AN EVALUATION OF THE CASES BEFORE THE EUROPEAN COURT OF JUSTICE IN WHICH THE SWEDISH GOVERNMENT HAS ACTED

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Despite the title of this lecture, "An Evaluation of the Cases in which the Swedish Government has acted", it is not my intention to pass judgement on the European Court of Justice (ECJ), the Swedish courts or the Swedish Government. A fair evaluation would demand a detailed review of all the cases, of which there are approximately 70, both Swedish and non-Swedish, in which the Swedish Government has acted in different ways during the first four years of EU Membership.

It is of course not possible to apply this method in the mere 45 minutes that I have at my disposal. Besides, it would not be a good use of the time, since many of the more specifically Swedish cases have not had a particular bearing on matters of principle, neither have they been of any great general interest. So an enumeration of all of them would only be boring. This observation is, however, not restricted to the Swedish cases. I think it is a general experience that the courts in all the Member States too often ask for preliminary rulings from the ECJ when it is not necessary to do so. In some cases the legal issue concerned could have been easily resolved by the national court itself. In other cases the national court has overlooked the fact that the ECJ has already answered a similar question. Or the national court has noted the existence of a previous decision but has not dared to trust the relevance of that decision. It also occurs

* The author is Director-General for Legal Affairs in the Ministry of Justice, Stockholm. The Article reproduces a speech held at an EIPA Seminar in Luxembourg on 26 April 1999, i.e. before the entry into force of the Amsterdam Treaty. Needless to say, the article represents only the authors' personal views, which in some instances are formulated rather frankly in order to promote discussion at the seminar. The evaluations of the Victoria Film and the Jessica Safir cases are substantially shortened; concerning these cases, see ERT 1999 p. 180–191, 339–343, 455 and 557–565 (Victoria Film) and p. 475 (Jessica Safir).

that the request by the national court concerns the applicability of Community law only to a limited extent or not at all.

Against this background it is actually rather surprising that constitutional EC law does not provide any formal provision for preventing the ECJ from being asked for interpretation in cases where there is no need for interpretation.[1] Perhaps a system should be introduced which would allow the ECJ to decline to rule in a case submitted by a national court. Or perhaps this power should be entrusted to one or more independent bodies outside the ECJ. In either case the workload of the ECJ would be considerably reduced, which in turn would mean that the Court could deliver its rulings faster in cases that were of real importance from the point of view of EC law. Another alternative, or should I say complement, that could reduce the ever-increasing workload of the Court would be to give the national courts of last instance greater freedom to interpret Community law. If this were so, the Court would first have to mitigate its own case law in this respect.[2] The same result could of course be obtained through an amendment of the EC-Treaty, but it is not likely that this will happen.

It is precisely this fact – that a decision to ask for a preliminary ruling delays the final decision in a national case by as much as two years – that is the probable reason why Swedish courts referred only five cases to the ECJ in 1998. Similarly, in the previous year only seven cases were referred to the ECJ. We have seen a number of cases in Sweden where national courts of last instance have refrained from asking for preliminary rulings and have instead elected to make their own interpretation of EC directives. In some widely observed and often criticised cases these courts have made rather advanced interpretations which have thus not come under the scrutiny of the ECJ.[3] Officially, the ECJ cannot accept that the national courts of last instance interpret Community law in difficult cases in this way. Unofficially, I would presume that the ECJ is grateful that its already heavy workload is kept down for the reason I have just given.

As I said, I am not going to make a systematic presentation or evaluation of all the cases in which the Swedish Government has acted since Sweden joined the Union. Instead I will describe a limited number of cases and from them make some observations which I hope will correspond fairly accurately with the ambitious title of my talk.

The first three cases that I will describe are the *Journalisten Case*, the *Victoria Film Case* and the *Jessica Safir Case*. They have in common the fact that all three of them are presented in the Court's own survey of the most important cases of 1998.

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1 Cf. however Article 104.3 in the Court's Rules of Procedure.
2 See *Melin*, JT 1999, p. 123.
3 See *Eliasson, Abrahamsson* and *Mattsson*, SvJT 1998, p. 219.

On 17th June last year the Court of First Instance (CFI) delivered its judgement in the case of the Swedish Union of Journalists versus the Council.[4] In that case not only did the Swedish Government intervene in favour of the journalists' union but it – or more precisely the Ministry of Justice – was also accused of having acted in breach of Community law by allowing the public access to certain Council documents concerning co-operation within Europol without the consent of the Council and the other Member States.

The case concerned the applicability and interpretation of the Council's 1993 decision on public access to Council documents. In recent years there have been a number of such "transparency cases" concerning either the Council's or the Commission's documents. The background to this case was that the Council refused the periodical *Journalisten* access to a number of Europol documents which the periodical, with a few exceptions, had already obtained from the Ministry of Justice and the National Police Board. The first objection on the part of the Council was therefore that the periodical could have no interest in having the documents made available once again. However, the CFI established that a party always has a legitimate interest in having a decision annulled if the decision has gone against him. Hence, the party need not give any explanation or reason for his appeal. In my view it also means that a person is not obliged to give a reason for an application for access to a Council document in the first place. The CFI also held that the handling of Europol documents fell within its competence, in spite of the fact that the Europol co-operation belongs to the third pillar, where the ECJ does not have general competence. The Council had justified its decision not to grant access by simply referring to the wording in the 1993 legal instrument concerning the need to protect public security and the deliberations of the Council. The CFI found that the Council should have given a better and more informative explanation and thus annulled its decision. So the periodical *Journalisten* won the case in principle, but was still ordered to pay a third of its own costs. This was because the CFI considered that the actions of the applicant in publishing an edited version of the Council's defence on the Internet, in conjunction with an invitation to the public to send their comments to Council officials, constituted an abuse of procedure. This abuse of procedure had delayed the proceedings and caused more work for all parties in the case.

In my opinion the CFI's decision in this case – which has attracted much attention both in and outside Sweden – is of limited importance with respect to the main issue of how precisely the Council must motivate its decisions under the 1993 legal instrument. In a few years' time this will be replaced by a legal instrument common to the Council, the Commission and the European Parliament within the framework of implementing the Treaty of Amsterdam.

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[4] T-174/95. See *Abrahamsson,* SvJT 1998, p. 687.

Furthermore, by then there will be no doubts about the Court's competence as to third pillar documents, as this competence is directly provided for in the new Treaty.

However, there are other remarks in the judgement that are of great interest, at least for Sweden.

First, it should be observed that the CFI refrains from criticising the Swedish Government for having handed over the documents that the Council considered should be kept secret. The Council and its Legal Service pleaded vigorously that Sweden had acted in breach of Community law when its Ministry of Justice gave access to the documents without the consent of the Council and the other Member States. According to the Council, only the Council itself has the right to dispose over Council documents. In fact, it is a common belief also in the Member States that that is the legal situation. For example, the Supreme Administrative Court in the Netherlands stated a few years ago that the Dutch authorities are bound by the assessments made by EU institutions as to whether or not the public shall have access to a document. A Council decision on the secrecy of a specific document is thus directly applicable to the Dutch authorities.

In Sweden, on the other hand, it is almost axiomatic that the Swedish authorities have not only the right but the obligation to make an independent assessment in the event of a request for access to an EU document which the authority has in its possession. A very important reason for the Swedish intervention was therefore to defend this independent system and to counter-argue what the Council and France had claimed in this part of their written observations. As I have already said, the CFI avoided bringing this matter to a head, something which the Swedish side was quite happy about.

If the CFI had followed the Council line, it would in principle have meant a very considerable restriction of the Swedish principle of openness. This principle goes back to 1766 and means that each authority must make its own assessment in accordance with the Secrecy Act concerning the secrecy of the documents held by that authority and that – with a few exceptions – the authority is not bound by the wish of the author or by decisions made by someone else. It would also have meant that the promises that the Government made to the people before the referendum on accession had proved to be false. However, I am not convinced that the Swedish courts and other authorities even then would have refrained from making their own secrecy assessments because they considered themselves obliged to follow the judgements made in Brussels or Luxembourg. The defence for such an attitude could be that the application of the principle of openness in the Member States is not an area subject to law harmonisation according to treaties ratified by Sweden (or any other Member State). In other words, Sweden would not have transferred decision-making competence to the EU institutions in this area, at least not if this meant that

Council and Commission secrecy assessments were automatically binding in Sweden.

If the CFI had followed the line taken by the Council and France in the *Journalisten* case, and the Swedish courts had still chosen to argue in the way I have just outlined, it could have had controversial consequences for relations between Sweden and EU institutions, including the ECJ. It would have meant that EC law as it is comprehended by the courts in Luxembourg would not have had full effect in Sweden, because the Swedish authorities held a different opinion. Of course, the Swedish authorities are not allowed to have a different opinion about *how* Community law shall be interpreted. In this respect the ECJ has exclusive competence. But my hypothesis is that they could have a different opinion about the scope of Community law.

A new critical point might arise when the Treaty of Amsterdam is implemented. Article 191a on public access to documents will be implemented via a new legal instrument, at present undecided whether it will be in the form of a regulation or a decision. If it is proposed that this legal instrument be applied not only to EU institutions but also the Member States, I can say now that Sweden will vote against the proposal. However, the legal instrument can be adopted by a qualified majority. So there is a distinct risk that the legal instrument, or rather the individual decisions on access based on the legal instrument, will interfere with the Swedish legal system, in precisely the same way as the Council wanted the CFI to decide in the *Journalisten* case.

A respected Swedish judge, now retired, recently claimed that if Community rules violate the Swedish principle of access, then these rules should not automatically be applied by the Swedish courts, as the principle of access is guaranteed in Swedish constitutional law. This kind of reasoning is in my opinion incorrect. If it was correct, then every Member State would be able to prevent the enforcement of Community law simply by adopting or referring to contrary provisions in their respective constitutions. Confronted with EC law, constitutional provisions are not, in principle, worth more than other national provisions.

The *Journalisten* case was also important to the Swedish Government in another respect. The issue of openness and transparency within the Union is a profile question for Sweden, and the Government therefore wants to keep up the pressure and raise the issue on possible occasions. From the point of view of Government credibility it was therefore necessary for Sweden to intervene in favour of the applicant in the case. However, we did so with some trepidation, since the applicant's activities could to some extent be described as abusive. The applicant had, after all, already gained access to the documents concerned. Also, he succeeded in provoking both the Council and the CFI by publishing documents of the procedure on the Internet. For that reason, it was extremely important that the applicant won the case, even though the central legal issues

– the obligation to give reasons for Council decisions and the character of third pillar documents – were not particularly important in a wider perspective.

The Government recorded a success in the very first openness case in which it acted, namely the case of the *World Wide Fund for Nature versus the Commission*.[5] Only Sweden intervened in favour of the applicant, whilst France and the UK intervened in favour of the Commission. In this case, too, the CFI held that the Commission had not fulfilled its obligation to give reasons for its decision not to grant access to documents. We are currently awaiting judgements in two other openness cases in which the Government has intervened. In the *Hautala* case[6] the question is if the Council must consider the possibility of partial access to documents and whether certain categories of documents may be exempted from public access irrespective of the content of the specific documents. The *Rothmans* case[7] deals with the question of whether Comitology documents are subject to the general rules on public access to Commission or Council documents.

In the openness cases it has been striking how actively the members of the CFI participates in the proceedings. Often the judges hold long inquiries with the parties. When questioning the Council's agent in the *Journalisten* case, the chairman went so far as to almost reveal his assessment of the legal issues in the case. He even told the Council's agent that it was the Council's fault that there needed to be a trial since the Council had dismissed the application with a cryptic motivation instead of explaining to the applicant exactly why it was not possible to give him the requested documents.

In *van der Wal*[8], also an openness case, the Swedish Government first applied to intervene but then withdrew the intervention after deeming van der Wal to be a "weak" case of low priority. We were not surprised that van der Wal lost the case. However, we were surprised and concerned when we studied the CFI judgement, as we saw findings of the court that seemed to threaten the Swedish principle of openness. So when van der Wal appealed the judgement in the ECJ the Government considered applying for intervention once again. What we did not notice, however, was a recently amended provision in the Court's rules of procedure stating that an application to intervene made to the Court in appeal proceedings shall be lodged before the expiry of a period of not more than one month from the publication of the application of the party.[9] So you can see that it is always wise to read the rules of procedure and not rely on what you think is in there. Personally, I regret that we are not now in a position to act in van der

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5 Case T-105/95. See *Abrahamsson*, SvJT 1998, p. 342.
6 Case T-14/98. Judgement 19 July 1999.
7 Case T-188/97. Judgement 19 July 1999.
8 Case T-83/96. See *Abrahamsson*, SvJT 1998, p. 497.
9 See Article 123 in the Court's Rules of Procedure.

Wal, since it would have been the first opportunity for Sweden to give its view on the openness issues before the ECJ itself.

If the *Journalisten* case was a victory for the Swedish Government, the same can hardly be said of the two other Swedish cases mentioned in the Court's annual report, namely *Victoria Film* and *Jessica Safir*.

The *Victoria Film* case[10] can be seen as a Swedish contribution to the rather far-reaching case law of the ECJ on what constitutes a court or a tribunal within the meaning of article 177 of the EC Treaty. The ECJ found in the case that the Council for Advance Tax Rulings (Skatterättsnämnden) is not a court which can ask the ECJ for preliminary ruling. Or, more correctly, that the ECJ does not have the competence to answer questions raised by Skatterättsnämnden.

In the *Jessica Safir* case[11], the ECJ found that the Swedish legislation could have the effect that people taking out life insurance refrained from taking out policies with companies not established in Sweden and that, correspondingly, foreign companies would refrain from providing services on the Swedish market. Therefore, article 59 of the Treaty was found to "preclude the application of national legislation relating to the taxation of capital life assurance such as the legislation in question in the main proceedings" (p. 34).

In its judgement, the Court had also stated that although direct taxation does not as such fall within the purview of the Community, the powers retained by the Member States in this field must nevertheless be exercised consistently with Community law. The Court concluded that the reasons invoked by the Swedish Government, based on considerations relating to the efficacy of the tax regime, are not such as to justify the inclusion in national legislation relating to the taxation of capital life assurance of elements restricting the freedom to provide services such as those contained in the Swedish legislation.

The ECJ judgement attracted broad attention. To European observers it was clear that the judgement will have consequences in all Member States.

Any review of the cases in which the Swedish Government has acted would be misrepresentative if it did not include the *Franzén* case[12], the case in which the Swedish retail monopoly on alcoholic beverages was put under scrutiny. No other ECJ judgement has attracted anything like as much attention in Sweden.

The facts of the matter were that Landskrona District Court had asked the ECJ whether a statutory monopoly such as Systembolaget (the Swedish Alcohol Retailing Monopoly) is compatible with articles 30 (on the free movement of goods) and 37 (on state monopolies) of the EC Treaty. The ECJ elected to consider the monopolies issue first. The Court pointed out that article 37 of the EC

[10] Case C-134/97. See *Abrahamsson*, SvJT 1999, p. 355.
[11] Case C-118/96. See *Abrahamsson*, SvJT 1998, p. 675.
[12] Case C-198/95. See *Abrahamsson*, SvJT 1998, p. 350.

Treaty does not call for the abolition of state monopolies, only that they should be adjusted to ensure that nationals of the Member States are not discriminated against regarding the conditions under which goods are procured and marketed. The ECJ concluded that Systembolaget appeared, in both form and function, to be adjusted in such a way that it could not be held to be discriminating or to restrict competition. To the surprise of many, the ECJ stated that article 37 is *Lex specialis* in relation to article 30, and that there was therefore no reason for the ECJ to also respond to the question of whether Systembolaget was compatible with article 30. The conclusion was, in other words, that the Swedish retail monopoly for alcoholic beverages is compatible with community law.

However, on the issue of Swedish legislation allowing only traders holding a production or wholesale licence to import alcoholic beverages, the ECJ found that Swedish import regulations discriminated against actors who were not established in Sweden. The Swedish legislation thus conflicted with article 30 of the EC Treaty. It is apparent from the judgement that the legislation could have been accepted under article 36 of the EC Treaty if it had, as the Swedish Government claimed, been in proportion to the need to protect human health from the harmful effects of alcohol and if that objective was not achievable through measures that were less restrictive on Community trading. The ECJ ruled that the Swedish Government had not been able to demonstrate that the Swedish regulations allowing only traders holding a production or wholesale licence to import alcoholic beverages were compatible with the proportionality principle. It was the amount of stock to be held and the high taxes and fees payable by the licensee that the ECJ criticised in particular.

Thus the ECJ found that Systembolaget could remain in place, as long as it continued to be run in more or less the same way as before. The judgement was a considerable success for the Swedish Government, particularly since the Advocate General had criticised Systembolaget in his Opinion. Following the Advocate General's statement several Swedish experts on Community law had spoken in the summer of 1997 as if the matter was settled and Systembolaget would soon be just a memory. Their authority was thus somewhat shaken, but it must in all fairness be said that it was not easy to foresee that the ECJ would focus on article 37 in this way and regard it as *Lex specialis* in relation to article 30. The judgement came at just the right time for the Government, as public opinion had turned strongly against the EU, and the Government needed to produce a political victory within the framework of the Swedish membership.

One of the first cases in which the Swedish Government acted, albeit less successfully, was *Data Delecta*.[13] This was a case which opened Swedish lawyers'

[13] Case C-43/95.

eyes to the fact that neither national procedural law is exempt from the ECJ's influence. The Supreme Court had requested a preliminary ruling in a case concerning the obligation to lodge security against the cost of legal proceedings. The question was whether it conflicted with the non-discrimination principle of the EC Treaty to require a plaintiff from another Member State – in this case the UK – to lodge security for the cost of the proceedings when no such requirement can be imposed on a Swedish legal person. The Swedish Government held the view that it should defend the Swedish legislation in the ECJ but had little real hope of success. As expected, the ECJ ruled against the Swedish provision. The reason given was that the principle of the equality of all EU citizens takes effect as soon as a claim in a national case has a connection with the exercise of one of the freedoms guaranteed under Community law.

The ECJ's position should not really have surprised anyone. There were even many people in Sweden who said that the answer was so self-evident that it was unnecessary for the Supreme Court to trouble the ECJ with the question. The judgement of the ECJ removed any uncertainties, and it resulted in an amendment to Sweden's procedural legislation from 1 January 1998 so that it is now compatible with the non-discrimination requirement contained in the Treaty. But that was not the end of the matter. There was an interesting twist. When the Supreme Court ruled in the national case it found to the surprise of many that the ECJ's preliminary ruling was not applicable. The reason, according to the Supreme Court, was that the goods for which payment was required in the main dispute had been delivered before Sweden joined the Union. Despite the preliminary ruling, therefore, the Supreme Court instructed the British plaintiff to lodge SEK 200,000 as security against the cost of proceedings, something which a Swedish plaintiff would not have had to do.

Shortly after the Supreme Court's ruling it so happened that the ECJ passed a preliminary ruling in *Saldanha*[14], an Austrian case. In this case an Austrian lower court had, in November 1994 – that is, before Austria joined the EU –, ordered a non-Austrian to lodge security against the cost of proceedings, despite the fact that an Austrian citizen would not have been required to do the same. The ECJ declared that the non-discrimination article in the EC Treaty was immediately applicable and binding from the day Austria joined the Union, so the article should be applied to future effects of situations that arose prior to Austria's membership.

As I see it, the ECJ's judgement in Saldanha is directly applicable to *Data Delecta*. It is also possible to see Saldanha as a rebuke by the ECJ of the Supreme Court, even though I do not believe that this was the ECJ's conscious intention. It is doubtful whether the ECJ knew at the time of the Supreme Court's finding.

[14] Case C-122/96. See *Abrahamsson*, SvJT 1998, p. 349.

It may be interesting to place the judgement of the Supreme Court in the *Data Delecta* case alongside that of the ECJ in the Dutch *Leur-Bloem* case[15] at approximately the same time. This will enable us to see the broad range of interpretations by national courts of the relevance of rulings by the ECJ. In *Data Delecta* the Swedish court refused to follow the ECJ's judgement on the grounds that the ECJ's reasoning was not relevant to the case in question. In *Leur-Bloem* the national court asked the ECJ to give a binding reply to provide guidance in interpreting what was in principle a purely national piece of legislation, albeit one which was referring to Community law provisions. What surprised many was that the ECJ agreed to the Dutch court's request and gave a preliminary ruling. The ECJ has recently confirmed this apparent enlargement of its sphere of competence in the *Bronner* case.[16]

When I have examined some of the European jurisprudence literature I have found no Swedish case that has attracted more attention than the *De Agostini* case.[17] Detailed analyses have been published in the Common Market Law Review and the European Law Review, to name just two. There are several reasons for the interest, but one is that the case is part of a series of interpretative decisions concerning the "Television without Frontiers" directive (89/552) and the principles that it establishes. Another is that, as always where television advertising is concerned, considerable financial interests are involved. The case concerned, among other things, the question of whether the Market Court could ban commercials aimed at children in TV3 broadcasts from the UK. The ECJ declared that it is incompatible with the television directive to impose a ban on advertising directed at children under twelve when it is broadcast from another Member State. So the directive prevents a Member State from interfering with broadcasts from other Member States (for example, TV3) but not from domestic broadcasters (such as TV4). The controls the broadcasting country is obliged to carry out under the directive must be deemed sufficient and there may be no further controls in the recipient country.

In this respect it is clear that Sweden lost the case in the ECJ. But what has been to some extent ignored in the analyses is that Sweden could still record a success with respect to the important issue of whether a Member State has the right to intervene against television commercials which an advertiser broadcasts from another Member State. On this question the ECJ took the same line as Sweden. The Court established that Community law allows a Member State to intervene against advertisers, under the general consumer protection legislation, on account of television commercials broadcast from another Member State. The Commission had argued that Sweden did not have the right to make such

[15] Case C-28/95. See *Abrahamsson*, SvJT 1998, p. 346.
[16] Case C-7/97.
[17] Case C-34/95–C-36/95. See *Abrahamsson*, SvJT 1998, p. 345.

an intervention. The ECJ made clear that a Member State can impose a ban against misleading advertising and intervene under this legislation against advertisers broadcasting from other countries.

The first case in which the Swedish Government made oral representation to the ECJ was the one that resulted in *Opinion 2/94*, which concerned whether the European Communities could accede to the European Convention for the protection of Human Rights and Fundamental Freedoms. The ECJ found that accession would mean such major changes with respect to how the Communities protected human rights that accession was not possible within the framework of the present treaties. The Swedish Government and the majority of other Member States had maintained that the communities were eligible under article 235 of the EC Treaty to accede to the Convention. Nevertheless, I venture to say that the ECJ's decision did not unduly disappoint the Swedish Government. The Swedish Government's position has consistently been that human rights within the Union can be better protected in some other way than through the EC acceding to the Convention. However, we have also maintained that accession to the Convention would be better than the inclusion of a special rights catalogue in the basic treaties. That is, that there would be parallel human rights in the Convention and in the basic treaties. Fortunately neither of these methods received enough support at the EU Intergovernmental Conference. The Treaty of Amsterdam pursues other solutions which are specially designed with EU enlargement in mind.

In spite of that, the process in this case was highly educational for the team of representatives from the Swedish Government. One thing we learnt is that it is difficult to put forward your argument orally if you have not previously submitted a written statement. The reason why the Government did not present a written statement in this case was that the internal preparation and drafting process had not been completed before the deadline. We compensated for this to a certain extent by having the oral statement written out in a French translation. In this way we ensured perfect interpretation, even though the interpreter was sometimes slightly ahead of the Swedish representative's statement. The interpretation of the statement by the Finnish Government's representative, on the other hand, was almost unintelligible, at least in English.

There is one case from last year that is of such importance that it has a natural place in the Court's annual report. That case is not Swedish but Austrian, and it is possible that my Austrian colleague will speak about it later. But I should like to mention it briefly here, since it was a case in which the Swedish Government acted vigorously, and in opposition to the Commission and the other Member States. This was the *Silhouette International* case[18], and the question of

[18] Case C-355/96. See *Abrahamsson*, SvJT 1998, p. 902.

whether trade-mark rights should be exhausted when the holder of the trade mark conveys a product outside the EEA.

In this case Silhouette, which manufactures spectacles, delivered a consignment of frames to Bulgaria, subsequently sold by another company in Austria. Of the Member States it was only Sweden that believed that this should be allowed. Sweden advocated what is known as global exhaustion, or the right to free parallel imports. In other words, we claimed that where trade-mark rights are concerned it makes no difference whether a product has been put on the market in an EEA Member State or in a third country, in this case Bulgaria. The ECJ took the majority line and ruled that the applicable directive should be interpreted to mean that the trade-mark holder retains his sole right to sell the product as long as it has not been put on the market within the EU with his consent.

The ECJ's judgement in the *Silhouette* case has radically altered the legal situation in Sweden, and given trade-mark holders new ways of preventing price competition from parallel imports. The judgement has mostly been negatively received in Sweden and has aroused public opinion to an unusual degree for such a complicated legal issue. The Minister for Trade has publicly criticised the judgement, the Commission has been lobbied, and at Sweden's initiative the Internal Market Council discussed parallel imports in the autumn of 1998. However, it is unlikely that the Commission and the other Member States will alter their opinion, at least in the short term. What is interesting to note, however, is that the EFTA Court in a similar judgement[19] reached the opposite conclusion to the ECJ.

On the subject of the EFTA Court, I should like to conclude by mentioning a case which was decided in the EFTA Court on 10 December last year. It concerns the case of *Sveinbjörnsdottir versus the Icelandic Government*[20] and the interpretation of the EEA Agreement and the Wage Guarantee Directive. The Swedish Government submitted both a written and oral statement in the matter. The reason for Sweden's interest was that the case really concerned whether the doctrine of State Liability developed by the ECJ from Francovich onwards is an integral part of the EEA Agreement. The Swedish Government referred, inter alia, to Protocol 35 to the EEA Agreement, which in the opinion of the Government means that all Community law provisions require national implementation before they can be applicable in the EFTA States. Direct applicability is out of the question, since the EEA Agreement is in principle an ordinary international legal agreement which, according to the Government's apprehension, can only give rise to legal obligations between states, not between states and their citizens.

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[19] Case E-2/97.
[20] Case E-9/97.

To our considerable surprise, however, the EFTA Court came to the opposite conclusion. The Advisory Opinion of the EFTA Court is long, but the explanation itself is short, just four sentences. It reads: "It follows from all the forgoing that it is a principle of the EEA Agreement that the Contracting Parties are obliged to provide for compensation for loss and damage caused to individuals by breaches of the obligations under the EEA Agreement for which the EFTA States can be held responsible. It follows from article 7 and Protocol 35 to the EEA Agreement that the EEA Agreement does not entail a transfer of legislative powers. However, the principle of State liability must be seen as an integral part of the EEA Agreement as such. Therefore, it is natural to interpret national legislation implementing the main part of the Agreement as also comprising the principle of State liability" (p. 62–63).

It might seem surprising that the Swedish Government involved itself in this case to such an extent, four years after Sweden ceased to be a member of EFTA. One reason was that as one of the constructors of the EEA Agreement we feel a responsibility for its correct interpretation. Another reason was that we saw a danger that Norway and Iceland would question their continued participation in the EEA co-operation if it turned out that this co-operation meant relinquishing national sovereignty in precisely the way that had so far prevented them from joining the EU.

But there was also a more self-interested reason for the Government's action. The Swedish state has been sued for damages in a case before Stockholm District Court on the grounds of incorrect implementation in 1994 of the same directive as in the Icelandic case. The legal issue has been referred by Stockholm District Court to the ECJ. Both at the hearing and in its written statement in the case – *Andersson versus the Swedish state*[21] – the Swedish Government maintained that Sweden was not required prior to its joining the EU to ensure that Swedish legislation was compatible with Community law, and that a breach could not give rise to liability for damages on the part of the State of Sweden. We also maintained that the ECJ does not have competence to answer questions concerning interpretation of the EEA Agreement, since the EFTA Court in principle has exclusive competence to interpret the agreement in relation to an EFTA country and Sweden undisputably was an EFTA country in 1994. We also maintained that the fact that Sweden is now a member of the EU is irrelevant since the matter in question relates entirely to a time before Sweden joined the Union.

For some reason the French Government has entered the case and given its support to the plaintiff. The Commission, Norway and Iceland, on the other hand, support the Swedish Government's line.

[21] Case C-321/97. In its Preliminary Ruling 15 June 1999 the ECJ declared itself not competent to interpret the EEA Agreement in this particular case.

The Advocate General has in his statement of 19 January analysed the legal issues more deeply and broadly than the EFTA Court did in December. The Advocate General supports Sweden's arguments. It will be interesting to hear the judgement of the ECJ. There is a possibility that the EFTA Court and the ECJ will reach opposite conclusions. If so, the question arises how many such strains the EEA Agreement can withstand before the question of review or renegotiation of the Agreement is raised.

In the Andersson case the Swedish state appeared in two guises: firstly as a Member State represented by the Swedish Government which in turn was represented by the Ministry for Foreign Affairs; secondly, through the Chancellor of Justice, whose responsibilities include safeguarding the economic interests of the Swedish state. The Andersson case is in no way unique in this respect. As a consequence of the structure and organisation of the Swedish civil service the Swedish state has appeared in a double guise on a number of occasions. The Government has thus several times been acting in parallel with Riksskatteverket and the Consumer Ombudsman.

In the *Kuusijärvi* case[22], which originated in the Administrative Court of Appeal in Sundsvall, what must seem to many non-Swedes to be an extraordinary and calamitous situation arose when the state in the form of the Government and the state in the form of Riksskatteverket had different opinions on an issue of fact. The state could be said to have been in conflict with itself in that case.

On the Government's part we seem to notice a certain scepticism and irritation on the part of the ECJ over the fact that we have not always adopted a single point of view, which would naturally have made it easier for the ECJ to deal with Swedish cases. I cannot resist repeating how the *Judge Rapporteur* in the Andersson case, Leif Sevon, phrased a question during the hearing. In his typically incisive manner Judge Sevon said "I don't know whom I should address this question to, the Swedish Government or the Swedish Government's agent!" By the Swedish Government's agent he meant the Chancellor of Justice. For several people the humour of the situation lay in the fact that the Chancellor sat on the same bench and wore the same robe as the Government representative. As my Swedish listeners know, there is no precedent for such robes in Swedish tradition. The robes now used are borrowed from the EFTA Court, which had a number of sets of robes made when the Court made its debut in 1994. There are those who say that Sweden – and perhaps Finland too – was too eager to give in to pressure and relinquish its own identity by dressing its agents in alien robes. Sweden could have said that Sweden does not have official dress of any kind and that it agents must therefore wear civilian clothes when appearing in the Court. Personally, I believe that the ECJ would have accepted

[22] Case C-275/96. See *Abrahamsson*, SvJT 1998, p. 683.

such a stand, just as it has – albeit reluctantly – accepted the Swedish administrative structure that makes it possible for the Swedish state to appear in several guises.

On this final point I expect some of you will disagree, and I welcome, now or later, discussion on this and other matters concerning cases in which the Swedish Government has acted.