

# Supreme Court's JUDGMENT

delivered in Stockholm on 7 July 2023

Case no.

T 4709-22

## **PARTIES**

### **Appellant**

Systembolaget Aktiebolag, 556059-9473

103 84 Stockholm

Counsel: Attorney KC

Counsel: Attorney JM

### **Respondents**

1. Winefinder AB, 556678-3238

Box 14017

167 14 Bromma

2. Winefinder ApS, 502065-4231

Gentoftegade 54

2820 Gentofte

Denmark

Counsel for 1 and 2: Attorneys OBP, RO and lawyer ML

Counsel for 1 and 2: Attorney SPL

### **THE MATTER**

Marketing of alcoholic beverages

### **RULING APPEALED**

Judgment of the Svea Court of Appeal, Patent and Market Court of Appeal, of 14/06/2022 in case B 13055-20

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### **JUDGMENT**

The Supreme Court – which does not seek a preliminary ruling from the European Court of Justice – affirms the operative part of the judgment of the Patent and Market Court of Appeal.

The Supreme Court orders Systembolaget Aktiebolag to pay Winefinder AB for its costs of litigation in the Supreme Court in the amount of SEK 92,686, the sum pertaining to counsel fees, and interest in accordance with Section 6 of the Interest Act from the date of this judgment.

The Supreme Court orders Systembolaget Aktiebolag to pay Winefinder ApS for its costs of litigation in the Supreme Court in the amount of SEK 834,174, the sum pertaining to counsel fees, and interest in accordance with Section 6 of the Interest Act from the date of this judgment.

## **CLAIMS IN THE SUPREME COURT**

Systembolaget Aktiebolag has requested that the Supreme Court, with amendment of the judgment of the Patent and Market Court of Appeal under para. 1(a), shall, in accordance with para. 1 of the Patent and Market Court's judgment, and under penalty of a fine, prohibit both Winefinder AB and Winefinder ApS from marketing alcoholic beverages for sale to consumers in Sweden.

Systembolaget has requested payment of their costs of litigation in all instances and that the Supreme Court relieve Systembolaget from the obligation to compensate Winefinder AB and Winefinder ApS for their costs of litigation.

Winefinder AB and Winefinder ApS have opposed the amendment of the judgment of the Patent and Market Court of Appeal and requested compensation for litigation costs in the Supreme Court.

Winefinder AB and Winefinder ApS have raised the issue of a preliminary ruling from the European Court of Justice. Systembolaget has opposed the reference for a preliminary ruling.

## **REASONS FOR THE JUDGMENT**

### **Background**

#### *Business of the Winefinder companies*

1. Winefinder ApS is a Danish company operating e-commerce with the sale of wine and other products to consumers. Winefinder ApS is fully owned by the Swedish company Winefinder AB. The boards of the two companies

have included the same individuals. All of these individuals have resided in Sweden.

2. The main part of Winefinder ApS's wine sales are made through a joint website for the companies. The customers, mainly consumers in Sweden, can choose home delivery via carriers with whom Winefinder ApS has concluded a framework agreement. Winefinder ApS pays the carriers and charges customers a fixed fee. The carriers deliver the wine, either directly to the consumer's home or to a special delivery point.

3. Winefinder ApS buys wine from producers and wholesalers. The wines are received and stored at the company's distribution centre in Denmark. Packing and handling of the wine that has been ordered is done in the distribution centre and is mainly handled by logistics companies enlisted by Winefinder ApS. The company also has at least one employee in Denmark working with the orders. Winefinder ApS has purchased financial, marketing, customer-service and IT services from Winefinder AB.

4. Winefinder ApS pays Swedish alcohol tax and VAT on the wines purchased by customers in Sweden. Winefinder AB has been the fiscal representative in Sweden for Winefinder ApS under the previously applicable regulations on alcohol tax.

#### *The Marketing Act*

5. Under the Marketing Act (2008:486), a trader whose marketing is unfair may be prohibited from continuing with that or other similar practices (see Section 23). The prohibition shall normally be accompanied by a fine (see Section 26). Marketing is unfair, inter alia, if it states or otherwise creates the impression that it is legal to sell a product when this is not the case (see, e.g.,

Section 4 and para. 9 of the Government's declaration pursuant to the Marketing Act, Swedish Code of Statutes 2008:487 and Swedish Code of Statutes 2022:648).

*In dispute*

6. In 2019, Systembolaget brought an action against Winefinder ApS and Winefinder AB, requesting that the companies should be prohibited, under penalty of a fine, from marketing the sale of alcoholic beverages to consumers in Sweden with carriers enlisted by or through the companies. According to Systembolaget, their marketing gives the impression that such sales are legal, yet it violates the retail monopoly under the Alcohol Act (2010:1622).

7. The Winefinder companies opposed the claim and argued, inter alia, that it is Winefinder ApS that retails alcoholic beverages to consumers in Sweden, that the deliveries are made by an independent carrier and that the sales do not constitute retail trade in Sweden but, instead, such private imports as are permitted under Chapter 4, Section 4, second paragraph, item 7 of the Alcohol Act.

8. The Patent and Market Court upheld the claim of Systembolaget. The Patent and Market Court of Appeal amended the judgment and dismissed the claim.

**At issue in the Supreme Court**

9. The case concerns the question of whether the Winefinder companies shall be prohibited, under penalty of a fine, from marketing the sale of wine to consumers in Sweden with carriers enlisted by or through the companies.

10. For the requested injunction to be upheld, several conditions must be met, including that the sale of wine with delivery to customers in Sweden via the website is contrary to the Alcohol Act. The Supreme Court will examine this question first.

### **Trade in, and importation of, alcoholic beverages**

11. The Alcohol Act regulates, among other things, trade in and importation of alcoholic beverages such as wine and strong beer. The law states, insofar as is relevant here, as follows.

12. Alcoholic beverages may not be sold where there is not a right to do so under the Alcohol Act (Chapter 3, Section 1). Retail trade in wine and strong beer, among other things, may only be conducted by a limited company formed for this purpose and owned by the State, that is, Systembolaget (Chapter 5, Sections 1 and 2). Retail trade refers to sales to consumers (Chapter 1, Section 11). The Alcohol Act also regulates wholesale trade, i.e., sales otherwise than to consumers (see Chapter 4). A distributor can sell goods to, e.g., Systembolaget or restaurants with beverage retail licences, but not to consumers. Anyone selling alcohol in violation of the Alcohol Act can be convicted of a criminal offence (see, e.g., Chapter 11, Section 3).

13. Rules on importation are contained in Chapter 4. Normally, wine and strong beer may only be brought into Sweden by distributors and, in certain cases, by Systembolaget. Chapter 4, Section 4 specifies several situations where wine and strong beer, among other items, may be brought into the country by others. Of these situations, some concern imports by individuals for their own use or use by their family, so-called private imports (see also para. 18-23). Anyone bringing wine or strong beer into the country, without

the right to do so, can be convicted of a criminal offence (see the Penalties for Smuggling Act, 2000:1225).

14. The Alcohol Tax Law (*Lagen om alkoholskatt*, presently 2022:156) includes specific rules on distance selling, i.e., when, for example, wine is purchased by someone not carrying out independent economic activity and is dispatched or transported, directly or indirectly, from another EU country, either by a consignor (normally a seller) who carries out independent economic activity or by someone else on his behalf. Sellers engaging in distance selling must, as a rule, pay alcohol tax and VAT on the goods when they are brought into the country. Previously, it was also required that the seller have a fiscal representative in Sweden.

### **Retail trade in Sweden**

15. The retail monopoly is thus essentially set out in Chapter 3, Section 1, and Chapter 5, Sections 1 and 2 of the Alcohol Act. Its wording prohibits the retail sale of, inter alia, wine or strong beer by persons other than Systembolaget without specifying any geographical limitation. Nor does the legislative history indicate any geographical delimitation. However, it is clear that the regulation of retail trade by the Alcohol Act does not concern trade abroad. Neither the wording of the act nor the legislative history specifies what, exactly, can be considered retail trade in Sweden.

16. The objective of the retail monopoly is to assure public control over the availability of alcoholic beverages with the purpose of reducing the medical and social harm caused by alcohol (see, e.g., Govt. bill 1993/94:136 p. 9 & Govt. bill 2009/ 10:125 p. 56 et seq.). This objective indicates that the monopoly would encompass all sales on the Swedish market (cf. the case "*Läkemedelshandeln på internet*" NJA 2008 p. 1135).

17. However, the question of the geographical scope of the retail monopoly must be assessed in the light of the general structure of the Alcohol Act and, in particular, the types of importation of alcoholic beverages authorised by the law.

### **Private imports**

18. The Swedish Alcohol Act was amended in 2008 following the judgments of the European Court of Justice in the cases “Rosengren”, C-170/04, EU:C:2007:313, and “Commission v Sweden”, C-186/05, EU:C:2007:571. With these amendments, alcoholic beverages can be imported by “an individual at least 20 years of age using a professional transporter or other independent intermediary, if the importation is from another country within the European Economic Area and the beverages are intended for his personal use or that of his family” (see Chapter 4, Section 4, second paragraph, item 7). Professional transport refers to transport by post or similar transport, e.g., by transport companies. In the legislative history, it was stated that the phrase “other independent intermediary” was taken from the judgment in *Commission v Sweden*, and that imports through independent intermediaries other than professional intermediaries should also be authorised in order for Swedish law to agree with EU law. (Govt. bill 2007/08:119 p. 36 et seq.)

19. To constitute a private import under Chapter 4, Section 4, second paragraph, item 7 of the Alcohol Act, the Act requires that the transport be carried out by an intermediary – an independent carrier – operating between the seller abroad and the consumer in Sweden. According to the Act, it is irrelevant whether it is the seller or the buyer who has enlisted the carrier. However, if the seller himself brings the alcoholic beverage into Sweden, this importation is not permitted under Chapter 4 (cf. Govt. Bill 2007/08:119 p. 44, where it is indicated that the provision is also applicable when the goods are transported by the seller).



20. At the time of the 2008 amendment to the Act, it was discussed whether the possibility of importation would include distance selling, where a foreign seller organises the transport. In the legislative history it was noted that this form of sale had increased after the decision in Rosengren, and that a rule to impede distance selling existed in Finland (see Swedish Government Official Reports 2007:113 p. 32 et seq.). However, the legislator decided against proposing such a regulation. Rather, it was emphasised in the statutory comments to (presently) Chapter 4, Section 4, second paragraph, item 7 that whether the underlying transaction is a distance sale, according to the definition given in the Alcohol Tax Act (Govt. bill 2007/ 08:119 p. 44), is irrelevant with regard to the right to import.

21. The provision was transferred, without amendment, to the Alcohol Act of 2010. The legislative history is based on the assumption that, given the rules on private import, purchases via distance selling are in principle permitted (see Govt. 2009/ 10:125 p. 59).

22. The legislative history indicates several reasons why a ban on distance selling has not been introduced. One reason was the uncertainty regarding whether a ban on distance selling would be compatible with EU law, but it was also stated that it would be difficult to delimit what would be allowed or not, under the Alcohol Act, for private imports, as it is fairly simple to arrange purchases in such a way that they would be permitted. It was also stated that the public health impact of such sales was presumably small, considering, among other factors, that excise duties and transport make the goods expensive. (ibid. p. 59 and Swedish Government Official Reports 2007 2007:113 p. 37).

23. The question of whether the rules on private import and distance selling should be amended has subsequently been considered by a government committee several times without it resulting in any amendment (see Swedish

Government Official Reports 2013:50, Swedish Government Official Reports 2014:58 and Ministry Publications Series 2016:33 p. 20).

### **Lawful distance selling**

24. It is clear from the above that the legislature intended for distance selling, where alcoholic beverages located in another EU or EEA State upon purchase are subsequently transported to Sweden by a carrier enlisted by the seller, to be permitted under the Alcohol Act. Legally, this was achieved by permitting the importation of alcoholic beverages as set out in Chapter 4, Section 4, second paragraph, item 7 of the Alcohol Act.

25. The fact that this type of transboundary purchase is permitted under the provisions on importation must, as a rule, mean that the corresponding sale cannot, at the same time, be considered to constitute retail trade in breach of the

Alcohol Act and thus be prohibited. However, this may not be taken to mean that the sale is permitted in all circumstances.

26. For distance selling not to constitute retail trade in breach of the Alcohol Act, it is required, inter alia, that the seller is not established in Sweden: a seller established in Sweden, selling alcoholic beverages directly to consumers in Sweden, is violating the Swedish law, even if the beverages are brought into the country after the purchase (cf. Jörgen Hettne, “Näthandel med alkohol - lagligt eller olagligt” in Birgitta Nyström et al., *Modern affärsrätt*, 2017, p. 108).

27. Furthermore, it is required that no sales activities take place in Sweden itself, e.g., through a commercial agent or equivalent. For example, if a seller, established in another EU or EEA country, sells goods via a website on the internet, the fact that this website is accessible from Sweden, or that the

equipment for the website is located here, does not mean that the sale is considered to take place in this country (cf. recital 19 of the Directive on electronic commerce<sup>1</sup>).

28. Where there are clear signs of purely formal or superficial arrangements, it may be necessary to examine whether an alleged establishment or sale really reflects the true state of affairs.

### **The assessment in this case**

29. The facts in the case, which consist, inter alia, of purchase conditions and order confirmations, show that it is Winefinder ApS that appears as the seller and has concluded the purchase agreements with the customers. It has not been shown that Winefinder ApS concluded the contracts on behalf of others.

30. The facts in the case show that Winefinder ApS has been registered and domiciled in Denmark since 2005. The wines ordered have been stored in a warehouse in Denmark, and the company has paid taxes and employed staff there. Against this background, the facts in the case do not support the claim that the establishment might be fictitious.

31. Winefinder ApS has purchased services from Winefinder AB regarding, e.g., finance, marketing, customer service and IT. This does not permit the conclusion that the sales activities are carried out in Sweden, or that the services are such that Winefinder AB must be regarded as a seller. Nor has it been shown that either Winefinder AB or Winefinder ApS have taken concrete measures in terms of sales within Sweden itself. The fact that

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<sup>1</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services.

complaints were handled by Winefinder AB in Sweden does not change that assessment.

32. Winefinder ApS has enlisted independent transport companies to ship the wine to consumers in Sweden. Since such distance selling is permitted, it is irrelevant that Winefinder ApS has offered consumers the use of the carriers enlisted by Winefinder ApS.

33. All in all, the facts in the case do not support any other conclusion than that Winefinder ApS alone conducted the sales activities from Denmark. Thus, based on the facts in this case, the Supreme Court concludes that the sale of wine via the website, with delivery to customers in Sweden, does not violate the retail-trade prohibition of the Swedish Alcohol Act.

34. The marketing is therefore not unfair for the reason that such sales would violate the retail-trade prohibition, and Systembolaget's action must therefore be dismissed. As reaching a decision in this case did not require the interpretation of any European Union law, a preliminary ruling from the European Court of Justice is not necessary (see Article 267 of the Treaty on the Functioning of the European Union).

35. With this outcome, Winefinder AB and Winefinder ApS are entitled to compensation for their litigation costs. The costs claimed by Winefinder AB and

Winefinder ApS in the Patent and Market Court of Appeal are reasonable. The Winefinder companies' claims for costs in the Supreme Court are also approved.

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Justices of the Supreme Court Gudmund Toijer, Agneta Bäcklund, Petter Asp, Cecilia Renfors and Jonas Malmberg (reporting Justice) participated in the ruling.

Judge referee: Cecilia Andgren

## SUPPLEMENT

On his own behalf, Justice of the Supreme Court Jonas Malmberg adds the following:

In order to fully understand the background to the provision in Chapter 4, Section 4, second paragraph, item 7 of the Alcohol Act, it may be in order to briefly describe how Swedish alcohol regulation has gradually been adapted to EU law with regard to private import.

Sweden has a long history of restrictive alcohol legislation based on the assumption that availability and price are important for overall consumption and the extent of alcohol-related harm. The most important alcohol-policy tools are the retail monopoly and the alcohol tax. The retail monopoly permits society to control the availability of alcoholic beverages and to limit profit-making business in the Swedish retail market in order to minimise alcohol consumption. (See, e.g., Govt. bill 1993/94:136 p. 9 & Govt. bill 2009/10:125 p. 56 et seq.)

Only two years after joining the EU, the European Court of Justice examined the compatibility of Swedish alcohol regulation with EU law (see Franzén, C-189/95, EU:C:1997:504). The European Court of Justice ruled that the Swedish retail monopoly was to be assessed under the Treaty rules on State monopolies of a commercial character (presently Article 37 of the Treaty on the Functioning of the European Union, TFEU). State monopolies of a commercial character are permitted under the Treaty as long as they ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States. The European Court of Justice held that the retail monopoly was not contrary to EU law.

In the Franzén judgment, the European Court of Justice also examined some existing rules on importation in the Alcohol Act. The Court held that these did not concern the functioning of the monopoly, and that the question of whether the rules were permitted was therefore to be examined under the Treaty rules on quantitative restrictions on imports (see presently

Article 34 TFEU). For such restrictions to be permissible, they must be based on certain general, non-economic considerations and be proportionate to the purpose. Such regulation must also be non-discriminatory. (See presently Article 36 TFEU.) The European Court of Justice held that existing rules on importation in the Alcohol Act were, to some extent, contrary to EU law.

Following the Franzén judgment, the European Commission issued a letter of formal notice questioning certain aspects of Swedish alcohol legislation, which led the Swedish Parliament, in 1999, to amend the rules of the Alcohol Act regarding the importation of alcoholic beverages in certain respects (see Govt. bill 1998/ 99: 134). In the legislative matter, it was discussed whether distance selling spirits, wine and strong beer to Sweden from other countries should be permitted. Distance selling referred to direct sales from another country to private individuals for consumption in Sweden, e.g., via mail order or the internet. It was emphasised that such sales were not allowed and that this was achieved, legislatively, by the Alcohol Act's rules on importation, which did not permit commercial shipments to individuals. The Government stated that this form of sale could become a realistic alternative to purchases at Systembolaget, which could undermine alcohol policy and, in the long term, make the retail monopoly difficult to maintain. The Government therefore considered that distance selling of alcoholic beverages to Sweden from other countries were not to be permitted. (ibid. p. 104 et seq.).

In 1999, the legislator thus assumed that it was the rules on importation – and not the retail monopoly – that prevented sales from another country to consumers in Sweden by mail order or the Internet.

In 2007, two judgments of the European Court of Justice assessed the rules on importation in the Alcohol Act.

In the Rosengren case, C-170/04, EU:C:2007:313, a number of private individuals had ordered wine from Spain partly via a Swedish-language Danish website and partly directly from the producer. The shipment of the wine had been ordered by an independent carrier through another website. Payment for the order and transport had been made to two Swedish postgiro numbers (see the reference for a preliminary ruling in NJA 2004 p. 137). Such private importation of wine was not permitted at the time under the Swedish Alcohol Act. However, private individuals who bought wine abroad were allowed to bring the wine into Sweden themselves.

The European Court of Justice emphasised that the specific function of the retail monopoly under the Alcohol Act consisted of an exclusive right for Systembolaget to sell alcoholic beverages to consumers in Sweden, but that this exclusive right did not extend to imports of such beverages. The Court therefore held that the Swedish private-import prohibition at that time in effect should not, in distinction to the Swedish retail monopoly in the Franzén case, be examined under the Treaty's provision on trade monopolies, but rather under the provision on quantitative import restrictions. The Court found that the rules of the Alcohol Act regarding import prohibitions at that time were contrary to EU law.

In parallel with that case, the European Commission had brought an action against Sweden for failure to fulfil its obligations under the Treaty, asking the Court to declare that Sweden's rules on private imports under the Alcohol Act



infringed the Treaty rules on quantitative restrictions on imports. The Court based its judgment on the Rosengren judgment, and stated, in the Swedish-language version, that Sweden had failed to fulfil its obligations by prohibiting “the importation of alcoholic beverages by private individuals through independent intermediaries or professional transporter”. According to the French-language version of the same judgment, Sweden has failed to fulfil its obligations by prohibiting private individuals from importing alcoholic beverages through an independent intermediary or professional carrier *that they have enlisted*. The Danish, English and German translations of the judgment have the same meaning as the French. (See *Commission v Sweden*, C-186/05, EU:C:2007:571.)

It should be noted that, in those cases, the Court had to assume that the purchaser acquired the wine abroad and arranged for its transport himself and held that a national regulation restricting such importation must be assessed as a quantitative restriction on imports. It is not possible to conclude from the judgments that a national regulation preventing distance selling, where the seller is established in another EU or EEA State and the goods are transported to Sweden by the seller or another person on behalf of the seller, is to be assessed as a quantitative restriction on imports. On the other hand, nor do the judgments provide clear support for rules preventing such distance selling from being examined vis-a-vis the Treaty provision on monopolies of commercial nature.

The issue was addressed in 2015 in the judgment of the European Court of Justice in the case “*Visnapuu*”, C-198/14, EU:C:2015:751. The case concerned, among other things, a rule of Finnish law according to which a seller established in another Member State must have a retail trade licence for the import of alcoholic beverages intended for retail sale to consumers living in Finland, when the seller carries out the transport of those beverages or

enlists a third party for that transport. In the case of beverages which the Finnish monopoly, Alko, had the exclusive right to sell, the Court stated that the permissibility of the retail-licence requirement must be examined under the Treaty provision on monopolies of a commercial nature (para. 93-95). The judgment shows that the situation was different with regard to the retail sale of strong beer and, to some extent, on-site brewery retail, which, under Finnish law, companies other than Alko could be licensed to carry out. Since Alko did not have a monopoly on such sales, the requirement for a retail licence in this respect could not be said to affect Alko's functioning and exclusive right. The requirement for a retail licence would therefore, according to the European Court of Justice, be examined as a quantitative import restriction.

As stated in the judgment of the Supreme Court in this case (para. 20-22), following the judgments in *Rosengren* and *Commission v Sweden*, the legislator considered drafting the Alcohol Act in such a way as to prohibit distance selling through, for example, e-commerce, but refrained from doing so. The main reason for the legislator's position seems to have been that, at least before the *Visnapuu* judgment, it was considered uncertain whether a ban on distance selling via, e.g., the internet would be compatible with EU law. Another reason seems to have been that the public health consequences of such sales were assumed to be small. Prior to, as well as after, the *Visnapuu* judgment, a government committee has considered the question of whether the rules on private import and distance should be amended, yet the law remains unchanged (see Swedish Government Official Reports 2013:50, Swedish Government Official Reports 2014:58 and Ministry Publications Series 2016:33).

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