

OPINION OF ADVOCATE GENERAL
JACOBS

delivered on 14 December 2000¹

1. In this reference for a preliminary ruling, Stockholms Tingsrätt (Stockholm District Court) asks whether national legislation entailing a general ban on the advertising of alcoholic drinks is in principle precluded by the Treaty prohibitions of quantitative restrictions on imports and/or of restrictions on freedom to provide services; if so, the national court wishes to know whether it may none the less be regarded as justifiable by reason of the public-health aim which it seeks to achieve and proportionate in the light of that aim.

injunction restraining Gourmet International Products Aktiebolag (hereinafter 'GIP') from publishing advertisements for alcoholic beverages in a supplement to its magazine *Gourmet*.

The retail sales monopoly

The Swedish legislation and the circumstances of the national proceedings

3. The State monopoly on retail sales of alcoholic beverages in Sweden has been considered by the Court in the *Franzén* case,² in which a helpful description is provided.³ The following features are perhaps the most salient for present purposes.

2. Sweden has an official policy of moderating alcohol consumption in the interests of health and safety. The instruments of that policy include a national monopoly on retail sales of alcoholic beverages for home consumption and a number of restrictions on advertising. In the context of those restrictions, the Consumer Ombudsman (Konsumentombudsmannen) is seeking an

4. Alcoholic beverages are defined as those containing more than 2.25% of alcohol by volume. Such beverages may be produced, imported and/or sold wholesale by persons holding a licence for the relevant purpose. With the exception of beer containing less than 3.5% alcohol, which may be sold in

¹ — Original language: English.

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

³ — See in particular paragraphs 21 to 26 of the judgment, with a fuller account in paragraphs 2 to 37 of the Opinion of Advocate General Elmer.

food stores, they may be sold directly to consumers only by those — namely restaurants and bars — holding a licence to serve alcohol or by the wholly State-owned company Systembolaget, which has a total monopoly on retail sales for home consumption.

dent on performance in blind tastings and on sales.

7. Among the requirements placed on Systembolaget by its agreement with the Swedish State are that it is to:

5. Systembolaget operates a network of some 400 shops of its own and has about 580 local agents — generally ordinary shops offering a simple ordering and delivery service. At many of its shops, items are not on display but must be requested at a sales counter, although it has now introduced self-service outlets. Opening hours are limited, and a prohibition on sales to persons under the age of 20 is strictly enforced.

— select beverages only on the basis of quality, possible adverse effects on health, customer demand and other business or ethical considerations, in such a way that national products are not favoured;

— inform suppliers of its reasons for not selecting any product or for dropping a product from its range and of their right to appeal;

6. The products sold by Systembolaget (about 2 400 in number) fall into five groups. There is a regular range of standard products in permanent stock, a temporary range which includes products of limited availability or candidates for inclusion in the regular range, a test range for products undergoing evaluation, a special order range for products stocked not by Systembolaget but by licensed producers or importers, and an import service for individuals and restaurants wishing to order products not otherwise available in Sweden. Inclusion (and continued inclusion) within the ranges stocked by Systembolaget is depen-

— adopt marketing and information measures which are impartial and independent of the origin of beverages; and

— take steps to ensure that new beverages which it markets become known to consumers, whilst having regard to the restrictions laid down by law.

Advertising restrictions

8. The legislation with which the national court is specifically concerned in the present case is Article 2 of Law 1978:763 (Lag med vissa bestämmelser om marknadsföring av alkoholdrycker, or Alkoholköklamlagen, hereinafter 'the Alcohol Advertising Law') enacting certain measures governing the marketing of alcoholic beverages, which applies⁴ to the marketing of alcoholic beverages to individuals by producers and traders. Alcoholic beverages (containing over 2.25% alcohol) include spirits, wines, strong beers (over 3.5% alcohol) and beers (between 2.25% and 3.5% alcohol).

9. Article 2 provides as follows:

'In view of the health risks involved in alcohol consumption, alcoholic beverages should be marketed with particular moderation. In particular, advertisements or other marketing measures must not be insistent, involve unsolicited approaches or encourage alcohol consumption.

Commercial advertising may not be used to market alcoholic beverages on radio or

television. The same prohibition applies to satellite broadcasts subject to Law 1966:844 on radio and television.

Commercial advertising may not be used to market spirits, wines or strong beers either in periodicals or in other publications subject to the Regulation on press freedom and comparable to periodicals by reason of their publication schedule. That prohibition does not however apply to publications distributed solely at the point of sale of such beverages.'

10. Under guidelines published by the Swedish Consumer Protection Authority (Konsumentverket) for the implementation of that article, advertising is prohibited in many public places and situations.

11. The ban on commercial advertising of alcoholic beverages in the press, on radio or on television is attenuated in a number of ways.

12. All alcoholic beverages may be advertised in publications available only at points of sale, although it was suggested

⁴ — It appears from what was said at the hearing that this Law has now been incorporated in codified legislation on alcohol, but that its relevant provisions remain essentially the same.

at the hearing that only beverages for sale at the outlet in question may be advertised. Beer with an alcohol content of between 2.25% and 3.5% may be advertised in periodicals, subject to certain limitations specified in guidelines. From the case-file and what was said at the hearing, it further appears that a particular category of 'light beer' having an alcohol content of less than 2.25% is marketed in Sweden and may be advertised without restriction, and that 'editorial publicity' in periodicals or in radio or television programmes — comment which may have a promotional effect but is not the subject of a commercial transaction — is not prohibited. Nor is there any ban on sending advertising material directly to a consumer at his or her request. Furthermore, since the Alcohol Advertising Law applies only to marketing directed at individuals, there are no restrictions on advertising in trade journals. It appears, moreover, that alcoholic beverages may be advertised on the internet.

13. However, all advertising which is permitted must still comply with the requirements of 'particular moderation' laid down in the first paragraph of Article 2.

14. Under Article 3 of the Law, any breach of Article 2 is deemed an unfair consumer practice in accordance with the provisions

of Law 1995:450 (Marknadsföringslagen — Law on marketing practices), from which parties may be restrained by injunction, with a fine in the event of failure to comply. Responsibility for seeking or, as the case may be, issuing such injunctions lies with the Consumer Ombudsman, who in this case seeks such an injunction against GIP from Stockholms Tingsrätt.

Circumstances of the main proceedings

15. GIP publishes the periodical *Gourmet*, which is printed in two editions. The first is on sale to the public at large, the second is sent only to subscribers. Total circulation is around 25 000 copies, of which some 9 300 are accounted for by the subscriber edition. Of those 9 300, 55% are delivered to businesses in the drinks trade, 35% to other businesses and 10% to private individuals. The subscriber edition, but not the public edition, has a supplement containing editorial comment and advertisements for alcoholic beverages placed by importers. The supplement published with Issue 4 (August-October 1997) contained one page of advertisements for red wines and two pages for whiskies.

16. The Consumer Ombudsman takes the view that this constitutes advertising directed at individual consumers and published in a periodical, thus falling foul of Article 2

of the Alcohol Advertising Law. He has applied to Stockholms Tingsrätt for an injunction restraining GIP from publishing such advertisements and imposing a penalty in the event of non-compliance.

Ombudsman, to seek a preliminary ruling on the Community-law issues.

17. GIP submits that no injunction may be made on the basis of Swedish legislation which is contrary to Community law. The legislation in issue here is contrary to Article 30 of the EC Treaty (now, after amendment, Article 28 EC) in that it imposes a measure whose effect is equivalent to a quantitative restriction on imports of goods from other Member States and to Article 59 of the EC Treaty (now, after amendment, Article 49 EC) in that it imposes a restriction on the freedom of publishers of magazines in Sweden to provide services (in this case, the service of making advertising space available) to persons established in other Member States. The Consumer Ombudsman disagrees.

18. It may be noted that there is another issue between the parties, not directly connected with the issue of Community law, namely whether the subscriber edition of *Gourmet* should be regarded as a trade journal falling outside the scope of the Swedish prohibition. That question has apparently not yet been settled by the national court, which on 9 November 1998 decided, at the instance of GIP but contrary to the wishes of the Consumer

19. The questions referred for a preliminary ruling are:

- ‘1. Is Article 30 or Article 59 of the Treaty of Rome to be interpreted as precluding national legislation entailing a general prohibition of alcohol advertising, such as the prohibition laid down in Article 2 of Alkoholreklamlagen?
2. If so, can such a prohibition be regarded as justified and proportionate for the protection of life and health of humans?’

20. Written observations have been submitted to the Court by the Consumer Ombudsman, by GIP, by the Finnish, French, Swedish and Norwegian Governments, and by the Commission. GIP, the Finnish, French and Swedish Governments and the Commission also presented oral submissions at the hearing.

Analysis

The nature of the prohibition

21. The national court refers to a 'general prohibition' and GIP seeks to present it as a total or absolute ban.

22. It seems to me that, in view of the numerous exceptions, there cannot be said to be a total or absolute ban on the advertising of alcoholic beverages as such. However, the ban does appear to be total as regards advertising material devised by or on behalf of a producer, importer, wholesaler or retailer and addressed to (potential) consumers in general, as opposed to those who have specifically requested it or are already in an 'alcohol-purchasing situation'.

23. Another point which may be briefly mentioned is the Commission's suggestion at the hearing to the effect that the advertising ban might be examined primarily as a possible restriction on the free movement of periodicals, entailing consequential restrictions on the free movement of alcoholic beverages and the freedom to provide advertising services.

24. However, from the facts as presented to the Court, there does not appear to be any restriction on the sale in Sweden of foreign periodicals containing advertisements for alcoholic beverages. I consider that the alleged restrictions of free movement of goods (alcoholic beverages) and of freedom to provide services are sufficiently independent of one another to be treated separately.

Articles 30 and 36 of the EC Treaty

— Inclusion within the scope of Article 30

25. According to the Swedish Government, the avowed aim and proclaimed effect of its alcohol policy is to limit alcohol consumption, and there appears to be no dispute over the effectiveness of that policy.⁵ In general, I consider, advertising restrictions cannot but contribute to the effect to a non-negligible degree, alongside high excise duties and State control of retail sales for home consumption. Sales, and thus imports, of alcoholic beverages must therefore be affected.

⁵ — Yearly figures given in the publication *World Drink Trends* show that per capita consumption of alcohol in Sweden is the lowest (at around half the average) of all the countries of the European Union; however, there appears also to be evidence of a parallel market in illicit alcohol not reflected in the statistics.

26. Thus, it seems clear that the Swedish legislation in issue falls within the *Dassonville* definition of measures having an effect equivalent to quantitative restrictions, for the purposes of Article 30, as any 'rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade'.⁶ (It may be noted that the situation here is different from a uniform Community-wide ban such as that contemplated by the Tobacco Advertising Directive.⁷ Divergent national rules are likely to create barriers at national boundaries; harmonised Community rules, although they may reduce trade overall, tend to eliminate such national barriers.)

domestic products and those from other Member States'.⁸ In the alternative and in any event, they consider that the restrictions in issue are justified 'on grounds of... the protection of health and life of humans' under Article 36 of the EC Treaty.

28. The Court has already held that advertising restrictions can fall within the category of rules on selling arrangements referred to in *Keck and Mithouard*.⁹

29. However, the *Keck and Mithouard* exception is dependent on the non-discriminatory nature of the rules in question, both in law and in fact.

27. The Consumer Ombudsman and all the governments which submitted observations consider, however, that the legislation is none the less excluded from the scope of the article by virtue of the *Keck and Mithouard* exception for 'national provisions restricting or prohibiting certain selling arrangements' which 'apply to all relevant traders operating within the national territory and... affect in the same manner, in law and in fact, the marketing of

30. Here, the restrictions do not seem discriminatory in law; there is nothing in any of the provisions which distinguishes between Swedish and imported products. Moreover, to the extent that it relates to advertising, there is a specific requirement on Systembolaget not to favour national products in its selections, but to bring all new products to the attention of consumers.

6 — Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837, paragraph 5 of the judgment.

7 — Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, OJ 1998 L 213, p. 9, recently annulled by the Court in its judgment of 5 October 2000 in Case C-376/98 *Germany v Parliament and Council* [2000] ECR 8419.

8 — Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraph 16 of the judgment.

9 — See Case C-292/92 *Hünermund and Others v Landesapothekerkammer Baden-Württemberg* [1993] ECR I-6787, paragraph 22 of the judgment, Case C-412/93 *Leclerc-Siplec v TFI Publicité and M6 Publicité* [1995] ECR I-179, paragraph 22, and Joined Cases C-34/95, C-35/95 and C-36/95 *Konsumentombudsmannen v De Agostini and TV-Shop* [1997] ECR I-3843, paragraph 39.

31. The legal situation, however, does not appear to be reflected in fact — and, as the Court has consistently recognised since its *Dassonville* judgment, the actual or potential impact on market access in fact is crucial for the application of Article 30 of the EC Treaty.

32. It is true that the Swedish Government points to a constant increase in sales of wines (overwhelmingly imported, principally from other Member States) and a constant decrease in spirit sales (with an increase in the proportion of imported whiskies as opposed to Swedish-produced vodkas), the changing balance reflecting one of the aims of the legislation to wean consumers away from stronger beverages.

33. However, GIP cites other statistics indicating Swedish domination of the domestic market in strong beer and points out that ingrained consumer habits will always tend to favour national beverages so that without advertising products from other Member States are at a disadvantage. At the hearing, the Swedish Government's representative agreed that there was a widespread preference for locally-produced beer. In addition, GIP argues, daily press information on other (for example economic) topics will keep the names of national producers to the forefront of consumers' minds; furthermore, the lack of any restriction on the advertising of light beer enables Swedish brewers of such beer to promote their brand names (which are

the same as for their strong beers) and thus gain an advantage over brewers of imported beer, who generally do not produce a light beer.

34. It might be argued that these are matters of fact for the national court to decide, but it seems to me inherent in any rule which prevents producers from advertising directly to the public that it will disproportionately affect imported products — and will at any rate 'prevent their access to the market or... impede access... more than it impedes the access of domestic products'.¹⁰

35. In conflicts of interest such as the present (another example would be that of tobacco advertising) it is often argued by advertisers that the aim and effect of advertising is not to encourage more people to consume the product in question but to persuade those who already do consume it to switch brands. In the present case, it seems clearly to be the intention of the Swedish authorities to permit advertising for that latter purpose alone. In both cases there is an underlying assumption that in the absence of advertising there would be less likelihood of brand-switching.

10 — *Keck and Mithouard*, paragraph 17.

36. The truth of that assumption is, I think, self-evident. A consumer who is unaware of alternatives to the products he or she is in the habit of purchasing is unlikely to go to any great lengths to discover whether such alternatives exist and is thus likely to continue to purchase the same products. The role of advertising is primordial in launching a new product or in penetrating a new market. The existence of a monopoly on the retail market, moreover, clearly heightens the danger that a limitation on advertising directly to customers will have a restrictive effect on trade; in that regard, the duty of impartiality imposed on Systembolaget is insufficient to overcome the inertia of settled purchasing patterns, particularly as customer demand is one of the criteria on which it must base the selection of its products.

ducts. It is quite plausible — as in an incident cited anecdotally by counsel for GIP at the hearing — that producers in other Member States will be discouraged from even attempting to penetrate the Swedish market.

38. I am therefore satisfied that the advertising restrictions in issue not only are capable of hindering intra-Community trade but also in fact affect the marketing of domestic products differently from those from other Member States and impede market access for the latter more than they impede the access of domestic products. That being so, the *Keck and Mithouard* exception could not in any event apply.

— Justification on public health grounds

37. Viewed in the light of the Swedish situation — the legislation in issue dates from 1978 and the same policies appear to have been pursued since the 19th century, whereas the obligation to allow free movement of goods from other Member States dates only from 1994¹¹ — those considerations lead inexorably to the conclusion that the restrictions on the advertising of alcoholic beverages must have a greater adverse effect on new products introduced onto the Swedish market than on products already present there, the former being more likely to be from other Member States and the latter to be Swedish pro-

39. It is however necessary to consider whether the advertising restrictions are justified 'on grounds of... the protection of health and life of humans' under Article 36 of the EC Treaty.

40. It may also be noted, parenthetically, that the *Cassis de Dijon* line of case-law provides an exception from the prohibition of measures having equivalent effect for legislation 'necessary in order to satisfy mandatory requirements relating in parti-

11 — Article 11 of the Agreement on the European Economic Area, OJ 1994 L 1, p. 3, which entered into force on 1 January 1994, preceded, for Sweden, Article 30 of the EC Treaty.

cular to... the protection of public health'¹² provided that the measure applies without distinction to both national and imported products. However, as the Court pointed out in *Aragonesa*,¹³ there is no need to consider Article 30 in that light where (as here) the justification offered is the protection of public health, since Article 36 of the EC Treaty provides for such a justification whether the measure is discriminatory or not.

41. It is I think undeniable that justification under Article 36 is in principle available for measures to reduce alcohol consumption. The dangers of excessive consumption of alcohol to human health and life (both direct through damage to the drinker's own body and indirect through violence, road traffic accidents and industrial accidents) hardly need to be reiterated. In *Franzén*, the Court confirmed that the protection of human health against the harmful effects of alcohol is indisputably a ground which may justify derogation from Article 30 of the Treaty.¹⁴

42. All Member States, moreover, apply restrictions of some kind on alcohol advertising, although in some they take the form

of voluntary codes, and those in Sweden and Finland appear to be the most severe.¹⁵ In the field of television, the 'television without frontiers' directive¹⁶ contains stringent criteria as regards the advertising of alcoholic beverages. As pointed out by the Swedish and Finnish Governments, advertising restrictions are included among the aims of the European Alcohol Action Plan drawn up by the World Health Organisation's Regional Office for Europe in 1993 and further developed for the period 2000 to 2005, and of the European Charter on Alcohol drawn up by the European Conference on Health, Society and Alcohol held by the same organisation in Paris in December 1995.

— Proportionality

43. In the present state of Community law, in which there are no common or harmonised rules governing in a general manner the advertising of alcoholic beverages, it is for the Member States to decide on the degree of protection which they wish to afford to public health and on the way on which that protection is to be achieved.¹⁷

12 — Case 120/78 *Rewe v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, paragraph 8 of the judgment.

13 — Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior and Publivia* [1991] ECR I-4151, paragraph 13 of the judgment.

14 — Cited above in note 2; see paragraph 76 of the judgment and the case-law cited there.

15 — See *Overview of national alcohol policies in the 15 countries of the European Union*, published by the Société Française de Santé Publique and the European Commission, October 1998.

16 — Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ 1989 L 298, p. 23; see in particular Article 15.

17 — *Aragonesa*, cited in note 13, paragraph 16 of the judgment.

44. However, national rules having, or likely to have, a restrictive effect on the importation of products cannot benefit from the derogation provided for in Article 36 of the EC Treaty if the health and life of humans may be protected just as effectively by measures which are less restrictive of intra-Community trade.¹⁸

45. Although the Swedish legislation as a whole contains a range of advertising restrictions, what is in issue here is the proportionality of the ban on all direct commercial advertising of beverages containing more than 3.5% alcohol in periodicals aimed at the general public.

46. Essentially, the Consumer Ombudsman and all the governments which have submitted observations consider that such a ban is proportionate because it allows advertising directed at traders and because a more limited ban would be less effective in achieving the stated aim of reducing individual and overall alcohol consumption in Sweden.

47. GIP and the Commission, however, consider that the stated aim could be

achieved by less restrictive means and that the ban as it stands is imperfectly effective. They stress the existence of the State monopoly on retail sales for home consumption and the purchasing restrictions which it applies, and point to the 'loop-holes' of editorial publicity and commercial advertising on the internet.

48. A ban such as that in issue here in my view goes farther than is necessary to achieve the aim sought, although the final decision should be left to the national court, which may be able to take into account factors specific to the Swedish context, not as readily ascertainable by this Court.

49. The aim of the restrictions is to reduce alcohol consumption. I do not consider that it can be argued that a ban such as the one in issue does not contribute to the achievement of that aim, although there appears to be no scientific agreement as to the precise effects of advertising on alcohol consumption as opposed to brand-switching.¹⁹ The crucial question is, however, whether a less

18 — See, most recently, the judgment of 11 July 2000 in Case C-473/98 *Kemikalieinspektion v Toolex Alpha* [2000] ECR I-5681, paragraph 40, and, with specific regard to the protection of human health against the harmful effects of alcohol, *Aragonesa*, cited in note 13, at paragraphs 14 and 16 of the judgment, *Franzén*, cited in note 2, at paragraph 75, and Case C-394/97 *Hemmen* [1999] ECR I-3599, paragraph 36.

19 — The 10th Special Report to the US Congress on Alcohol and Health produced by the National Institute on Alcohol Abuse and Alcoholism — a Federal Government body set up to study the causes, consequences, treatment, and prevention of alcoholism and alcohol-related problems — examines a large number of experimental surveys and investigations into the effects of alcohol advertising and concludes that, other than perhaps in the case of children and young people, there is 'little consistent evidence that alcohol advertising affects drinking beliefs and behaviours'. Some sources, however, do report a link.

restrictive ban might not contribute just as effectively and that question must be considered, as GIP and the Commission rightly point out, in the context of the Swedish situation.

50. That situation appears to be characterised, *inter alia*, by the fact that the purchase and consumption of alcohol by persons over 20 years of age are perfectly legal and a matter of free choice for the individual. There is, moreover, no legislative intention of depriving such individuals of access to information about the alcoholic beverages available — there is no ban on editorial publicity and direct commercial advertising is available to consumers on request or at points of sale. The contested ban must also be seen against the background of limitations on the availability of alcohol, high excise duties, strict enforcement of purchasing age-limits and the requirement that all advertising of alcoholic beverages must display ‘particular moderation’, which appears from what the Swedish Government says to imply objectivity and restraint in both text and image.

51. Against that background, what restrictions on advertising are justified? Some are, without doubt. It seems eminently reasonable to seek, for example, to protect children and young people who do not yet consume alcohol and who, by reason of their age, would be particularly susceptible to its adverse effects from the possible influence of advertisements for alcoholic beverages. Any ban on alcohol advertising

in publications aimed at those sections of the population is thus justified. Nor, it seems to me, can it be considered disproportionate for that purpose to prohibit advertising in media which, by their nature, are likely to come frequently to the attention of children and young people — street hoardings, mass-circulation newspapers and peak-time television, for example. Variations of such bans are imposed in many Member States.

52. As regards adult consumption, which is also targeted by the Swedish rules, it again seems to me perfectly justifiable to impose certain limitations — although it must be remembered that anyone over 20 appears to be deemed, by the Swedish legislature, to possess sufficient maturity to be able to reach a decision as to whether to consume alcohol and to what extent.

53. It would seem, for example, justified in the light of the aims sought to ban advertising which portrays heavy drinking in a favourable light or which is specifically likely to encourage the drinking of alcohol rather than other beverages. Instances might include advertisements which associate alcohol with health, happiness, prosperity, success, elegance, sophistication, sexual attractiveness or similarly desirable attributes. Such limitations would appear to be covered by the obligation of ‘particular

moderation' in advertising, which itself seems perfectly proportionate. Equally, having regard to a different type of danger to human health and life than that caused directly to the drinker, it might seem wholly justified to impose a ban on the advertising of alcohol in publications devoted to motoring.

3.5% alcohol are not very high. More importantly, it may be wondered whether this type of restriction is effective where producers are able (as seems to be the case for Swedish brewers) to circumvent its aim by using the same brand name for beverages both below and above the threshold.

54. With a view to discouraging the 'recruitment' to alcohol of those who would not otherwise be inclined to drink it, I can also see a possible justification for a ban on the advertising of, for instance, 'alcopops' — alcoholic drinks designed specifically to appeal to those (including no doubt young people and even children) whose preferred beverage is sweet and carbonated.

56. I have provided those examples as an illustration, rather than an exhaustive list, of the types of case in which a ban on advertising may — depending on all the circumstances — be justified in that it contributes to the legitimate aim of attenuating the consumption of alcohol by adults and preventing its consumption by those under the age of 20 and a less restrictive ban would not achieve the same effect.

55. A further type of justified limitation might concern advertisements for drinks over a certain alcoholic strength, likely to be more damaging to health. Such restrictions are in force in several Member States. In *Aragonesa*,²⁰ the Court held that a criterion of 23% alcohol did not appear manifestly unreasonable as part of a campaign against alcoholism, although the precise alcoholic strength which will constitute a proportionate criterion may vary according to specific circumstances and drinking habits in the Member State in question. In that regard, it may be noted that the Swedish thresholds of 2.25% and

57. I am not convinced, however, that it is either necessary or effective, in the light of the aim of reducing lawful alcohol consumption by adults, to impose a ban on all commercial advertising of alcoholic beverages in all media directed at the general public, bearing in mind that such advertisements must in any event display 'particular moderation'. Many sections of the media are unlikely to come to the attention of children and young people — who are, moreover, unlikely to seek out such publications simply in order to experience the thrill of reading a 'particularly moderate' advertisement for an alcoholic beverage (in

20 — Cited in note 13, at paragraph 17 of the judgment.

that respect, the situation here cannot be compared to, for example, a ban on sexually explicit advertising material).

58. But even on the hypothesis that exposure to moderate advertising material is in general likely to encourage consumption by adults to a greater extent than would otherwise be the case, I consider that it would be extremely difficult to extend that reasoning to all sections of the media.

59. A copy of the offending issue of *Gourmet* has been provided by the national court. It is a magazine devoted principally to food and drink. It contains, *inter alia*, what is apparently perfectly legal editorial comment on alcoholic beverages. In addition to the three full-page advertisements of which the Consumer Ombudsman complains, we find a seven-page feature on strong beers, with photographs of brand labels, a three-and-a-half-page feature on spirits and five pages of wine-tasting notes, together with sundry lesser references. Regardless of whether the subscription edition and supplement fall within the definition of trade publications for the purposes of the Swedish Law, it seems to me highly unlikely that a reader — who has presumably made a conscious choice to read the magazine unless it is common in dentists' waiting rooms — will be incited to drink alcohol to any greater extent as the result of the presence of commercial advertising material than he or she would otherwise have been after reading the editorial content.

60. Indeed, the purchaser of such a magazine may reasonably be regarded as in a position comparable to that of a purchaser of alcohol or one who specifically requests advertising material from a producer — both situations which are exempt from the ban on commercial advertising. The rationale of those exceptions seems to be that in such a situation any effect produced by advertising material is much more likely to involve brand-switching than increased consumption, and I think the same may apply where someone has chosen to read a publication devoted to any significant extent to alcoholic beverages.

61. My view that, in so far as it relates to certain sections of the media and in particular to the specialist press for those interested in food and wine, the ban on direct commercial advertising is ineffective for the purpose for which it is expressly intended — and thus excessive and incapable of justification under Article 36 of the EC Treaty — is buttressed by several of the other factors stressed by GIP and the Commission.

62. The lack of any prohibition on editorial publicity seems to me to weaken considerably the effect of a ban on commercial advertising. On the one hand, commercial advertising must in any event be particularly moderate; on the other, journalists writing about alcoholic beverages may tend to wax lyrical. Moreover, editorial comment may carry more authority in the mind

of the reader than does commercial advertising. The effect must be further weakened by the fact that — from what was said at the hearing — foreign publications containing alcohol advertisements, some placed by the Swedish State-owned alcohol production company Vin & Sprit for its own products, are on sale in Sweden.

capable of being justified on grounds of the protection of the health and life of humans provided that the aim sought cannot be achieved just as effectively by measures which are less restrictive of intra-Community trade; it appears however — subject to verification by the national court in the light of factors specific to the national situation — that the Swedish aim of reducing alcohol consumption could be achieved just as effectively by measures less restrictive than a ban imposed on all such advertising in all sections of the media, in particular in so far as it extends to periodicals devoted to food and drink.

63. It must, however, be borne in mind that — and this is a matter for the national court — the Swedish legislation in issue may perhaps be capable of interpretation in such a way that its application in the present case is not disproportionate and that it thus remains in conformity with Community law. This might conceivably be achieved by regarding *Gourmet* as a trade magazine or by deeming its purchasers to be in the same situation as persons who have requested advertising material.

Article 59 of the EC Treaty

— Inclusion within the scope of the article

— Conclusion

65. Article 59 prohibits all restrictions on freedom to provide services within the Community in respect of nationals established in a Member State other than that of the person for whom the services are intended.

64. I therefore consider that, viewed in the light of Articles 30 and 36 of the EC Treaty, a ban in one Member State on the commercial advertising of alcoholic beverages directly to the general public amounts to a measure equivalent to a quantitative restriction on imports; it is none the less

66. The restriction in issue here concerns GIP's freedom to provide the service of making commercial advertising space avail-

able to advertisers of alcoholic beverages who are established in other Member States.

existence of an identifiable recipient cannot be a condition for the application of Article 59.

67. That is sufficient in order for Article 59 to apply. Whilst a cross-border element in the service is necessary,²¹ the alleged restriction need not concern the advertising of alcoholic beverages produced in other Member States — in fact, for these purposes, the product advertised might even be of purely Swedish origin.

69. It is thus in my view clear that a rule under which a publisher may be restrained from offering advertising space to advertisers established in other Member States is such as to restrict that publisher's freedom to provide cross-border services. The same restriction must presumably affect advertising agencies established in the Community which seek to provide producers of alcoholic beverages with the service of advertising in the Swedish periodical press.

68. Nor is it of any relevance whether GIP has actually made advertising space available to customers outside Sweden. In the main proceedings the Consumer Ombudsman is seeking an order restraining GIP, on pain of a fine, from publishing commercial advertisements for alcoholic beverages. The identity of the persons whose advertisements were placed in Issue No 4 of the subscription edition of *Gourmet*, which appears to have triggered the proceedings, is thus immaterial. The issue is whether GIP may be restrained from offering such services in the future, and it clearly wishes to be able to provide them to advertisers established in other Member States. As the Court stated in *Alpine Investments*,²² freedom to provide services would become illusory if national rules were at liberty to restrict offers of services, and the prior

70. The Norwegian Government and the Commission have suggested that, in order to be caught by the prohibition in Article 59, such a rule might none the less have to discriminate between offers of services made to advertisers in the publisher's own State and those in other Member States. They point out that there does not appear to be any such discrimination in the present case.

71. Whilst I agree that there is no evidence here that the prohibition in issue affects offers of cross-border services any differently from offers of services within Sweden, I do not agree that any such discrimination is required for a breach of Article 59. The Court has consistently held that Article 59 prohibits 'any restriction, even if it applies to national providers of services and to

21 — See, for example, Case C-70/95 *Sodemann and Others v Regione Lombardia* [1997] ECR I-3395, paragraph 38 of the judgment, and the case-law cited there.

22 — Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraph 19 of the judgment.

those of other Member States alike, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services²³.²³ It is further clear from the judgment in *Alpine Investments*²⁴ that the prohibition covers also restrictions laid down by the State from which, as well as by the State to which, the services are to be provided, and that in assessing restrictions on the freedom to provide cross-border services there is no analogue to the exception laid down in *Keck and Mithouard*.

72. In those circumstances, I have no difficulty in concluding that the prohibition in issue is caught by Article 59.

— Freedom of expression

73. At the hearing, both the Swedish Government and the Commission referred to editorial publicity as being protected by the right to freedom of expression. According to the case-law of the European Court of Human Rights, however, commercial advertising also comes within the scope of Article 10 of the European Convention on

Human Rights, which guarantees freedom of expression for everyone.²⁵ This aspect of the case has not been debated before the Court, nor do I consider it necessary to analyse it in order to reach a conclusion in this case.

74. None the less, the existence of any encroachment on advertisers' fundamental right to freedom of expression (which may be justified on grounds analogous to those which may be invoked in relation to a restriction on freedom to provide services and with which I shall deal below) can only mean that the incompatibility with Article 59 of the EC Treaty must be viewed with particular seriousness.

— Justification on grounds of public health

75. Article 56(1) of the EC Treaty, which by virtue of Article 66 applies to matters covered by Article 59, provides for an exception similar to that contained in Article 36 in respect of restrictions on the free movement of goods: Article 59 may not prejudice the applicability of legislation 'providing for special treatment for foreign

23 — See, most recently, the judgment of 3 October 2000 in Case C-58/98 *Corsten* [2000] ECR I-2919, at paragraph 33, together with the case-law cited there.

24 — Cited in note 22; see in particular paragraphs 30 and 35 to 38 of the judgment.

25 — See, for example, Case 8/1993, *Casado Coca v Spain*, at paragraph 35 of the judgment, and the other case-law cited there.

nationals on grounds of public policy, public security or public health’.

76. That wording seems to permit of such justification only for rules which are expressly or deliberately discriminatory and not for those which apply equally to domestic and cross-border provision of services, yet the latter also fall within the scope of Article 59.

77. However, it would be absurd if a rule which provided for specific treatment of foreign nationals could be justified on grounds of public health whereas one which applied without distinction but none the less restricted the cross-border provision of services could not.

78. Indeed, in parallel to what has been called its ‘rule of reason’ case-law in relation to the free movement of goods, starting with the *Cassis de Dijon* judgment,²⁶ the Court has also developed a judicial test under which a non-discriminatory restriction on the freedom to provide services may escape the prohibition in Article 59 of the EC Treaty if it is objectively justified in pursuance of a legitimate public interest. Thus, in *Alpine Investments*

for example — another case involving a restriction affecting would-be service providers established in the Member State imposing it — the Court did not hesitate to enquire whether the prohibition, which it had found to be non-discriminatory, could be justified by imperative reasons of public interest.²⁷

79. In that regard, the objective of limiting alcohol consumption is again clearly a matter of sufficient public interest to be capable of justifying certain restrictions on the freedom to provide services. Restrictions on advertising have, moreover, been accepted by the Court as capable of being justified on grounds of public interest.²⁸

80. Again, however, any such restrictions must, in order to be justified, be appropriate to achieve the intended aim and must not go beyond what is necessary for that purpose.²⁹ For the reasons I have given above in my analysis of the situation under Article 36 of the EC Treaty, I consider that, when viewed in the overall context, a ban on the commercial advertising of alcoholic beverages in all publications intended for the general public does appear to go beyond what is necessary to achieve the stated aim of the Swedish authorities.

27 — Cited in note 22; see paragraphs 35 and 40 et seq. of the judgment.

28 — See, in particular, Case C-288/89 *Collectieve Antennevoorziening Gouda and Others v Commissariat voor de Media* [1991] ECR I-4007, paragraphs 23 and 27 of the judgment, and Case C-6/98 *ARD v Pro Sieben* [1999] ECR I-7599, paragraph 50.

29 — See, for example, *Collectieve Antennevoorziening Gouda*, paragraph 15 of the judgment, *Alpine Investments*, cited in note 22, paragraph 45, and *ARD*, paragraph 51.

26 — See paragraph 40 above.

Conclusion

81. In the light of the above considerations, I am of the opinion that the Court should give the following answer to the questions raised by Stockholms Tingsrätt:

A national rule banning the commercial advertising of alcoholic beverages directly to the general public constitutes a measure equivalent to a quantitative restriction on imports of such beverages, prohibited by Article 30 of the EC Treaty, and a restriction on the freedom to provide cross-border advertising services, prohibited by Article 59. Such a rule may be justified by reason of its aim to protect the health and life of humans from the dangers of excessive consumption of alcohol, but only in so far as that aim cannot be achieved just as effectively by less restrictive measures. A ban which extends to commercial advertising in periodicals a significant part of whose subject-matter is lawfully devoted to alcoholic beverages is in principle unnecessary and ineffective in that regard, and thus incapable of such justification.