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Case Notes

Minimum Unit Pricing for Alcohol May Not be a Proportionate Public Health Intervention

*Oliver Bartlett**

Case C-333/14 Scotch Whisky Association and Others v Lord Advocate and Advocate General for Scotland [2015] ECLI:EU:C:2015:845

I. Background to the Case

Setting a minimum unit price for the sale of alcoholic beverages has been on the agenda of the Scottish government for many years. As far back as 1999 the then newly formed Scottish Government decided to review data on the use of alcohol¹ that revealed trends in Scottish alcohol consumption such as the fact that in the two decades following 1994 alcohol sales went from being split equally between the on-trade and off-trade to the off-trade comprising around 70 per cent of sales.² Further studies reveal that the affordability of alcohol throughout the whole United Kingdom increased steadily between 1987 and 2007, with duty increases frequently short of inflation, and with supermarkets continuing to use alcohol as a loss-leader.³ The result has been an increase in the affordability of wines and beers by 129% and 153% respectively.⁴

Another study focussing on alcohol related admissions to a hospital in Edinburgh 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',⁵ and that 'of these patients, those who pay the lowest prices per unit tend to consume the greatest number of units'.⁶ A Sheffield University Study that is consistently referred to by the Scottish Government furthermore found that setting a minimum unit price for alcohol of £0.50 may lead to a 5.7% reduction in population alcohol consumption,⁷ mostly attributable to reductions in 'the consumption of heavier drinkers'.⁸ An evidence base comprised of empirical findings such as these has been the driving force behind efforts to reduce the harm caused in Scotland by the consumption of alcoholic beverages that are low in price but high in alcoholic strength (LPHS alcohol), which are favoured by the heaviest and most hazardous drinkers.

The Scottish Parliament rejected minimum pricing in 2010,⁹ however after the UK general election returned a majority Scottish National Party government in Scotland, plans for minimum unit pricing were reintroduced into the Scottish Parliament,¹⁰ and

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1 Peter Rice, 'Why do health professions want Minimum Unit Price in Scotland?' (*Scotland the Brave! Alcohol Policy in Scotland*, 5th September 2014, Brussels), available on the Internet at <<http://www.epha.org/IMG/pdf/mup-event-summary.pdf>> (last accessed on 16 February 2016), at p. 2.

2 *ibid*, at p. 2.

3 Petra Meier, 'Polarized drinking patterns and alcohol deregulation' 27 (5) *Nordic Studies on Alcohol and Drugs* (2010), pp. 383 *et seq.*, at p. 395.

4 *ibid*, at p. 396.

5 Heather Black et al, 'The price of a drink: levels of consumption and 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 seq.*, at p. 733.

6 *ibid*, at p. 734.

7 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/1.156503!/file/scotlandjan.pdf> at p. 5.

8 *ibid*.

9 BBC News, 'MSPs pass Alcohol Bill without minimum drink pricing' (*BBC News*, 10 November 2010) available on the internet at <<http://www.bbc.co.uk/news/mobile/uk-scotland-11719594>> (last accessed 16 February 2016)

10 BBC News, 'Scottish government reintroduces alcohol pricing bill' (*BBC News*, 1 November 2011) available on the internet at <<http://www.bbc.co.uk/news/uk-scotland-scotland-politics-15525950>> (last accessed 16 February 2016)

were successfully voted through on 24 May 2012 in the form of the Alcohol (Minimum Pricing)(Scotland) Act 2012 (the Act).

Section 1(2) of the Act amends schedule 3 of the Licensing (Scotland) Act 2005 to ensure that in all licensed premises, ‘alcohol must not be sold on the premises at a price below its minimum price’. The Act stipulates that the formula to be used in calculating the minimum unit price is the minimum price per unit given in pounds, multiplied by the strength of the alcohol given in ABV percentage, multiplied by the volume of alcohol given in litres, multiplied by 100 – or $MUP \times S \times V \times 100$. Section 2 of the Draft Alcohol (Minimum Price per Unit)(Scotland) Order has provisionally set the minimum price per unit as £0.50. By way of example, under the Act a bottle of wine of 12% ABV would be $0.50 \times 0.12 \times 0.75 \times 100 = £4.50$.

When the Act was introduced, it attracted substantial criticism from industry operators and several Member States,¹¹ as well as the European Commission, who issued a Detailed Opinion which argued that the Scottish measure unlawfully restricted trade within the internal market.¹² Opposition culminated in a consortium of alcohol producers, led by the Scotch Whisky Association, petitioning for judicial review of the Act. The grounds of petition relating to EU law were incompatibility with Article 34 TFEU, inability for justification under Article 36 TFEU, and incompatibility with the common organisation of the

market in wine. This challenge was initially dismissed by Lord Doherty in the Outer House of the Court of Session, where his Lordship held that there was ‘objective justification for the conclusion that the alternative measures would be likely to be less effective in achieving the legitimate aims which the minimum pricing measures pursue’.¹³ Upon appeal to the Inner House a preliminary reference was made to the Court of Justice of the European Union (the Court), comprised of six questions on the application of EU law.¹⁴ The next section of this piece analyses the Court’s response.

II. Judgement of the Court

Following an Advocate General’s Opinion that was generally cautious on the legality of minimum unit pricing for alcohol (MUP),¹⁵ the Court delivered its judgement on 23 December 2015. It can be summarised as a disappointment for public health advocates but not necessarily the end of MUP in Europe. The Court noted that the answer to all questions posed, including the single question on the common organisation of the market in wine, ‘specifically concerns the analysis of the proportionality of [the] legislation’,¹⁶ and thus an analysis of proportionality constituted the bulk of the judgement.

The Court began by applying the classic case law on Articles 34 (prohibition of quantitative restrictions on imports) and 36 TFEU (circumstances in which derogation from Article 34 is justified). Since MUP erases competitive advantages arising from lower production costs it hinders trade within the meaning of *Dassonville*¹⁷ and is therefore caught by Article 34.¹⁸ In line with case law including *ANNETT*,¹⁹ MUP may be justified under Article 36 on grounds of protection of health and life of humans, but only if appropriate and necessary for achieving the objective pursued.²⁰ Finally, in line with case law including *Rosengren*,²¹ Member States can decide the degree of public health protection they wish to pursue, including whether to implement measures such as MUP, as long as they remain within the limits of the Treaties.²²

The Court then turned its attention to the proportionality of MUP. The Court first noted that ‘it is apparent from the Explanatory Notes that accompanied the draft of the 2012 Act ... and from a recent study entitled “Business and Regulatory Impact Assess-

11 For further detail on the objections raised, see: Oliver Bartlett, ‘Distilling prospects: reflections of the proportionality of minimum unit pricing under EU law’ 1 European Journal of Risk Regulation [2014], pp. 73 *et seqq.*

12 Commission Communication SG (2012) D/52513.

13 *The Scotch Whisky Association & Ors* [2013] CSOH 70, para 81.

14 See: Aidan Robertson, ‘Minimum unit pricing for alcohol in the Court of Justice’ 4 European Journal of Risk Regulation [2014], pp. 459 *et seqq.*

15 Opinion of Advocate General Bot, delivered on 3 September 2015, in Case C-333/14 *The Scotch Whisky Association and Others* [2015] ECLI:EU:C:2015:527.

16 Case C-333/14 *The Scotch Whisky Association and Others* [2015] ECLI:EU:C:2015:845, para 28

17 Case C-8/74 *Procureur du Roi v Dassonville* [1974] ECLI:EU:C:1974:82

18 note 16, at paras 31-32

19 Case C-456/10 *ANNETT* [2012] ECLI:EU:C:2012:241.

20 note 13, at para 33

21 Case C-2170/04 *Rosengren and Others v Rikssåklagaren* [2007] ECLI:EU:C:2007:313

22 note 16, at para 35

ment”, that that legislation pursues a twofold objective,²³ namely of reducing harmful and hazardous consumption specifically and population consumption generally – a twofold objective that the Lord Advocate confirmed in the hearing.²⁴ The framing of the Act’s objectives was crucial. The Scottish Government allowed the Court to misinterpret the targeting of the Act and assume that reducing consumption specifically and generally were equal objectives, when in reality MUP targets hazardous and harmful drinkers while incidentally reducing population consumption.

On the question of appropriateness, the Court held that it was not unreasonable to consider that MUP, ‘the very specific aim of which is to increase the price of cheap alcoholic drinks, is capable of reducing the consumption of alcohol, in general and the hazardous or harmful consumption of alcohol, in particular.’²⁵ Thus, the appropriateness of MUP in achieving both general and specific objectives of public health protection was not in doubt for the Court.

On the question of necessity, the Court started by pointing out that tax, a measure that is less trade restrictive than MUP, is an important tool for discouraging alcohol consumption, and that raising the price of alcoholic beverages to a high level ‘can adequately be pursued by their increased taxation, since increases in excise duties must sooner or later be reflected in increased retail selling prices, without impinging on the free formation of prices.’²⁶ This is questionable reasoning. The Court cannot know with certainty that industries *will* pass on tax rises in full to the consumer,²⁷ and therefore that taxation will be effective as intended.

The Court continued to factor misunderstandings of public health practice into its proportionality analysis. The Court supported its reasoning on the general effectiveness of taxation with case law on tobacco taxation, but then held that:

‘the fact that the case law cited in the preceding paragraph concerns tobacco products does not mean that it is inapplicable to the main proceedings, which concern the trade in alcoholic drinks. In the context of national measures which have as their objective the protection of human life and health, and irrespective of the particular characteristics of each product, an increase in the prices of alcoholic drinks can be achieved, as was the case with respect to tobacco products by increased taxation.’²⁸

This reasoning is unsatisfactory from a public health viewpoint – the particular characteristics of products are crucial when determining the desirability of public health measures, including taxation. Tobacco-containing products always cause harm when consumed, and are relatively homogenous in terms of the purpose they fulfill for the consumer. Alcoholic beverages do not always cause harm, are an extremely heterogeneous product, and serve a variety of consumption desires. Raising the price of tobacco in order to discourage consumption is desirable in every circumstance. However this is not the case for alcohol, since even tax increases within certain categories of beverage cannot effectively discriminate between the variety of products and the ways in which they are consumed – some of which do not need to be discouraged. A large increase in tax of the kind envisaged by the Court would be liable to raise the price of beverages for which discouragement of consumption is not necessary, warranted or likely to occur, such as with respect to more expensive, non-mass market and bespoke products.

It is submitted that the Court was misguided in applying the case law on the public health effects of tobacco taxation to alcohol taxation without question. The Court’s subsequent implication that MUP is unnecessary for securing general and specific price rises on alcoholic beverages due to the availability of a less trade restrictive measure such as taxation was therefore a disappointing one, in view of the questionable effectiveness of a blunt measure such as taxation in securing specific objectives of reducing LPHS alcohol consumption. *FUßNOTE 300 NICHT GEFUNDEN* This is especially so in view of the Court’s later statement that governments are not under an obligation to ‘prove, positively, that no other conceivable measure could enable the legitimate objective pursued to be attained under the same conditions.’³⁰

23 note 16, at para 34

24 note 16, at para 34

25 note 16, at para 36.

26 note 16, at para 44

27 Jenny Chalmers et al, ‘Real or perceived impediments to minimum pricing of alcohol in Australia: public opinion, the industry and the law’ 24(6) *International Journal of Drug Policy* (2013), pp. 517 *et seqq.*

28 note 16, at para 45

30 note 16, at para 55

Mistaken or not in its conclusion that taxation is an equally effective public health tool whatever the product, the Court then proceeded to state that the fact that increased taxation affects harmful and moderate drinkers alike ‘does not appear, in the light of the twofold objective pursued by the national legislation at issue in the main proceedings ... to lead to the conclusion that such increased taxation is less effective than the measure chosen’.³¹ The additional benefits offered by taxation of contributing to general objectives ‘not only cannot constitute a reason to reject such a measure, but is in fact a factor to support that measure being preferred’.³² This led the Court to the inexorable conclusion that ‘Articles 34 TFEU and 36 TFEU must be interpreted as precluding ... the option of legislation ... which imposes an MPU ... and rejecting a measure ... that may be less restrictive of trade and competition’.³³ This conclusion feels distinctly unsatisfactory from a public health perspective.

However from a legal perspective this decision was somewhat inevitable. By telling the Court that there is a general, albeit secondary, objective pursued by the Act, the Scottish government led the Court to frame its analysis in terms of a twofold objective. The Court’s analyses in alcohol control cases have tended to be economically oriented,³⁴ and this case is no exception. If price rises constitute an effective public health tool in general, and taxation raises the price of drinks consumed by the specific and general target populations without being as restrictive of trade as MUP, and the stated objective of intervention is both specific and general, it was not surprising that the application of an economically oriented internal market analysis led to the conclusion that MUP is a potentially disproportionate restriction on trade when taxation is also available.

Despite this, there may yet be hope for the Scottish government. At the brink of an outright declaration that MUP is disproportionate, the Court stayed

true to its *Gourmet*³⁵ judgement and declared that ‘it is however for the referring court, which alone has available to it all the matters of fact and law pertaining to the circumstances of the main proceedings, to determine whether ... [taxation] is capable of protecting human life and health as effectively [as MUP] ... while being less restrictive of trade’.³⁶ The Court confirms that it is, in the end, the national court who must decide whether the summary of the law given by the Court is actually applicable to the Scottish circumstances specifically. This may throw a lifeline to the Scottish Government, who now have a second chance to present all of the evidence on MUP with maximum clarity, and to emphasise the targeting of the 2012 Act to the Court of Session – provided the Court of Session can be persuaded, of course.

III. Implications for Alcohol Control Policy

The judgement of the Court in *Scotch Whisky* is good and bad news for public health advocates. The bad news is that the judgment clearly demonstrates the CJEU’s lack of understanding of the comparative effectiveness of public health interventions, and its conviction that taxation should be preferred if price measures are desirable for public health protection. There was an air of ambivalence towards MUP in the Court’s analysis, the Court being clear that internal market principles would be breached if MUP is adopted in the face of equally effective and less trade-restrictive measures. The Court also demonstrated a willingness to prioritise the protection of economic freedoms over protection of public health in this case. There is nothing to suggest that the Court would change this economic approach when confronted with other ambitious public health strategies. From this judgement we can gather that either the Court is happy to pay little attention to the public health imperatives that interact with internal market imperatives in national decisions to adopt laws that might restrict trade – or that national governments are still not particularly competent at leveraging public health imperatives to argue for the proportionality of their laws.

Disheartening though the Court’s decision in *Scotch Whisky* may be at first, public health advocates might still take solace from the judgement. It is possible to compare this case to the infamous *To-*

31 note 16, at para 47

32 note 16, at para 47

33 note 16, at para 50

34 Ben Baumberg and Peter Anderson, ‘Health, alcohol and EU law: understanding the impact of European single market law on alcohol policies’ 19(4) *European Journal of Public Health* (2008), pp. 392 *et seqq.*

35 Case C-405/98 *Konsumentombudsmannen v Gourmet International Products* [2001] ECLI:EU:C:2001:135.

36 note 16, at para 49

*bacco Advertising I*³⁷ judgement, with respect to the mechanical reasoning employed. The Court essentially held in *Scotch Whisky* that if a twofold objective is pursued, MUP is a disproportionate response. The implication beneath the surface of the judgement is relatively clear – pursuit of a targeted objective *only* may result in MUP being proportionate. In similar fashion to *Tobacco Advertising I*, the Court did not particularly dispute the public health credentials of MUP, merely how it was mapped onto the stated objectives. Thus, it might be tentatively concluded that if another, more closely targeted MUP measure were to be brought before the Court, the

conclusion on its proportionality may be more favorable. This possibility is encouraging for other governments that are considering implementing a minimum unit price for alcohol – if they were to rigorously ensure that the targeting of their measure is clearly and specifically concerned with harmful and hazardous drinkers *only*, the *Scotch Whisky* judgement might actually build bridges for those governments, rather than burn them.

37 Case C-376/98 *Germany v Parliament and Council* [2000] ECLI:EU:C:2000:544