



**ROYAL MINISTRY
OF FOREIGN AFFAIRS**

To the Court of Justice of the European Union

Oslo, 25 August 2014

WRITTEN OBSERVATIONS

BY

THE KINGDOM OF NORWAY

represented by Ms. Kristin Nordland Hansen, Adviser, Ministry of Foreign Affairs, and Ms. Tonje Skjeie, Advocate, Office of the Attorney General of Civil Affairs, acting as agents, in

Case C-198/14

in which Helsingin hovioikeus has requested a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union (“TFEU”). The Government of Norway hereby submits its written observations pursuant to the third paragraph of Article 23 of the Protocol on the Statute of the Court of Justice of the European Union.

1. Introduction

1. Helsingin hovioikeus (“the national court”) has, by reference dated 22 April 2014, requested the Court of Justice of the European Union (“the Court”) to give a ruling on eight questions. The background for the request is a case pending before the national court concerning the European Investment Group oü (“EiG”), a company registered in Estonia, which maintained an internet site through which Finnish buyers could purchase alcoholic beverages that EiG would deliver to their home.
2. The first four questions referred to the Court concern the Finnish system of beverage packaging duty, and whether this system should be examined in light of Article 110 TFEU or Article 34 TFEU. The Court is further asked to assess whether the system is compatible with Directive 94/62/EC¹ examined in the light of Article 110 TFEU or Article 34 TFEU, and whether the system can be authorised on the basis of Article 36 TFEU.
3. Questions five to eight concern EiG’s offences under the Finnish Law on Alcohol², and whether the Finnish system on retail sale of alcohol should be considered under Article 34 TFEU or Article 37 TFEU. The Court is further asked to assess whether the Finnish system is compatible with Article 37 TFEU, alternatively Articles 34 and 36 TFEU.
4. The Government will limit its observations to commenting upon questions five to eight.

2. Background

5. The request for the preliminary ruling sets out in detail the background for the dispute before the national court. The Government will in the following briefly summarize the legal context relevant to questions five to eight as it transpires from the reference for a preliminary ruling.

¹ European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste.

² Law 8.12.1994/1143.

6. The Alko Inc. holds a monopoly on retail sale of alcohol in Finland, pursuant to paragraph 13(1) of the Finnish Law on Alcohol. Nevertheless, according to paragraph 14(1) of the Finnish Law on Alcohol, a person may engage in the retail sale of alcoholic beverages containing alcohol up to 4.7% by volume if he is granted a retail sale license for that purpose. It transpires from the reference that no application for a retail sale license has been made by EiG.
7. The Alko Inc. does not hold a monopoly on import of alcoholic beverages. Paragraph 8(1) of the Finnish Law on Alcohol prescribes that alcoholic beverages may be imported for personal use without a special import license. Alcoholic beverages may also be imported for commercial or other business purposes, if a separate license for the activities relating to the imported alcoholic beverages has been granted, for example licence for retail sale pursuant to paragraph 14(1).
8. Private import of alcohol for personal use is subject to further criteria laid down in guidelines and circulars issued by Finnish authorities.³ According to these rules it is *inter alia* required that the right of ownership to those beverages must unequivocally have been transferred to the person placing the order before they are imported to Finland. This entails that the person placing the order must himself personally transport the beverages across the border into Finland, or he must organize transport separately from the seller. The vendor is thus not permitted to transport the beverages into Finland in the context of private import; the seller must deliver the beverages to the buyer or the buyer's representative outside Finnish territory ("the separation requirement").
9. The rules seem to rest on the premise that a direct or indirect involvement in the sales arrangement in Finland from the vendor changes the characteristics of the activity from private import to retail sale in Finland, which makes the provisions on retail monopoly and retail sale license applicable.

³ According to the preliminary reference para. 22; see for example Product Supervision Centre of the Welfare and Health Authority's circular of 5 November 2007 and the Joint Circular of 9 July 2009 of Southern Customs District and Finnish National Supervisory Authority for Welfare and Health (Valvira).

10. Before assessing the specific questions raised by the national court, the Government will make some preliminary observations.

3. Preliminary observations

11. The guidelines and circulars issued by the Finnish authorities, referred to in para. 8 above, seem to clarify the notion of private import as opposed to retail sale in Finland. The Government is of the view that the guidelines clarify the necessity of a structural and functional separation between the undertaking selling the alcoholic beverages from abroad and the entity delivering the alcohol to the consumer in Finland, in that the latter must be the consumer or his representative, for an arrangement to be considered private import.
12. The Government is of the view that the concept of private import presupposes a transaction between a person in one Member State and a retailer outside that Member State, where *the point of sale* of the commodity is also outside that Member State. The separation requirement merely stresses the distinction between this arrangement and retail sale in the Member State. An arrangement where both the sale of beverages and the delivery to the private consumer in Finland is carried out by the same undertaking, is in fact retail sale in Finland.
13. The separation requirement in the guidelines merely seem to clarify the distinction between the two types of arrangements, a distinction that would follow from an interpretation of the arrangements as such, whether this was directly regulated in the guidelines or not. The separation requirement thus seems to serve as a legal clarification and is not a restriction in itself.
14. The separation requirement as a distinguishing feature finds its support in instruments of EU law. Reference is made to Directive 2008/118/EC⁴ Article 36, where distance selling is defined as goods “which are purchased by a person, other than an authorized warehousekeeper or a registered consignee,

⁴ Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC.

established in another Member State who does not carry out an independent economic activity, and which are dispatched or transported to another Member State directly or indirectly by the vendor or on his behalf". In such a case, the good is subject to excise duty "in the Member State of destination". The underlying premise seems to be that point of sale in such a case is in the Member State of destination. This is further supported by Article 32, which on the other hand sets out that if a private individual purchases goods for his own use, and the good is "transported from one Member State to another by him", the good is subject to excise duty in the Member State in which the excise goods are acquired.

15. The Government is thus of the view that the separation requirement is merely a distinguishing feature between two types of arrangements, subject to different regulations. The distinguishing feature should thus not in itself be regarded as a restriction on trade and in itself subject to demands of justification. However, the Government will also provide some supplementary remarks on the separation requirement as such, should the Court of Justice disagree with the Government's position on this.
16. To summarize these preliminary observations, the Government is of the view that the relevant starting point for the assessment is that the arrangement by EiG is in fact retail sale *in Finland*. Such a retail sale makes the provisions in the Finnish Law on Alcohol paragraph 13 and 14 applicable. This means that, in so far as the activity falls within the ambit of the Alco Inc.'s exclusive right, it contravenes paragraph 13, and is prohibited. In so far as it concerns alcoholic beverages containing less than 4.7 % alcohol, the activity requires a retail licence pursuant to paragraph 14.

4. Question no. 5

17. In this question, the national court asks whether the requirement that a person using alcoholic beverages for commercial or other business purposes needs a separate retail sale licence for his activity relating to imported alcoholic beverages,

in a case such as the one at issue, is to be evaluated in the light of Article 37 TFEU or Article 34 TFEU.

18. In answering this question, the Government assumes that a distinction must be made between activities relating to alcoholic beverages with less than 4.7 % alcohol and activities relating to beverages that fall within the monopoly's exclusive right. The observations under questions 5 and 6 are limited to the latter.
19. At the outset, the Government notes that that Articles 34 TFEU and 37 TFEU should apply exclusively rather than cumulatively.⁵
20. It is established case law that the existence and operation of state monopolies for the retail sale of alcoholic beverages should be assessed under Article 37 TFEU, while provisions which, although they have a bearing upon the monopoly, are separable from its operations, are to be assessed under Article 34 TFEU.⁶
21. In this regard, the Court of Justice has held that Article 37 TFEU covers the methods of retail sale, the system of selection of goods to be sold, the monopoly's sales network and the promotion of alcoholic beverages⁷, whereas rules which prescribe that the monopoly may obtain supplies only from holders of production or wholesale licences⁸ and rules prohibiting private individuals from importing alcoholic beverages⁹ must be assessed in light of Article 34 TFEU.
22. In *Rosengren*¹⁰ the Court held that:

“Firstly, it should be recalled that the specific function assigned to the monopoly by the alkohollagen consists of the exclusive right of retail sale in Sweden of alcoholic beverages to consumers... It is common ground that that exclusive right does not extend to the importation of those beverages.”

⁵ This seems to be the premise in case C-189/95 *Franzén*, paras. 34-35. See by comparison the EFTA Court's case E-4/05 *HOB-vín*, para 24.

⁶ E.g. *Franzén*, para. 35; Case C-170/04 *Rosengren and others*, paras. 17-18, with further references to case law.

⁷ See *inter alia* *Franzén*, *Rosengren* para. 24 and Case C-456/10 *ANETT* para. 29.

⁸ *Franzén* para. 67

⁹ *Rosengren* para. 27

¹⁰ *Rosengren* para. 20

23. The Court further held that the rules at issue did not govern the monopoly's exclusive right of retail sale in Sweden, and did therefore not concern the monopoly's exercise of its specific function and consequently could not be considered relating to the very existence of the monopoly.¹¹ Accordingly, the relevant starting point for the assessment is the specific function of the monopoly and whether the measure at hand relates to this specific function.

24. In line with this, the EFTA Court held in *Gundersen v. Oslo kommune*¹²;

“Following this approach, it must be pointed out that Vinmonopolet enjoys and exercises the exclusive right for the retail sale of wine and strong beer. As pointed out by the EFTA Surveillance Authority, the provisions at issue defines the scope and product coverage of that exclusive right. Consequently, these provisions, which define the scope of the exclusive right, are to be considered according to Article 16 EEA.”

25. The Government submits that in light of the case law referred to above, the Finnish system at issue should correctly be assessed under Article 37 TFEU.

26. The Government reiterates that the relevant starting point in the case at hand, where the vendor transports the goods to the consumer in Finland, is that the point of sale is within Finland. Reference is made to the preliminary observations in section 3 above.

27. The Government notes that within the field of the Finnish monopoly, it appears that it is not possible to obtain a retail sale licence. Since the point of sale in the case at issue is considered to be in Finland, the sale thus contradicts the retail monopoly. The prohibition in Section 13 establishes the monopoly and as such concerns the existence and operation of the state monopoly, in line with case law from the Court. As specified in the decision by the EFTA Court in *Tore Wilhelmsen AS v. Oslo kommune*¹³:

¹¹ *Rosengren* paras. 21-22 and para. 24.

¹² Case E-1/97 *Fridtjof Frank Gundersen v. Oslo kommune* para.19

¹³ Case E-6/96 *Tore Wilhelmsen AS v. Oslo kommune* para.101. Article 16 EEA mirrors Article 37 TFEU.

“Provisions granting an exclusive right for retail sale of beer containing more than 4.75 % alcohol by volume to Vinmonopolet form an inherent part of the regulations designing the system. These provisions must, therefore, be examined in light of Article 16 EEA.”

28. The Government thus submits that Article 37 TFEU is to be applied in the case at hand.

29. In any event, and should the Court disagree with the Government’s view regarding the separation requirement in section 3 above, the Government is of the view that the separation requirement, in this context and in light of the case law above, falls to be assessed under Article 37 TFEU. This is because it serves to define the scope of the monopoly’s exclusive right to consumer supply within Finland, as well as it ensures that arrangements that would undermine the function of the monopoly are not established.

30. By example, problems with regards to establishment of delivery arrangements within the border undermining the function of the alcohol retail monopoly were noted in Finland prior to the introduction of the separation requirement. As noted in the preparatory works for the Norwegian legislation concerning private import about the experience from Finland:¹⁴

“At the end of the 1990’s, several companies that took orders on alcoholic beverages from consumers, as well as carried out the delivery of the ordered goods, were established in Finland. There were also established permanent order and delivery premises within Finland for the company.” (unofficial translation)

31. The separation requirement is also distinguishable from the rules at issue in i.e. *Rosengren*, since the Finnish rules do not prohibit private import, but merely seek to ensure that such import is conducted in a way that does not undermine the alcohol monopoly. In order to safeguard the monopoly's exclusive right to retail

¹⁴ See Ot.prp. nr. 53 (2008-2009) om lov om endringer i lov 2. Juni 1989 nr. 27 om omsetning av alkoholholdig drikk m.v. (opphøvelse av forbudet mot privat innførsel av alkoholholdig drikk) p. 11, available at <http://www.regjeringen.no/en/dep/hod/documents/regpubl/otprp/2008-2009/otprp-nr-53-2008-2009.html?id=553862>. See also by comparison the Swedish Government Official Report in SOU 2014:58 *Privat innførsel av alkoholdrycker* (2014).

sale of alcohol in Finland, it is the Government's view that it would also be necessary to establish rules that seek to hinder the establishment of competing arrangements that would undermine the monopoly.

32. The Government thus submits that the separation requirement is indivisible to the alcohol monopoly, and must be considered as concerning the existence and operation of a state monopoly. The Government is hence of the view that, regardless of which approach is taken, the regulation is to be considered under Article 37 TFEU.

5. Question no. 6

33. By its sixth question, the national court asks whether the license requirement in such a case is compatible with the conditions laid down for state monopolies of a commercial character in Article 37 TFEU.

34. Firstly, the Government would like to stress that the lawfulness of the existence of the Finnish monopoly on retail trade in alcohol does not seem to be called into question. In this regard, the objective of Article 37 TFEU, as pronounced by the Court in *Franzén*, is recalled:

“The purpose of Article 37 of the Treaty is to reconcile the possibility for Member States to maintain certain monopolies of a commercial character as instruments for the pursuit of public interests aims with the requirements of the establishment and functioning of the common market. It aims at the elimination of obstacles to the free movement of goods, save, however, for restrictions on trade which are inherent in the existence of the monopolies in question.”¹⁵

35. The Court has also held that the retail sales monopoly of alcohol is compatible with EU law.¹⁶ The Government thus submits that the retail sales monopoly on certain alcoholic goods for the Alko Inc., and the fact that it is not possible for other vendors to obtain a separate retail sale licence for goods that fall within the ambit of the alcohol monopoly, is compatible with Article 37 TFEU.

¹⁵ *Franzén* para.39.

¹⁶ Cf. *inter alia* *Franzén*.

36. If the separation requirement falls to be assessed separately, it should as a starting point be noted that Member States have a broad discretion in formulating and implementing their alcohol policies, as the health and life of humans rank foremost among the interests that the states legitimately can protect.¹⁷
37. Article 37(1) (1) TFEU provides 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.”*
38. According to the wording, and as confirmed by consistent case law, the decisive test is that of discrimination. Consequently, the operation of a monopoly is consistent with Article 37 TFEU in so far as trade in goods from other Member States are not put at a disadvantage, in law or in fact, compared with trade in domestic goods.¹⁸
39. The discrimination test under Article 37 TFEU must also be interpreted in line with the general discrimination test under EU law, according to which comparable situations must not be treated differently and different situations must not be treated in the same way, unless such treatment is objectively justified.¹⁹ These two elements of the test are to a certain degree overlapping.
40. The Government submits that nothing indicates that the Finnish regulation does in law or in fact discriminate between products or undertakings. It applies equally to all, whether nationals or from another EEA state, and on equal terms. In this regard, the Government also recalls that as to the question of whether there are any elements of discrimination *in fact*, this should primarily be for the national court to assess based on the facts of the case.²⁰

¹⁷ In relation to Article 36 TFEU, see Case C-320/93 *Lucien Ortscheit GmbH* para. 16, *Rosengren* para. 39, Case C-108/09 *Ker-Optika* para. 58 and Case C-421/09 *Human plasma GmbH* para. 32. See also the EFTA Court's case E-1/97 *Gundersen* para. 20 with regards to EEA Article 16 which mirrors Article 37 TFEU

¹⁸ See *Franzén* para 40.

¹⁹ E.g. Case 106/83 *Sermide*, para. 28, Case C-127/07 *Société Arcelor Atlantique et Lorraine and Others*, para.23 and *Franzén*, para. 65.

²⁰ See, to this effect, Case C-20/03 *Burmanjer* para. 32. See also e.g. the EFTA Court's case E-5/96 *Ullensaker commune and Nille*, para. 27; Case E-16/10 *Philip Morris AS v Norway*, para. 87; Case E-4/01

41. In any event, the Government holds that any potential different treatment is objectively justified. The alcohol monopoly is undisputedly based on public health considerations.²¹ With regard to the public health grounds which constitute the rationale for the Finnish system, reference is made to section 7 below.

6. Question no. 7

42. In this question, the national court essentially asks that if the answer to question 5 is negative and Article 34 TFEU is applicable, whether the Finnish system constitutes a quantitative restriction on imports or a measure having equivalent effect contrary to Article 34 TFEU.

43. At the outset, the Government assumes that the requirement of retail sale licence is to be assessed under Article 34 in so far as the case concern alcoholic beverages with alcohol content of less than 4.7%. Question seven is also relevant should the Court be of the view that the separation requirement, also to the extent that it relates to goods that fall within the monopoly's exclusive right, is to be assessed under Article 34 TFEU rather than Article 37 TFEU.

44. The Government is of the view that a license requirement for sales of alcoholic beverages represent a certain type of selling arrangement that, based on settled case law, does not constitute an import restriction under Article 34 TFEU if they apply to all relevant traders operating within the national territory and affect the marketing of domestic products and of those from other Member States in the same manner, both in law and in fact.²² The same applies for the separation requirement in itself.

Karlsson, para 21. See also by comparison the Court's review of proportionality and of the effectiveness in e.g. Case C-434/04 *Ahokainen and Leppik*, para. 38.

²¹ See *Franzén* para. 41: "*In the present case, it is not contested that, in aiming to protect public health against the harm caused by alcohol, a domestic monopoly on the retail of alcoholic beverages, such as that conferred on Systembolaget, pursues a public interest aim*".

²² E.g. Joined cases C-34/95, C-35/95 and C-36/95 *De Agostini and TV-shop* para.40, Case C-110/05 *Commission of the European Communities v Italian Republic*, para. 36. For recent application of the principles set out, see case C-108/09 *Ker-Optika bt*.

45. It should be noted that the Court has applied the selling arrangement-doctrine specifically to rules obliging retailers to be licensed²³ and on national restrictions on sales outlets²⁴ as well as provisions prohibiting certain types of sale²⁵. This also follows directly from the wording in *Keck*, cited ever since, referring to “*national provisions restricting or prohibiting certain selling arrangements*”.²⁶
46. Further, it should be noted that the scheme in the case at hand does not imply any requirement to be met by the products themselves, such as requirements as to designation, form, size, weight, composition, presentation, labelling and packaging.
47. Regarding the test of discrimination under Article 34 TFEU, the Government submits that the way the test should be set out, and the application of this test, should not differ from the Article 37-test analysed in section 5 above. The Government hence submits that there is no indication of discrimination in the Finnish regulations, neither in law nor in fact. The referring court should therefore be able to conclude that there is no import restriction under Article 34 TFEU.

7. Question no. 8

48. In its last question, the national court asks whether the system can be considered justified and proportionate in order to protect the health and life of humans, if the answer to question 7 is affirmative. The Government submits that the Finnish regulation is substantiated as a suitable and necessary public health measure.
49. At the outset, it is recalled from section 5 above that public health considerations should be accepted as integrated elements in the assessment under Article 37 TFEU. The Government fails to see relevant arguments calling for the conclusion that the discretion for the state to invoke important public health arguments may be more limited under Article 37 than under Article 34. Thus, it is submitted that

²³ E.g. Case C-20/03 *Burmanjer, Van der Linden, De Jong and C-387/93 Banchemo*.

²⁴ E.g. Case C-391/92 *Commission v. Greece*.

²⁵ Case C-322/01 *Deutscher Apothekverband*.

²⁶ Joined Cases C-267/91 and C-268/91 *Keck and Mithouard*, para. 16, emphasis added.

Article 36 and the relevant case law must apply by analogy also under Article 37. Alternatively, the Government submits that the test in Article 106(2) TFEU must apply to the Finnish state alcohol monopoly, and that the submissions below are relevant to this test.²⁷

50. The Court has acknowledged that legislation that purports to control alcohol consumption in order to prevent harmful effects caused to human health by alcoholic substances, reflects health concerns as recognized by Article 36 TFEU.²⁸ It is not contested that the Finnish rules in question, the monopoly established in Section 13 and the retail sale license established in Section 14, are based on such public health concerns.

51. The Court has also consistently held that the health and life of humans rank foremost among legitimate objectives, and that this influences the proportionality test.²⁹ Further, it is for each state not only to determine the level of protection opted for, but also the way in which this level is to be achieved, irrespective of different choices by other Member States, see *inter alia* the Court's decision in *Ker-Optika*³⁰:

"[...] in that regard, if that measure is within the field of public health, account must be taken of the fact that the health and life of humans rank foremost among the assets and interests protected by the Treaty and that it is for the Member States to determine the level of protection which they wish to afford to public health and the way in which that level is to be achieved. Since the level may vary from one Member State to another, Member States should be allowed a measure of discretion [...]"

52. The principle of proportionality consists of essentially two tests: A test of suitability and a test of necessity. The Government will perform this two-pronged analysis in the following.

²⁷ E.g. Case C-438/02 *Hanner*, para. 47.

²⁸ See *Rosengren* para. 40 and *Ahokainen and Leppik* para 28.

²⁹ See the Court's case law as referred to in footnote 20.

³⁰ See *Ker-Optika* para. 58.

53. Firstly, the suitability test entails that the means employed must be suitable to attain the ends. In this regard, it should be recalled that in cases where the states enjoy a wide margin of discretion, such as in the present case, this also entails “*a margin of discretion in determining [...] the measures which are likely to achieve concrete results*”.³¹ This seems to imply that the state has a margin of discretion also in determining whether a measure will be suitable. At least, it must be sufficient that the existing documentation indicates that there is a reasonable connection between the measure and the protection of human health.³²
54. The alcohol monopoly is undoubtedly based on public health considerations.³³ The basic premise is that by limiting retail sales of alcoholic beverages in Finland to the alcohol monopoly, this will in turn limit the general consumption of alcohol and thus contribute to the protection of human health. The requirement of retail sale license for weaker substances reduces availability and ensures control that the entities abide by the relevant legislation for i.e. age-limits, serving hours etc., and is also indeed based on public health considerations.
55. Recent studies strongly indicate that restrictions on availability, such as monopoly and licensing systems, are associated with reduction in both alcohol use and alcohol-related problems.³⁴ In the Babor report it was *inter alia* held that “[g]overnment monopolies on alcohol production and sales provide an effective way to control availability if public health considerations rather than revenue maximization are the primary rationale for the system”.³⁵ It was underlined that there is strong evidence to support that off-premises monopoly systems limit

³¹ Case C-694/97 *Heinonen*, para. 43 and the Opinion by AG Saggio, para. 32; and *Ahokainen and Leppik*, para. 32.

³² See Case 132/80 *United Foods* para. 28. See also by comparison the EFTA Court’s case E-16/10 *Phillip Morris* para. 84.

³³ In *Franzén*, the Court acknowledged that a domestic monopoly on the retail of alcoholic beverages pursues a public interest aim in aiming to protect public health against the harm caused by alcohol, see para. 41.

³⁴ Babor et al. (2010), “Alcohol: No Ordinary Commodity. Research and Public Policy”, Second Edition, *Oxford University Press*, p. 145. The relevant pages from this report are submitted as attachments to this written observation.

³⁵ *Ibid.* p. 249.

alcohol consumption and alcohol-related problems.³⁶ Further, in the Global Alcohol Strategy, adopted by the World Health Assembly in May 2010, governmental alcohol monopolies and licensing systems on retail sales are mentioned as policy options to reduce the harmful use of alcohol.³⁷

56. Reference can also be made to the EFTA Court's case in *Alcopops*, where the EFTA Court held that:

*“Excessive alcohol consumption causes health problems, as well as considerable social problems, and there is a link between availability and the harmful effects caused by the consumption of alcohol.”*³⁸

57. The Government submits that this supports the contention that it is reasonable to assume that the Finnish regulations on monopoly and retail licenses will contribute to the protection of public health.

58. The Government reiterates that the separation requirement serves as a factor that distinguishes private import from retail sale and that it in itself should not be regarded as a restriction subject to justification. However, the Government recalls from section 4 above that without a distinct functional and structural separation between the seller of the alcoholic beverage and the undertaking charged with the task of delivering the alcoholic beverage, it may in practice be very difficult to hinder the establishment of delivery arrangements which undermine the monopoly on alcohol and the rules on retail sale license. The Government thus finds it reasonable to assume that the separation requirement, in safeguarding the Finnish system of monopoly on alcohol and rules on retail sale license, will contribute to the protection of public health.

59. The second part of the proportionality principle, the necessity test, requires an assessment of whether the same level of protection can be achieved equally effectively with less restrictive means. The Government fails to see such

³⁶ Ibid. p. 136.

³⁷ Global Alcohol Strategy, adopted by World Health Assembly in May 2010 (Res WHA 63.13) page 14, available at: http://www.who.int/substance_abuse/activities/gsrhua/en/

³⁸ Case E-9/00 *Alcopops* para. 56.

alternative measures, and thus submits that the Finnish regulations are necessary. In this regard it should be recalled that the fact that other states may not have introduced such measures is of no significance.³⁹

60. The Government would firstly like to stress that it could be very difficult to assess the degree to which a concrete national regulation produces the desired result, in particular because many public health instruments work in parallel. It is even more difficult to assess and compare the effects of the chosen measure with other measures, perhaps even measures never implemented. The states should therefore be accepted a certain margin of discretion also under the necessity test.⁴⁰
61. In any event, the Government submits that it could be appropriate to leave the decision on the necessity of the measure to the national court, *inter alia* as it must be based on matters of facts and of national law that should be for the national court to assess. See by way of illustration the Court's ruling in *Gourmet International products*, concerning the Swedish law prohibiting advertising for alcoholic drinks in periodicals, motivated by public health concerns. The Court held that the decision as to whether the objective sought might be achieved by less restrictive means, called for an analysis of law and of fact which the national court was in a better position than the Court of Justice to carry out.⁴¹
62. Finally, it is required that the measure under consideration should not constitute either a means of arbitrary discrimination or a disguised restriction on trade between Member States.⁴² The Government notes there is nothing in the preliminary reference which suggests that the public health grounds have been diverted from their purpose and used in such a way as to discriminate against

³⁹ See Case C-384/93 *Alpine Investments* para. 51 and Case C-262/02 *Commission v. France* para. 37.

⁴⁰ See, to this effect, e.g. Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad*, paras. 16 and 17; and Case C-429/02 *Bacardi France SAS*, paras. 33 and 39

⁴¹ See Case C-405/98 *Gourmet International Products*, para. 33. See also to this effect *Ahokainen and Leppik*, para. 38

⁴² See *Rosengren* para. 41.

goods originating in other Member States or indirectly to protect certain national products.

8. Suggested answers to the questions

63. In concluding, the Government respectfully suggests that the questions referred in Case C-198/14 should be answered in the following way:

5. The Finnish rules on retail sale of alcoholic beverages that fall within the ambit of the monopoly's exclusive right, in a situation in which a Finnish buyer has purchased via the internet or other method of distance selling from a vendor in another Member State, alcoholic beverages which the vendor transports to Finland, concerns the existence and operation of a monopoly, and is to be evaluated in the light of Article 37 TFEU.
6. The measures described in question one are compatible with the conditions laid down for State monopolies of a commercial character in Article 37 TFEU.
7. Article 34 TFEU does not preclude the Finnish system, under which , where alcoholic beverages are ordered from abroad via the internet or another means of distance selling, their import for personal consumption is permitted only if the person ordering the goods or a person unconnected to the vendor transported the alcoholic beverages into Finland, and under which a licence in accordance with the Law on Alcohol is otherwise required.
8. The system is in any case justified and proportionate on grounds of public health and life of humans, unless the protection of health can be secured equally effectively with measures having less restrictive effect.

Oslo, 25 August 2014


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