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Lifestyle Risks

This section discusses the regulation of “lifestyle risks”, a term that can apply to both substances and behaviours. Lifestyle risks take place along the line of “abstinence – consumption – abuse – addiction”. This can concern substances such as food, alcohol or drugs, as well as behaviours such as gambling or sports. The section also addresses the question of the appropriate point of equilibrium between free choice and state intervention (regulation), as well as the question of when risks can be considered to be acceptable or tolerable. In line with the interdisciplinary scope of the journal, the section aims at updating readers on both the regulatory and the scientific developments in the field. It analyses legislative initiatives and judicial decisions and at the same time it provides insight into recent empirical studies on lifestyle risks.

Distilling Prospects: Reflections on the Proportionality of Minimum Unit Pricing under EU Law

*Oliver Bartlett**

I. Introduction

On 3 May 2013 the Scottish Court of Session ruled that minimum unit pricing of alcoholic beverages did not breach EU law on the free movement of goods.

It held that the Alcohol (Minimum Pricing)(Scotland) Act 2012,¹ passed in June 2012 but not implemented pending the completion of legal action, did constitute a measure having equivalent effect to a quantitative restriction under Article 34 TFEU, but that such a restriction of trade was justified as proportionate under Article 36 TFEU as it was the most effective way of achieving the legitimate aim of reducing the consumption levels of harmful and hazardous drinkers.

While the Scottish Government hailed this ruling as a victory, the Scotch Whisky Association, who led the legal challenge, have on 6 February 2014 appealed this decision to the Inner House of the Court of Session, and will ask for a reconsideration of the choice

of the Outer House not to refer the matter to the Court of Justice of the European Union (CJEU).

This report seeks to support the case for minimum unit pricing. It will first provide a brief summary of the legislation and the supporting evidence. Second, it will analyse the arguments relating specifically to the proportionality of minimum unit pricing under EU free movement of goods law in order to show that the Scottish court’s decision was correct. Finally it will consider the implications that success for minimum unit pricing might have for alcohol control policy and why the industry vehemently opposes it.

II. The Disputed Legislation and Supporting Evidence

The dispute over the legality of minimum unit pricing concerns the Alcohol (Minimum Pricing)(Scotland) Act 2012. Section 1(2) of the Act amends schedule 3 of the Licencing (Scotland) Act 2005 to include the provision that ‘alcohol must not be sold on the premises at a price below its minimum price’. The formula to be used to calculate minimum price is set as the minimum price per unit x strength of the alcohol x volume of alcohol in litres x 100. The minimum price per unit is provisionally set at 50 pence by Section 2 of the Draft Alcohol (Minimum Price per Unit)(Scotland) Order 2013.² Thus, the minimum

* Durham Law School. The author is grateful for the comments of the anonymous reviewer on the initial draft of this report, and for the assistance of Mr James Nelson and Mr Guy Barrett with editing the final draft.

1 Available online at <http://www.legislation.gov.uk/asp/2012/4/pdfs/asp_20120004_en.pdf> (last accessed on 9 January 2014).

2 The text of the Draft Order is available online at: <http://ec.europa.eu/enterprise/tris/pisa/app/search/index.cfm?fuseaction=pisa_notif_overview&sNlang=EN&iyear=2012&inum=394&lang=EN&iBack=2> (last accessed on 9 January 2014).

price for a bottle of wine with an alcoholic strength of 12.5% abv, would be $0.50 \times 0.125 \times 0.75 \times 100 = \text{£}4.69$, and for a pint of cider at 4.5% abv would be $0.50 \times 0.045 \times 0.568 \times 100 = \text{£}1.28$.

Evidence suggests minimum pricing could be an effective tool in combatting alcohol related harm. Since higher levels of alcohol consumption lead to higher levels of alcohol related harm, both in terms of average volumes and certain specific patterns of drinking,³ seeking to reduce consumption through imposing higher prices on cheaper alcohol would seem to be one way of consequently reducing harm. Recent data analysed by Sheffield University in 2012 supports this idea, indicating that setting a minimum price for alcohol of 50p would result in a 5.7% reduction in general consumption.⁴ Such drops come specifically from reducing 'the consumption of heavier drinkers who prefer these beverages'.⁵ Research suggests that such a sub-population target is legitimate and can result in meaningful harm reductions. Black et al have surveyed patients admitted to Edinburgh hospitals due to alcohol related harm and found that 'this patient population purchases alcohol units on average at £0.29 less per unit than that paid on average by the general Scottish population',⁶ that 'of these patients, those who pay the lowest prices per unit tend to consume the greatest number of units'⁷ and finally that 'this patient population purchase 83% of their alcohol at or below £0.50/unit'.⁸ Further research supports the predicted effectiveness of minimum pricing policies targeting a reduction in the consumption and thus harm of heavy drinkers. A study examining the relationship between minimum prices and alcohol-attributable deaths in British Columbia between 2002 and 2009 suggests that there is 'credible evidence of (i) large and significant reductions in wholly [alcohol-attributable] deaths associated with co-occurring minimum price increases and (ii) significant lagged effects for chronic [alcohol-attributable] deaths'.⁹

Such studies cannot predict all eventualities, and Black's study recognise that it does not represent all harmful drinkers in Scotland, and could not cover all those patients admitted to hospital.¹⁰ One must also consider that the effectiveness of minimum pricing may be influenced by the reaction of the industry, who will seek to maintain consumption levels through new marketing strategies that will not materialise until the policy comes into force. Further evidence is always beneficial. To this end the Scottish

policy should be monitored, so that it can be observed whether results on the ground reflect the modelling.

Taking these caveats into account, we still might conclude that the evidence so far accrued indicates that minimum pricing has great potential to be an effective policy tool to reduce alcohol related harm. The following section examines whether minimum unit pricing is justified as a proportionate restriction of trade under the conditions set out by EU free movement of goods law.

III. Proportionality of Minimum Unit Pricing

1. The Decision of the Court of Session

The SWA's petition for judicial review of the Scottish Act¹¹ argued that the conditions for recourse to Article 36, which permits restrictions on trade caught by Article 34 to stand provided they are justified as proportionate according to certain public interest grounds, could not be satisfied. Minimum pricing was accused of being disproportionate on grounds that the legislative aims were confused, the measures did not target harmful and heavy drinkers, and less restrictive measures such as taxation could be used.¹²

3 See Jürgen Rehm et al, "The relationship of average volume of alcohol consumption and patterns of drinking to burden of disease – an overview" 98 *Addiction* (2003), pp. 1177 *et seqq.*, at p. 1209; Martin McKee and Annie Britton, "The positive relationship between alcohol and heart disease in eastern Europe: potential physiological mechanisms" 91(8) *J R Soc Med* (1998), pp. 401 *et seqq.*, at p. 402.

4 Petra Meier et al, *Model-based appraisal of alcohol minimum pricing and off-licenced trade discount bans in Scotland using the Sheffield alcohol policy model (v2): - second update based on newly available data* (University of Sheffield, 2012) available on the internet at <http://www.shef.ac.uk/polopoly_fs/1.1565031/file/scotlandjan.pdf>, at p. 5.

5 *Ibid.*, at p. 1067.

6 Heather Black et al, "The price of a drink: levels of consumption an price paid per unit of alcohol by Edinburgh's ill drinkers with a comparison to wider alcohol sales in Scotland" 106 *Addiction* (2010), pp. 729 *et seqq.*, at p. 733.

7 *ibid.*, at p. 734.

8 *ibid.*

9 Jinhui Zhao et al, "The relationship between minimum alcohol prices outlet densities and alcohol-attributable deaths in British Columbia, 2002-09" 108 *Addiction* (2013), pp. 1059 *et seqq.*, at p. 1066.

10 *ibid.*

11 *The Scotch Whisky Association & Ors* [2013] CSOH 70.

12 *ibid.*, at para 33.

It was furthermore asserted that it would be wrong to allow the Scottish Government any margin of discretion.¹³

After agreeing that the measure was a restriction on trade under Article 34, Lord Doherty observed that the ‘crucial question is whether there is objective justification for the measures.’¹⁴ To be proportionate for the purposes of Article 36, a measure must be appropriate and necessary to achieve the legitimate aims claimed.¹⁵ Since minimum pricing was aimed at reducing alcohol misuse and overconsumption, focusing on harmful and heavy drinkers rather than eradicating consumption,¹⁶ it was considered that the policy pursued legitimate aims under Article 36.

On appropriateness, Lord Doherty considered the evidence to show that harmful drinkers across the income spectrum tend to buy cheap alcohol, and that low income harmful drinkers consume far more per head and are a source of much greater health harm. He therefore concluded there was objective evidence that the measures were appropriate to achieve their aims.¹⁷

On necessity, the critical issue for Lord Doherty was ‘the comparative effectiveness of minimum pricing and the alternative measures.’¹⁸ He supported arguments that minimum pricing would be more effective than increasing excise duties on alcoholic beverages because, amongst other considerations, it would not be subject to the same constraints as excise duties are under EU excise duty directives and

would apply exclusively to lower priced alcohol.¹⁹ He opined that ‘[a] system which results in higher prices for higher strength alcohol appears to be more consistent with the legitimate aims’,²⁰ namely reducing the number of units consumed by harmful and heavy drinkers.²¹ In light of the fact that national authorities are indeed afforded a margin of discretion when determining to what extent they wish to protect public health,²² Lord Doherty concluded that there was objective justification that minimum pricing would be more effective than the alternatives in achieving the aims pursued.²³

2. Did the Court of Session Get It Right – Would the CJEU Agree on Proportionality and Does the Case Need Referring?

The Court of Session was correct to conclude that minimum unit pricing fulfils the conditions of Article 36 relating to proportionality. In its Detailed Opinion²⁴ given in response to notification of the Scottish policy, the Commission contended that minimum unit pricing appeared disproportionate because ‘if the goal is, for health policy reasons, to reduce alcohol consumption via increasing the prices of alcoholic beverages that goal can be achieved by raising alcohol taxation across the board.’²⁵ However this misinterprets the aims since the more important goal, as the Scottish Government stated in the case, was ‘to target harmful and hazardous drinkers and reduce their consumption’,²⁶ as well as lowering consumption generally. Since the proportionality principle requires that ‘another *equally* effective, but significantly less restrictive measure, could not have been chosen’²⁷ to achieve the aims, not just that a less restrictive alternative exists, the proposed alternative measures must be as effective as minimum pricing at reducing consumption among harmful and heavy drinkers as well as amongst the population generally, irrespective of whether they are less restrictive.

Contrary to the Commission’s claims, evidence suggests that taxation would not effectively achieve the primary aim sought. If the primary aim is to reduce the consumption levels of harmful and hazardous drinkers, and evidence such as that cited above suggests that such drinkers buy cheaper alcohol and consume more of it, then a measure increas-

13 *ibid*, at para 34.

14 *ibid*, at para 48.

15 See Jules Stuyck, “Case C-262/02, *Commission v France* and Case C-429/02, *Bacardi France SAS and Television française 1 SA et al.*, judgments of the Grand Chamber of the Court of Justice of 13 July 2004” 42 *CMLR* (2005), pp. 783 *et seqq.*

16 *ibid*, at para 54.

17 *ibid*, at paras 58-60.

18 *ibid*, at paras 63-66.

19 *ibid*, at paras 68-69.

20 *ibid*, at para 71.

21 *ibid*, at para 53.

22 *ibid*, at para 79.

23 *ibid*, at para 81.

24 Commission Communication SG(2012) D/52513.

25 *ibid*, at p. 6.

26 *The Scotch Whisky Association & Ors*, *supra* note 11, at para 36.

27 Stuyck, “Judgments of the Grand Chamber of the Court of Justice of 13 July 2004”, *supra* note 15, at p. 795 (emphasis added).

ing the price of cheap alcohol only would appear to be more effective than a measure which cannot increase the price of cheaper alcohol at a differential rate to more expensive alcohol.²⁸ The Commission raised *Commission v Greece*,²⁹ in which the Court observed that the objective of protecting public health was adequately attained by increasing tobacco prices, but this is improper authority in this context. Any level of tobacco consumption is harmful, therefore increasing prices across the board to cut consumption would be appropriate. However there are varying levels of alcohol consumption that cause varying levels of harm, thus addressing the most serious levels requires a tailored intervention. The Commission states that increasing tax ‘would impact all products equally’,³⁰ however this is not the point of the intervention. The Scottish government have chosen to target alcohol drunk by the heaviest drinkers, protecting public health to that extent while balancing the interests of moderate drinkers, a choice that is within the discretion of national governments to make. Consequently, if minimum pricing is on available evidence the most effective way of achieving the specific aim sought by the Scottish Government, it must be necessary to achieve the aim and proportionate.

The CJEU would be unlikely to overturn the Court of Session’s ruling, should the case be referred. The Court has a history of allowing Member States a margin of discretion over the extent to which they wish to protect public health and the way this is achieved. In *Aragonesa*, involving a Catalan ban on the advertising of alcohol above a certain strength in public areas, the Court held that where no harmonised rules existed in a particular area ‘it is for the Member States to decide on the degree of protection which they wish to afford to public health and on the way on which that protection is to be achieved’,³¹ provided this is within the bounds of the principle of proportionality, a decision which was followed in *Commission v France*.³² Furthermore, *Commission v Portugal* held that the effective protection of health ‘requires a wide range of preventative measures ... with the result that the Member States have in principle complete discretion to determine how strict the checks to be carried out are to be.’³³ Member States therefore have the right to decide what to prioritise and how to pursue this where there is no secondary EU law to guide them, providing trade restrictive measures are proportionate. The Scottish Government’s choice to adopt minimum pricing measures in pursuit of ad-

ressing the health problems posed by the heaviest drinkers falls within this remit, and the Court of Session was correct in recognising this.

The CJEU has also consistently held that the evaluation of the factual situation for the purpose of assessing proportionality is for the national court to make. In *Gourmet* the Court infamously held that the decision on proportionality, ‘calls for an analysis of the circumstances of law and fact which characterise the situation in the Member States concerned, which the national court is in a better position than the Court of Justice to carry out.’³⁴ Other cases echo this approach. In *Greenham* the Court declared that the national court ‘alone has jurisdiction to determine and evaluate the facts in the proceedings before it’.³⁵ In *Mickelsson and Roos*, the Court found that it was for the national court to ascertain whether certain conditions necessary for the fulfilment of the proportionality test were made out.³⁶ Evidently, if the Court of Session has evaluated the evidence on minimum unit pricing and is satisfied that it is the most effective measure to achieve the aims sought, then due to the consistency of the case law it is extremely likely that the CJEU will defer to that judgment should the case be referred. Consequently the Court of Session’s decision not to refer the case should be considered sound.

The next section will consider the wider implications of this outcome, particularly what success for Scotland’s minimum pricing policy could mean for the future of alcohol control policy, and why the alcohol industry endeavours to block minimum pricing legislation.

28 See comments in Liam Donaldson and Paul Rutter, “Commentary on Black *et al.* (2011): Minimum pricing of alcohol – a solution whose time has come” 106 *Addiction* (2011), pp. 737 *et seqq.*, at p. 737.

29 Case C-216/98 *Commission v Greece* [2000] ECR I-8921.

30 Commission Communication, *supra* note 24, at p. 7.

31 Joined Cases C-1/90 and C176/90 *Aragonesa* [1991] ECR I-4179, at para. 16.

32 Cases C-262/02 *Commission v France* [2004] ECR I-06569, at para. 33.

33 Case C-265/06 *Commission v Portugal* [2008] ECR I-02245, at para. 58.

34 Case C-405/98 *Konsumentombudsmannen v Gourmet International Products* [2001] ECR I-01795, at para. 33.

35 Case C-95/01 *Greenham and Abel* [2004] ECR I-01352, at para. 33.

36 Case C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* [2009] ECR I-04273, at para. 40.

IV. Wider Regulatory Issues Raised by Minimum Unit Pricing

An initial consequence of success for minimum pricing in Scotland is that further states may decide to implement the policy themselves. The potential for this is illustrated by the fact that following Scotland's notification of the policy to the Commission, several Member States lodged detailed opinions with the Commission, many of which were prompted by complaints of the national alcohol industries, which have attempted to frame the problem during this debate so as to distract attention from the true effectiveness of the policy.³⁷ Five detailed opinions were submitted, with five further states offering comments, levels of interest that would only arise if there were serious concern that the spread of minimum pricing is a genuine possibility. Thus for example, it was reported that Bulgarian wine producers encouraged their Government to raise objections to the policy,³⁸ hence the Bulgarian opinion obligingly contended that the measures 'will create many obstacles to trade for Bulgarian wine and spirit producers'³⁹ and that '[t]his

would mean a contraction of sales of Bulgarian wines'.⁴⁰ The French opinion summarises the concerns of the industry in other Member States that 'if this regulation is adopted by Scotland, third countries who import wine and spirits originating in the European Union may feel authorised to take similar measures'.⁴¹ The industry is doing all they can to avoid minimum unit pricing catching on, however judging from the interest generated by the present legal challenge, turning the European spotlight on it might be a double edged sword if the policy works as expected. It is therefore important to reiterate that the policy be monitored to determine whether such expectations are being met.

The graver concern for industry though is that the success of a hard legislative measure could demonstrate that alcohol production and sale requires stricter legislative measures, even at the expense of currently favoured self-regulation. The industry does not want '[their] own country to be regulating the alcohol industry and giving the impression that the industry can't be trusted to regulate itself'.⁴² The industry have lobbied extremely hard to convince governments and regulators around the world that self-regulation works and that it works more effectively than legislation, and have worked hard to portray themselves as partners in the fight against alcohol abuse.⁴³ It is unsurprising that research has found 'a general reticence expressed by industry respondents towards any form of government regulation and a fear that support for minimum pricing may open the door to other, less desirable forms of regulation in the longer term'.⁴⁴ The industry is, 'terrified of contagion, as Scotland shows Europe what is possible'⁴⁵ in terms of designing, passing and maintaining a coherent and effective legislative policy that will reduce the consumption of alcohol. If minimum pricing is embraced throughout Europe and does reduce alcohol related mortality, questions will have to be asked as to whether faith in self-regulation, which has been shown to be ineffective at controlling many aspects of alcohol production and marketing,⁴⁶ can be maintained in the face of demonstrably effective legislative policies.

V. Conclusion

The conclusion to the minimum pricing saga will certainly be watched closely by stakeholders. If the fresh

37 See Benjamin Hawkins and Chris Holden, "Framing the alcohol policy debate: industry actors and the regulation of the UK beverage alcohol market" 7(1) *Critical Policy Studies* (2013), pp. 53 *et seqq.*

38 Nathalie Thomas, "Bulgaria wants to block UK minimum alcohol pricing" *The Telegraph*, 14 September 2012, available on the internet at <<http://www.telegraph.co.uk/finance/newsbysector/retailandconsumer/9544535/Bulgaria-wants-to-block-UK-minimum-alcohol-pricing.html>> (last accessed on 9 January 2014).

39 Text of opinion released to BBC Scotland, available on the internet at <<http://www.bbc.co.uk/news/uk-scotland-scotland-politics-22184541>> (last accessed on 9 January 2014).

40 *Ibid.*

41 Text of opinion released to BBC Scotland, available on the internet at <<http://www.bbc.co.uk/news/uk-scotland-scotland-politics-22188373>> (last accessed on 9 January 2014).

42 Civil Servant, November 2010, cited in "Chris Holden and Benjamin Hawkins, "Whisky gloss: The alcohol industry, devolution and policy communities in Scotland" 28(3) *Public Policy and Administration* (2013), pp. 253 *et seqq.*, at p. 262.

43 On industry efforts to promote self-regulation and partnership, see Oliver Bartlett, "Under the influence? The Alcohol Industry's Involvement in the Implementation of Advertising Bans" 4(3) *European Journal of Risk Regulation* (2013), pp. 383 *et seqq.*

44 Hawkins and Holden, "Framing the alcohol policy debate", *supra* note 37, at p. 59.

45 Martin McKee, "Minimum unit pricing for alcohol – the case is overwhelming" 22(4) *European Journal of Public Health* (2012), pp. 451 *et seqq.*, at p. 451.

46 See Oliver Bartlett and Amandine Garde, "Time to Seize the (Red) Bull by the Horns: The European Union's Failure to Protect Children from Alcohol and Unhealthy Food Marketing" 38(4) *European Law Review* (2013) pp. 498 *et seqq.*, at pp. 508-510.

appeal of the SWA does eventually find its way to the CJEU, then a verdict cannot realistically be expected until the latter half of this decade.

This report has attempted to contribute to the speculation that will doubtless accumulate in that time by suggesting that Scotland's minimum pricing policy was rightfully upheld by the Court of Session as a proportionate, evidence-based response, and that any reference to the CJEU should confirm this. It reflected on reasons for the industry to dis-

like the policy, including the potential for minimum pricing to prompt more extensive legislative controls.

Minimum unit pricing and other related legislative policies hold the potential to make a tangible difference to the fight against alcohol related mortality. It is time that hard action on public health took centre stage, and there is every chance that a success for minimum unit pricing in Scotland could provide the necessary impetus.