

**Breaking Up Is Never Easy – How Krister
Hanner Forced the Hand of the Swedish
State to Abandon its Pharmacy Monopoly**

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Introduction – the Swedish pharmacy monopoly

- Since 1971 retail sale of medicinal products, both prescription and OTC, had been reserved exclusively to state-owned company, Apoteket AB
- Sweden, along with Cuba and North Korea, was one of only three countries with state-owned pharmacy monopolies in the world
- All other OECD countries had privately owned pharmacies where the business is regulated by the state as regards e.g. establishment, security, pricing and product range

Krister Hanner provided test case to challenge Swedish monopoly

- Swedish legislation on retail sale of pharmaceuticals: no sales of prescription and OTC products outside the monopoly
- In 2001 Mr. Hanner sold small quantity of anti-smoking product Nicorette in his store
 - Ad was posted in biggest daily paper, announcing where and when “the crime” would be committed
- Prosecuted for violation of Swedish “Trade in Medicinal Products Act” – a criminal act carrying a sentence of up to two years imprisonment
- Mr. Hanner contended Swedish rules contrary to EC law, in particular Articles 28 and 31 EC
- Stockholm District Court requested preliminary ruling from European Court of Justice (ECJ)

Arguments of Hanner before the ECJ – Part I

- **Only Swedish retail monopoly for sale of OTC products explicitly challenged by Hanner**
- **No public policy grounds to uphold monopoly**
 - No valid state interest in deterring the arrival of new products or reducing customer access to sales points
 - Cannot matter whether anti-smoking products, aspirins or allergy medicines are sold by an employee of a state-owned enterprise or by an employee of a privately-owned pharmacy, or by an employee of a shop offering a range of products related to health and lifestyle
- **Public health better served by more sales outlets and the improved accessibility these would bring to consumers**

Arguments of Hanner before the ECJ – Part II

- At supplier level, Swedish system hinders access to the market and leads to discrimination in favour of well-known (usually Swedish) and against unfamiliar (foreign) products
- Not necessary on public health grounds to require suppliers of new kinds of creams, pills or capsules for minor ailments to deal with a monopoly at retail level which has limited economic interest in expanding the range of its offerings
- Hanner contrasted restrictions on selling Nicorette with lack of restrictions on selling cigarettes

ECJ judgment

- “The way in which Apoteket is organised and operates, and more particularly its system of selecting medicinal preparations, is liable to place trade in medicinal preparations from other Member States at a disadvantage as compared with trade in Swedish medicinal preparations. Thus, that State monopoly is not arranged in such a way as to exclude any discrimination against medicinal preparations from other Member States. It thus infringes Article 31(1) EC”

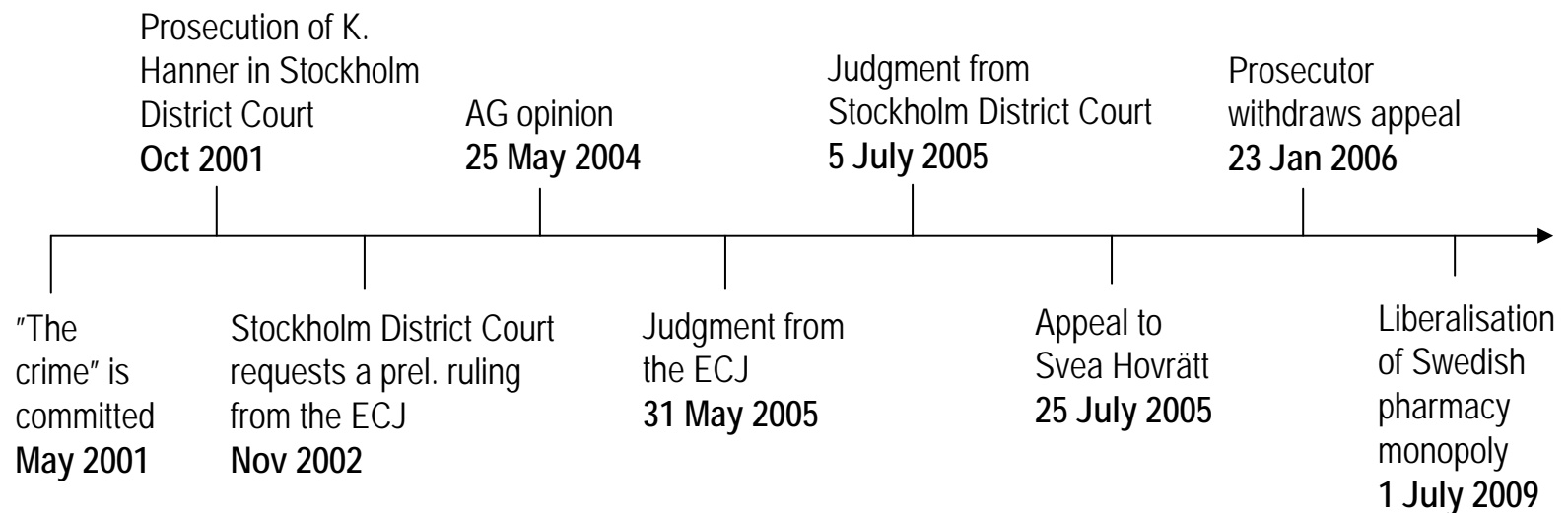
The effect of a preliminary ruling

- **The ECJ has wide discretion in answering the questions referred**
 - It only answered one of five questions
 - It did not examine all elements of the monopoly
 - Did not limit its ruling to OTC products
- **The ruling is binding on all national courts**
- **Supremacy of EC law**
 - The Stockholm District Court ruled in accordance with ECJ judgment
 - As the prosecutor withdrew its appeal, the acquittal pronounced by the Stockholm District Court was final
- **The monopoly was declared contrary to EC law**

Aftermath of the Hanner case - a consensual approach

- OTC products were not sold everywhere straight after the *Hanner* judgment
- Change emerged gradually through the Swedish Parliament
- Since 1 March 2008 smoking cessation products can be sold outside of the pharmacy monopoly
- As of 1 July 2009 a new law enters into force, effectively abolishing the monopoly position of the state-owned Apoteket
 - Pharmacy business may be operated provided that a license is obtained from the Swedish Medical Products Agency (*Sw: Läkemiddelsverket*)
- Swedish Parliament currently considering a proposal by which sales of certain OTC products may be conducted from sales outlets other than pharmacies
 - Law expected to enter into force on 1 November 2009
 - May require “shop within a shop”
- Government plans to sell off a number of the Apoteket stores

Timeline in the Hanner case



Contrast to *Hanner* – The UK Sunday Trading Cases

- The Shops Act 1950 generally prohibited shops from being open on Sundays
- Instead of searching for a consensual approach, traders defied the law, relying on EC law arguments to say The Shops Act 1950 was illegal
 - They had initial success in the ECJ, which issued helpful rulings
- As a result of the ECJ rulings and changing public opinion, The Shops Act 1950 was repealed and Sunday trading was liberalised in the UK
 - Interestingly, the ECJ later ruled in *Keck* that such trading rules may not fall foul of EC law after all

Conclusion

- The right test case, supported by careful planning and preparation, can bring a longstanding monopoly to an end
 - Apoteket declared illegal – for both prescription and OTC – as a result of Hanner being prosecuted for selling a few packs of Nicorette
- Similar approach could be applied to restrictions less severe than a monopoly
 - For example, would it be justified that Apoteket could sell OTC on its regular shelves whereas a general retailer may need a shop within a shop?
- Such changes are not limited to Sweden – what may come next other countries?

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