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Swedish Institute for European Policy Studies

SEMINAR SUMMARY
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Alcoholic Goods, Sweden and EU Law

To mark the publication of Dr **Graham Butler's** report *Alcoholic Goods and Sweden. The EU Law of Private Imports, Retail Sale, and State Monopolies,* SIEPS held a public seminar. The moderator was SIEPS Senior Researcher **Anna Södersten,** and the report's findings were discussed by **Jörgen Hettne,** Professor of Law at Lund University and Senior Advisor at Sieps, **Joakim Zander,** an author and lawyer formerly at the European Commission, and **Claes Granmar,** Associate Professor of Law, Stockholm University.

Anna Södersten introduced the seminar, noting that in the thirty years since discussions on Sweden's accession to the EU began, the question of whether Sweden's alcohol policies were compatible with EU law had been frequently debated. As she noted, the history of restrictions on the sale of alcohol in Sweden goes much further back, at least as far as the period of excess spirit consumption in the mid-to-late 19th century.

Graham Butler introduced his report's findings by commenting on the landmark judgement of 1997 which found the Systembolaget system to be compatible with EU law, *Franzén*. It is a mistake, he said, to consider this judgement in isolation or to understand it as a final judgement endorsing the legality of the Swedish alcohol monopoly, as it were, forever. The judgement was, in his view, poorly argued, and the Court of Justice of the EU (CJEU) has avoided relying on it in subsequent judgements.

In the significant case relating to Swedish private imports, *Rosengren*, the Court did not rely on its ruling in *Franzén*. Instead of invoking Article 37 TFEU (a special provision allowing for state monopolies), the Court adjudicated on the basis of Articles 34–36 TFEU (the general provisions on the free movement of goods). This leads Butler to conclude that if the Court were to decide the issues in *Franzén* again, today, the case would not be determined on the same basis. Two recent cases not involving Sweden – ANETT and *Visnappu* – provide no comfort regarding the continued compatibility of Systembolaget with EU law. Butler was hopeful that a preliminary reference will be requested from the CJEU in ongoing litigation in Swedish courts.

Butler views the current proposal on farm-sales to be discriminatory. You can't have it both ways: if Systembolaget is to have exclusive physical retail rights these must be exclusive. If it is passed into law, private actors would be tempted to litigate the issue, a reference to the CJEU in this context would have the potential to unravel the wider current regime.

Finally, he discussed the wider changes to the situation of alcohol sales in Sweden (e.g. online private imports, the ability to order online from Sytembolaget, deliveries to non-Systembolaget locations in outlying areas) these do not seem to be in line with the public health / public interest exemption. He noted that, having lost its monopoly right to manufacture spirits, Vin och Sprit competed like any other private actor – this is a possible future for Systembolaget.

During the panel discussion **Butler** gave some historical background to recent developments: from 1958 to 1969, during the transitional period of EEC law, state monopolies could discriminate. From 1970 onwards their compatibility with EEC/EC/EU law was assessed under Article 37 TFEU, but the big cases which truly give effect to the free movement of goods concern restrictions rather than only non-discrimination.

On whether Systembolaget was at risk, **Jörgen Hettne** noted that although the scope of Article 37 TFEU, has probably narrowed over the years, it can – and is – still be relied on. **Joakim Zander** suggested that early cases of the Court on Article 37 TFEU concerned defining the legal boundaries of state monopolies. Now that these are well-defined the CJEU is less inclined to invoke that provision. For the 'brick and mortar' aspects of the

Swedish system, Article 37 TFEU remains therefore relevant, whereas other issues (such as online sales) involve other reasoning. **Claes Granmar** expressed the view that EU law is pragmatic. For him, *Franzén* is good law, and the ECJ still relies on it. He noted that Systembolaget provides information, wide consumer choice, and access to the Swedish market. In that respect it actually drives trade. He thought that the relevant motive for allowing farm sales does not concern free movement of goods but rather services because it is so limited that it only increases tourism without negatively impacting on the trade in alcoholic products. **Butler** objected that yes, *Franzén* is referred to, but it is not relied on to decide cases.

Regarding the ongoing cases in Swedish courts **Hettne** outlined how in the fifteen years since *Rosengren*, which allowed private imports, Sweden has taken a liberal approach. Systembolaget has taken legal action, however, because it finds that the state is going further than what is allowed for in *Rosengren*. One of the cases has recently been referred to the Swedish Supreme Court that could feel obliged to request a preliminary ruling from the CJEU.

On the likelihood of infringement proceedings, brought by the Commission, **Zander** thought that there was little appetite for this at the Commission. The Commission remains interested in what private actors might do, but while this is a big political issue in Sweden it is not such a major issue for the EU.

There were questions from the audience on whether Sweden could count on the continued legality of Systembolaget, and on whether the Commission was interested in complaints from private actors.

Zander responded that the Commission were certainly interested in complaints as it helps to guide investigation and action, but when it comes to issues they are already monitoring (such as the purchasing policies of Systembolaget) they may be less impactful. Regarding objections to farm-sales **Butler** suggested that what the CJEU decides will depend on the question they are asked by the national courts. While national courts enjoy some flexibility in the implementation of preliminary reference cases, no such possibility exists if the issue comes before the CJEU as an infringement action. He noted, however, that the Commission's strategy regarding infringement cases today is more political and targeted, and it often uses other tools such as pilot procedures and dialogues. **Hettne** said that in principle he agrees with what Butler was saying, but that before any proposal [on farm sales] enters into force the Commission will be notified, if it refrains from objecting at that stage it would be difficult to bring an infringement action on the same issue later in time. **Granmar** suggested that the Commission understands that monopolies can drive international trade, a thought that **Zander** vehemently rejected.

Asked to condense their key position into a twenty-second statement, **Claes Granmar** reiterated that monopolies can drive trade, and that they can be relaxed a bit without losing their compatibility with EU law. **Joakim Zander** stated that the Nordic monopolies are an anomaly in EU law, and that though the Commission is not in favour of such trade restrictions it is a tiny issue in Brussels. **Jörgen Hettne** thought that EU law should really be more certain on these questions, and that we (Sweden) should not be afraid to get an answer. Finally, **Graham Butler** said that regardless of what happens, EU law provides for restrictions on the supply of alcohol. Even if it does not, in future, allow for state retail monopolies, there are many other legal ways to regulate it.