 The Directive on unfair terms in consumer contracts¹⁰³

The Directive on unfair terms in consumer contracts came into force in 1993.¹⁰⁴ A consumer is defined in the Directive as “any natural person who, in contracts by this Directive, who is acting for purposes which are outside his trade, business or profession”¹⁰⁵. One of the important articles in the Directive is Article 5 which states that unfair terms in contracts shall not be binding to the consumer. The Directive states that a term is unfair if “contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”¹⁰⁶ Further on it states that “a term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract”.¹⁰⁷

This directive could be applied on the actual contract that has been made between the seller and the buyer. It can provide the consumer a protection as a weaker part in a B2C transaction, but merely on the contract of purchase. The transaction as a whole, that is from the time the consumer concluded the contract of purchasing the alcohol until to actual products has been delivered to the consumer, can not fall under the scope of this directive.

6.3 Potential issues that can arise when the transportation of the goods is made by a third party

In the proposal for a new definition of private import of alcohol, two different contracts would underpin the whole transaction. There is the actual contract of purchasing the alcohol which is between the seller and the buyer. In order to be able to import the alcohol the buyer has to comply with the requirement of being of the legal age of twenty. This is the seller’s interest to make sure that the buyer is twenty years old. However, the contract of the transportation is between the buyer and a third party. Since there should be no connection between the seller and the third party in order to classify the transaction as a distance purchase, the seller has no guarantees that the third party complies with the strict control of legal age. Some Internet-companies¹⁰⁸ that specialise on selling alcohol via the Internet provide has solved this problem by providing links to companies that they consider reliable transportation companies. In this situation the buyer would be the one organising the transport. However, could that link to some point be seen as the seller is involved in the transportation? This writer’s opinion is that the transportation should be seen as organised by the buyer, yet the seller is providing him with recommendations on reliable transportation-companies. The buyer has still the possibility to

¹⁰³ Directive 93/13/EEC Directive on Unfair Terms in Consumer Contracts.

¹⁰⁴ *Dickie, J*, Internet and the Electronic Commerce Law in the European Union (1999), p. 73.

¹⁰⁵ Article 2 (b).

¹⁰⁶ Article 3.1.

¹⁰⁷ *Ibid* section 2.

¹⁰⁸ See for instance www.vinsajten.com/se/kopvillkor/frakt.php.

choose another transportation-company than the one's being linked to, so these links are merely to be seen as guidance from the seller on which companies that are trustworthy.

6.3.1 The product do not fulfil the expectations from the buyer

Since the business-agreement of the transportation is between the buyer and a third party many unprofessional companies could act as sellers and deliver products to the buyer which not correspond to the products ordered. An example is the situation where the buyer has bought beer of a certain classification yet the delivered beer is of a lower percentage of alcohol. Of course the buyer would not be excepting these products, yet he has to pay the company which performed the transportation of goods that he really did not ordered. The transporting company has no obligation to ensure that the products being transported are equal to the products ordered by the consumer. Since the contract concerning the actual purchase is between the seller and the buyer, and the contract of transportation is between the buyer and the company providing the transportation, problems can arise when the buyer would like to return the goods. Surely the seller would be liable to pay for the transportation when a complaint on the products is reported.

6.3.2 The buyer fails to fulfil the requirement of certain legal age

What happens when the buyer fails to prove his certain legal age? Since the buyer has organised the transport he is also liable to pay the transportation-company for fulfilling its commitment. Should that company be obligated to make sure that the requirement of fulfilling a certain legal age is upheld? This could create a complicated situation since the buyer might refuse paying that company on the grounds of breach of contract. And if there were to be a situation like that, would that company be obligated to return the products to the seller since the buyer failed to prove his age. This could potentially create a situation where the company chooses to deliver the product anyway, since they want to get paid for performed services.

There is also a lack of relationship between the seller and the transporting company, and that company's only interest is to get paid for performed services, not to make sure the legal age is upheld. Since there is no contract between the seller and the transporting company the seller has no guarantees that that company really controls the legal age of the buyer. The real problem is that the seller has an interest of making sure that the buyer is of a certain age, but the transporting company's only interest is to get paid for performed services. If the seller would have an interest of making sure that the legal ages are upheld the guarantee of controlling the legal ages would be much better.

At Systembolaget there are constantly unannounced controls to make sure that the legal age is upheld, and this is something that makes the system so great. By that, Systembolaget can actually have strict controls to be ensured that alcohol is not being distributed to people under the age of twenty. There are also often police officers in plain clothes observing Systembolaget's different stores to prevent people of buying alcohol to under-aged people, and by that preventing alcohol to get distributed to people under the age of twenty. It seems to this writer that similar controls like this would be difficult to perform when allowing a transportation company to carry out the transportation of the goods back to Sweden.

6.3.3 Fulfil the requirement of personal use

Outside Systembolaget's stores there are often police officers in plain clothing to make sure peddling to under-ages people is prevented. This would be harder to control when transportations of alcohol from other countries are carried out by a third party. Many times there are large quantities of alcohol delivered to the same address, yet the deliverance includes orders from many consumers, which have organised the transportation together. It would be hard to ensure that all these orders are to consumers over the age of twenty, but it would also be hard to determine if that order is actually for that individual's personal use. The risk of peddling could increase by allowing transportations made by a third party to the consumer. Of course there that same situation can occur when buying alcohol from Systembolaget, but this author is of the opinion that this risk would increase when allowing a third party to transport the products from the seller.

6.4 Conclusion

Consumers are often the weaker part in a transaction made on the Internet. Therefore it is crucial that they receive protection so consumers feel secure when doing business online. Often standard contracts are used, which could put consumers in difficult situations. Also the ability for the parties to choose could in some cases put the consumer in a weaker position. However, according to the Rome Convention, the consumers are entitled the protection of their national legislation applicable on the contracts. That is when the contracts was concluded in the consumer's domicile and the contracts was preceded by an offer address to him, or by advertisement, and all necessary steps to conclude the contracts was taken in that country. Problems often occur when deciding to whom the advertisement is addressing. If the advertisement is in Swedish as well as the prices the assumption can be made that the advertisement is addressing Swedish consumers. However, when the advertisement is in English, it could be hard to determine which consumers it is actually addressing. The fact that an advertisement is placed on the Internet could not be seen as addressing every consumer which speaks English. All circumstances should be taken into consideration, and merely that fact that an advertisement is in a certain language do not conclude that it is addressing a whole population.

When it comes to the consumer protection in Swedish legislation do not provide much guidance in situations concerning distance purchase. The Distance and Doorstep Sales Act could be applied on the actual contract between the seller and the buyer, but it not applicable on the whole transaction. Neither could the International Sales of Goods Act be applicable since it only covers B2B transaction. The Directive on unfair terms in consumer contracts can be applied on the actual contracts between the seller and the buyer, or between the buyer and the third party, but that is only to ensure the consumer a possibility to be excluded from unfair terms in contracts. There is a notable lack of consumer protection which can be applied on the whole transaction, and it could therefore create problems for the consumer when concluding to such transactions.

One of the cornerstones of the Swedish monopoly is to prevent people under the age of twenty to get access to alcohol. This could be upheld by having strict age-controls at Systembolaget, and by having unannounced controls from the Supervising Authority a guarantee that these controls are really implemented. Similar controls like these would

be hard to obtain if the current prohibition would be removed. What guarantees would the seller have that the transportation-company is really controlling the legal age of the buyer. Since there is no actual contract between the seller and that company it would be hard for the seller to make sure that these controls are upheld. The transportation-company's only interest is to get pay for performed services and has no actual interest of making sure that the buyer is of a certain age. Problem arises when it turns out that the buyer is under twenty; he would still be liable to pay the company for the transport. It could easily lead to that the company ignores the fact that the consumer is under age only to receive compensation for executing the transportation. Another problem is when the goods do not comply with the expectations from the buyer. He would still have to pay for the transportation, even though he could demand the seller compensation for that actual transport.

The evidence suggests that there is still an incomplete protection of the consumer, and a great uncertainty when having a third party transporting the purchased alcohol to Sweden.

7 Comparison to Finland

Since Finland, like Sweden, has a monopoly on alcohol and is part of EU a comparison between the countries would be interesting.

7.1 Introduction

Finland entered the European Union in January 1995. Before their entrance they had five monopolies concerning the distribution of alcohol, so an adjustment had to be made in order to comply with the EC law and Article 31. They were forced to eliminate four of these monopolies, which were the monopoly on import, export, wholesale and manufacturing. Only the monopoly on retail on alcohol remained state-owned.¹⁰⁹

The Finnish people are known for being heavy drinkers and that is today part of their culture. But lately the consumption has increased even more. Some say it is due to the decrease of tax on alcohol, whereas other suggests it is because they now allow distance sales of alcohol over the Internet.

In Mars 2004 Finland lowered their tax on alcohol (spirits) with 40 percentages as an attempt to decrease the import of alcohol from other countries such as Russia and Estonia. These countries have much lower prices on alcohol, and Finland hoped to increase the domestic sales by lowering the tax on alcohol. Compared to Sweden the Finnish tax on spirits is about 50 percentages lower than the Swedish and about 90 percentages lower on wine.¹¹⁰ The decrease resulted in growth in sales volume in Finland, but also an increase of consumption of alcohol.¹¹¹ This has led to a massive debate whether they should raise the taxes again to decrease the consumption but danger a potential raise of imports of alcohol from other countries.¹¹² Or if keeping the low taxes and by that keeping the import from countries like Estonia low, but continue to battle with high levels of consumption. In Mars this year a decision was made to retain the low taxes on alcohol, but instead focus on information-campaigns and warning-labels on bottles as an attempt to decrease the consumption.¹¹³

In the years 2000, Finland was granted an exception from the principle of quantitative restriction in order to limit the import of beer made by private individual for a personal use. The limit was set to 16 litres of imported beer from countries other than the Member State. This mainly because Russia is close to the Finnish boarder and that they apply much lower prices on beer. The purpose behind this was the Finnish growth of consumption of alcohol and the effect on the society it caused in terms of economic and social terms as well as the public order. It was set to be valid to the 31st of December

¹⁰⁹ *Roslin, B*, När slagregnet föll, nordisk alkoholpolitik i den europeiska integrationen p.72.

¹¹⁰ *Laurén, A-L*, Finland importerar fritt, published 2005-10-26, www.svd.se/dynamiskt/inrikes/did_10752932.asp, available 2006-05-11.

¹¹¹ *Hellman, M*, Fortsatt ökning i den finländska konsumtionen, published 2006-02-08, www.nosam.net/fhp/d_nyhet/cf/hPKey_1193/hParent_46/hDKey_7, available 2006-05-11.

¹¹² IOGT- NTO, Finsk minister vill höja spritskatten, www.iogt-nto.com/templates/NewsPageSmall____5083.aspx, published 2005-02-25, available 2006-05-21.

¹¹³ Drugnews, Finsk varningstext – ej höjd spritskatt, www.drugnews.se/article.asp?id=3178, published 2006-03-02, available 2006-05-21

2005. Finland has now been granted an extension of the restriction concerning import of beer from countries outside the EU to the 31st of December 2006. There are still big differences in prices on alcohol between Finland and Russia, and they keep on struggle with their high levels of consumption. This extension should also facilitate to their economic- and tax problems.¹¹⁴

7.2 The Finnish Alcohol Act¹¹⁵

The purpose behind the Finnish Alcohol Act is, as it often is when there is a state owned monopoly on alcohol, to limit the availability of alcohol. The Act came into force in 1995 as a result of their entrance to EU.

Finland has like Sweden a monopoly on alcohol, although it is a bit less restrictive. It is stated in the Finnish Alcohol Act Chapter 4 Section 13 that the Alcohol Company (Alko Ab) has the exclusive right to retail on alcohol, with the exceptions made in Section 14. Alcoholic beverages with a highest alcohol percentage of 4,7 are allowed to be sold in store with a special permit to retail trade. This could be compared to Sweden and the beer containing 3,5 percentage of alcohol that are allowed to be sold in grocery stores and petrol stations. Another exception is made for products containing maximum 13 percentage alcohol, which have been manufactured by someone who has permission from the authority of supervision. An example of this is Finnish vineyards that can receive a special permission to retail of their locally produced wines.

In Finland it is possibly to order alcohol over the Internet. According to the Finnish Alcohol Act Chapter 3 Section 8 a person with a non-commercial purpose is entitled to import alcohol without carrying any special document. They do however have to pay Finnish tax and VAT on purchased products. Finland has realised the importance of complying with the EC law and the free movement of goods and allowed their citizens to order alcohol via the Internet. Since the purchasing of alcohol via the Internet is a fairly new way of acquiring alcohol there is a lack of statistics and what affect it really has on the consumption levels.

7.3 Conclusion

The monopoly on alcohol in Finland is a bit less restrictive than the Swedish one. They allow beer up to 4,7 percentage of alcohol to be sold in stores with a special permit to retail trade. They also have a special rule concerning wine that has been produced on vineyard to be sold there if they have a special permission. By this Finland has a greater availability of alcohol than Sweden and alcohol is a bigger part of their culture. If Finland would have had a prohibition on private import of alcohol the evidence suggests that it would be hard for them to justify it. In Sweden case they have a more restrict legislation to minimise the availability of alcohol. For instance, the maximum percentage of alcohol is 3,5 on beer sold in supermarkets and petrol station. By allowing beer up to

¹¹⁴ COM (2005) 427 final, Proposal for a COUNCIL DIRECTIVE amending Directive 69/169/EEC on temporary quantitative restrictions on imported beer to Finland.

¹¹⁵ Alkohollag 8.12.1994/1143.

4,7 percentage of alcohol in ordinary stores and wine to be sold from vineyard Finland clearly has extended the accessibility of alcohol in comparison to Sweden.

Finland biggest problem at the moment is their high levels of consumption of alcohol and they have struggling with this for quite a while. It is unclear if the raise of alcohol consumption the last couple of years is because the decrease on tax on alcohol or the fact that they now can order alcohol from the Internet. There has been a proposal to raise the tax again but that would danger the import from other countries such as Estonia. However, if they maintain the low tax they would have to continue the battle of high consumption level but the concern of imports from other countries would stay low. It has been decided that they would maintain the low tax on alcohol but they are going to increase campaigns to inform the consumer the dangerous effect that alcohol possesses. Warning-labels should also be printed on the bottles to inform and to some extent deterrent from purchasing alcohol. Finland is in a difficult situation but it is hard to say how much the purchasing of alcohol via the Internet has affected the total consumption of alcohol.

They have however realised that the introduction of purchasing alcohol via the Internet was an important step in order to comply with the EC law. They have allowed distance sales of alcohol via the Internet with the requirement of having to pay Finnish tax on VAT on the goods purchased. So they have taken it a step further than the proposal made from the Commission to Sweden to take, which is to allow the goods to be transported on the behalf of the buyer i.e. distance purchase. By allowing distance sales the consumer achieves a much safer and controlled transaction since there are only two parties involved. The seller would then make the transportation of the goods to the buyer and a greater certainty of controlling the legal age would be achieved. The situations where a return of the products is demanded would be easier to handle since the buyer can turn directly to the seller. The evidence suggests that the consumer protection would be better in situations where there is a distance sale and the seller is responsible for the transportation of the products.

Also, by requiring Finnish tax and VAT to be laid down, the purchase could be seen as less profitable. One of the advantages of buying alcohol via the Internet could be that some products are cheaper than in ordinary stores. If one of the main reasons why a consumer would be buying alcohol via the Internet vanished less people would be buying from the Internet. This could actually be seen as an advantage of allowing distance sales since Finland now can benefit from the private import from other countries.

8 Final conclusion

One of the purposes with this thesis was to examine whether the Swedish prohibition on private import of alcohol could be seen as in conflict with Article 28 EC and the free movement of goods. Even though the prohibition do constitutes a restriction on the trade between the Member States a justification could be made under Article 30 EC. It is there stated that Member States are allowed to retain national obstacles on good on the internal market if a justification to the protection of the public health can be made. The Swedish government has made a fairly good attempt to show that the prohibition should be justify to protect the public health, but their arguments are not enough. The restriction is not proportionate in relation to the purpose to be achieved. Surely, it is of importance to limit the availability of the alcohol and to make sure that alcohol is not acquired by persons under the age of twenty, but there might be other options which would not have such negative effect on the trade between the Member States. The Swedish government has not been able to prove that such prohibition is justified in order to protect the public health. So to answer the question, the Swedish prohibition can not be justified under the arguments provided by the Swedish government.

The Swedish legislation provides a few exceptions from the prohibition of private import. The most common one is when a person is travelling with the goods, but also alcohol received through inheritance or a will, and single gift parcels should be seen as legal imports. Another possibility to import is through Systembolaget, even though this service could in some cases be seen as less profitable and time-consuming. Much of the discussion concerning the Swedish prohibition has been based on the former section in the Alcohol Act which provided Systembolaget with the ability to deny a customer's request to import a special product if they had legitimate reasons. By being able to do that, an absolute restriction was imposed on that product since it would not be able to enter the Swedish market. That section has been removed, which could indicate that the Swedish government has realised the importance of complying with EC law. However, by removing that section they created a justification to be able to maintain the prohibition, since Systembolaget is now obligated to carry out any request from customers.

The redefinition of private import to include situations where the transportation is carried out by a third party is something that is an appealing development, at least on paper. An increase of distance purchase of alcohol would most likely occur, which would benefit consumers, sellers and transporting-companies. However, this change could also put consumers in a difficult situation since many of the Acts and Directive are not applicable on construction like this. Even though a Swedish consumer could rely on the Distance and Doorstep Sales Act, that specific Act could only be applied in the actual contract between the seller and the buyer. Difficulties might occur when reclamation of goods is required. From the seller's point of view, such a transaction is not to prefer since he has no guarantees that the third party controls the legal age of the buyer. Since there is not contract between the seller and the third party, he has limited possibilities to take any further action due to the third party's failing of controlling and upholding the legal ages.

This author is of the opinion that distance purchase at the moment is not to prefer. There is still a great uncertainty in such construction, and further development within the legislation is a requirement to be able to feel safe as a consumer in such situations. The fact

that there different national legislation that can be applicable on such transaction and it can be hard for consumers to predict the outcome when problems occur. Some protection is received through the Rome Convention which in some situations ensures consumers protection of mandatory requirement according to the national legislation of their domicile.

Further on, the evidence suggests that Sweden should follow the example set by Finland, if the prohibition on private import of alcohol would have to be removed. By allowing distance selling of alcohol Sweden would be able to benefit from such sales through the tax being laid down on such imports. To impose such imports with taxation in Sweden, purchase via the Internet would be seen as less profitable and by that one of the main reasons for purchasing alcohol via the Internet would vanish. Even though it could be seen as increasing the availability of alcohol on the Swedish market, Sweden would be able to benefit from such import due to the taxation on the products. The taxation would increase the final price of the alcohol, and by that make purchases of alcohol via the Internet less profitable.

It would also, in those cases where a consumer decides to purchase alcohol via the Internet, create much safer transactions and import. Distance selling is in much greater regulated through directives and national legislation way than distance purchase. The consumer would to much greater extent receive the protection necessary in transactions where consumers are a weaker part. The predictability would also increase, which is important when concluding to a contract or a transaction online.

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