

# State Intervention in Pricing: An Intersection of EU Free Movement and Competition Law

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## Abstract

A number of EU Member States have chosen to use price control as a regulatory tool to alter the incentives for consumer or producer behaviour. This paper analyses the mechanisms through which EU law restricts a Member State's ability to directly regulate prices through the antitrust prohibitions, market organisation Regulations, and the free movement prohibitions. It shows that the protection of price competition is central to all form of regulation and sets out that that the protection of price competition has become influential as a policy goal across EU law and is given special status within the internal market.

## Introduction

In contemporary European economies the direct regulation of prices is not normally seen as being the role the State. Competitive markets are the preferred method of determining the market price for goods and services. Until recently there were very limited circumstances, such as liberalised utility markets, where direct price regulation was considered as an appropriate regulatory measure.<sup>1</sup> There have, however, been a number of recent attempts to impose direct price regulation within the EU, these have subsequently been challenged as being incompatible with EU law. In these situations the Member State has chosen to use price control as a regulatory tool to alter the incentives for consumer or producer behaviour. The State's concerns are not related to a lack of competition on the market, but rather the State is using pricing as a regulatory mechanism to promote some other goal; for example, road safety or the reduction in the consumption of a potentially harmful product.

This paper analyses the mechanisms through which EU law restricts a Member State's ability to directly regulate prices beyond specific authorisation. The restrictions on price regulation are interesting because they fall under three distinct types of EU regulatory control: the antitrust prohibitions in the TFEU,<sup>2</sup> the EU Regulations governing the organisation of

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<sup>1</sup> In such markets price regulation is seen as being a necessary step in the process of creating 'normalised' price competition on the market. For an explanation of this process see, George Yarrow, *Report on the impact of maintaining price regulation* (2008).

<sup>2</sup> Art.101 and 102 TFEU.

markets,<sup>3</sup> and the TFEU free movement provisions.<sup>4</sup> All three regulatory forms have their own rationales and perspectives, but I will show that the protection of price competition is central to all three. I explore why the competition rules cannot be directly utilised in relation to State activity, why price competition has differing importance in different trade rules, and how competition goals are now being more forcefully expressed in free movement cases. It is only by examining the developments in competition law and the trade rules that one can understand the recent developments in the free movement case law. The paper will set out that the protection of price competition has become influential as a policy goal across EU law and is given special status within the internal market beyond its natural home in competition law. While the goal of undistorted competition may have been removed from the EU Treaties proper, and sent to the relative obscurity of Protocol 27 to the TFEU, it is clear that price competition is an individual policy goal within EU law.

Each of the three regulatory tools will be analysed in turn; first the competition rules, then market organisations, and finally the free movement rules. In the final section I will set out the importance of price competition as a driver of trade within the internal market.

## Price Competition under the Competition Rules

The importance of price competition in markets is largely undisputed.<sup>5</sup> The antitrust prohibitions within EU competition law, arts.101 and 102 TFEU, have a long standing ‘State exemption’ which means that they do not apply when the State is exercising its functions ‘qua State’; however, the State must not adopt measures which deprive the competition rules of their effect.<sup>6</sup> State actions are directly controlled through the EU State aid prohibition, art.92 TFEU, but legislative pricing intervention will not usually be captured as it, for instance in minimum pricing to guarantee income and encourage investment in renewable energy generation, does not involve any “direct or indirect transfer of State resources”.<sup>7</sup> The competition rules do not allow all State action to escape sanction. State owned enterprises, when acting on the market, must comply with the competition rules. The areas of contention tend to arise when the State works with commercial undertakings, be they public or private, in order to further State policy. In that cooperation there is room for contention as to when State action ends and commercial cooperation begins.

The long standing rules surrounding State intervention in the market were set out in cases such as *BNIC v Aubert*<sup>8</sup> and *Van Eycke v ASPA*.<sup>9</sup> It is clear that a State cannot, “deprive its own legislation of its official character by delegating to private traders responsibility for

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<sup>3</sup> See, for example, Regulation (EU) 1308/2013 establishing a common organisation of the markets in agricultural products [2008] OJ L347/671, or Council Directive (EU) 2011/64 on the structure and rates of excise duty applied to manufactured tobacco [2011] OJ L176/24.

<sup>4</sup> The prohibition on quantitative restrictions on trade of measures having equivalent effect on trade in art.34 TFEU.

<sup>5</sup> The extant dispute is not whether price competition is important, but rather should it be the only policy goal of competition law. See, for example Neil W Averitt and Robert H Lande, ‘Using the “Consumer Choice” Approach to Antitrust Law’ (2007) 74 Antitrust Law Journal 175.

<sup>6</sup> See Case C-13/77 *INNO v ATAB* ECLI:EU:C:1977:185, [1977] ECR 2115, [1978] 1 CMLR 283, and K Bacon, ‘State Regulation of the Market and EC Competition Rules’ [1997] European Competition Law Review 283.

<sup>7</sup> See Case C-379/98 *PreussenElektra AG v Schleswag AG* ECLI:EU:C:2001:160, [2001] ECR I-2099, [2001] 2 CMLR 36, 59.

<sup>8</sup> Case C-138/86 *BNIC v Aubert* ECLI:EU:C:1987:524, [1987] ECR 4789, [1988] 4 CMLR 331.

<sup>9</sup> Case C-267/86 *Van Eycke v ASPA* ECLI:EU:C:1988:427, [1988] ECR 4769, [1990] 4 CMLR 330.

taking decisions affecting the economic sphere”.<sup>10</sup> For an act to be considered as true State action it must be an act which is seen as independent of the narrow commercial interests of any individual or group of undertakings. A recent application of this principle can be seen in *API and Others*.<sup>11</sup>

### *Minimum Operating Costs for Road Haulage*

The *API* case stemmed from a preliminary reference from a series of cases before the Italian courts in which measures fixing the minimum ‘operating costs’ for carriage of goods by road were challenged. Following the liberalisation of the road haulage market a number of legislative decrees were adopted which were designed to protect both competition and traffic safety. The decrees set up a number of bodies that, in current parlance, could be described as ‘stakeholder’ bodies with representatives from the State authorities, of industry, and of consumers. One such body, the Osservatoria, carried out monitoring tasks concerning compliance with road traffic safety and updated practices relating to oral contracts. Membership of the Osservatoria was drawn from a larger stakeholder body, the Consulta, but at the relevant time it had 10 members, eight of which represented road haulage operators or customers, and two who represented State authorities.

Following amendment of the rules in 2008 charges payable by customers could not be lower than ‘minimum operating costs’ which the Osservatoria were asked to fix.<sup>12</sup> The Osservatoria determined that figure on the basis of sample survey provided by the Ministry of Economic Development on the average price of road diesel, their determination of the cost of fuel per kilometre, and their determination of the percentage of operating costs of haulage undertakings represented by fuel costs. The Decree set out that the fixing of charges was put in place to ensure compliance with safety standards. The concern was presumably that in a price war hauliers may be tempted to cut corners in safety related areas in order to win contracts by quoting charges at or below unavoidable fuel costs. The measure also set out procedures and penalties if a haulage operator was to charge below the minimum. The Osservatoria adopted a table of minimum operating costs in November 2011, which were set out in a decree of the Director General of the Ministry for Infrastructure and Transport one day later.

The challenge to the operation of this system of mandatory minimum operating costs was brought on the basis of their incompatibility with EU competition law, free movement of undertakings, freedom of establishment, and freedom to provide services. The Court of Justice of the EU (CJEU) did not consider it necessary to look at the free movement provisions making its ruling entirely on the basis of competition law. It noted that the Osservatorio was principally composed of representatives of professional associations and customers,<sup>13</sup> and that the State had no right of veto or casting vote.<sup>14</sup> The fact that the participants came from industry does not, in itself, stop the measure having the character of legislation, but it would have to be clearly shown that the members:

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<sup>10</sup> Ibid, 16.

<sup>11</sup> Cases C-184 to 187, 194, 195 & 208/13 *API and Others* ECLI:EU:C:2014:2147, [2014] 5 CMLR 993. See also Cases C-532 & 538/15 *Eurosanamientos SL and Others v ArcelorMittal Zaragoza SA and Francesc de Bolós Pi v Urbaser SA* ECLI:EU:C:2016:932.

<sup>12</sup> Art 83a of Decree-Law No 112 of 25 June 2008.

<sup>13</sup> *API*, n 11, 32.

<sup>14</sup> Ibid, 33.

“are experts who are independent of the economic operators concerned and they are required, under the law, to set tariffs taking into account not only the interests of the undertakings or associations of undertakings in the sector which has appointed them but also the public interest and the interests of undertakings in other sectors or users of the services in question”.<sup>15</sup>

In the case of the Osservatorio there was no such provision. The decree made “vague reference” to road safety, and left a large discretion to its members in the fixing of the minimum operating cost.<sup>16</sup> The CJEU took the view that the operation of the Osservatorio “procedural arrangements or substantive requirements” did not ensure it was operating as an “arm of the State working in the public interest”.<sup>17</sup>

As the State exemption could not apply to the operation of the Osservatorio it was deemed to be an association of undertakings for the purposes of art.101 TFEU, and that the fixing of minimum operating costs was clearly capable of restricting competition within the internal market.

This case, and its antecedents, clearly indicates that the State can regulate the operation of markets, but that if it is to do so within the confines of the art.101 TFEU ‘State exception’ it cannot delegate that responsibility to commercially interested undertakings. If commercially interested undertakings have any level of control over the process it will take that process out of the protection of the State; as the process, no matter what its outcome, will have become tainted by private interest. That is not to say that ‘stakeholders’ cannot be involved in the process of regulation, or indeed have influence over it, but that the State must take ultimate responsibility, or control, over the ‘output’ of that regulatory process.

### *High Strength Alcohol in the UK – An Example of Intervention*

It is clear that if the State wants to intervene in a market it must retain control of the intervention to ensure its intervention remains within the ‘State exception’ to the competition rules. But it will often want to work with stakeholders in an industry in order to maximise the impact of the intervention. How can such a balance be struck?

An example of an intervention programme which has tried to walk the line between cooperation and the competition rules can be seen in the interactions in UK Local Authority (LA) led “Reduce the Strength” campaigns, designed to limit the sale of high-strength alcohol to tackle problems associated with street drinking.<sup>18</sup> Street drinking is the practice whereby individuals, often in groups, drink heavily in public places and are unable, or unwilling, to control or stop their drinking.<sup>19</sup> Street drinking is also associated with the consumption of particular types of strong and cheap alcohol. “Reduce the Strength” campaigns target the problem through a number of different interventions; including treatment, education and accommodation, but also by seeking to limit the supply of the strong and cheap alcohol products by removing selected products from retailers in a

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<sup>15</sup> Ibid, 34.

<sup>16</sup> Ibid, 37.

<sup>17</sup> Ibid, 38.

<sup>18</sup> See generally, Local Government Association, *Reducing the strength - Guidance for councils considering setting up a scheme* (2014).

<sup>19</sup> Ibid, 6, referring to D Lamb, *Services for Street Drinkers: An Initial Overview* (National Street Drinking Network, London, 1995).

locality. Research into street drinking indicates that the products of relevance are those above 6.5% alcohol by volume in cans or plastic bottles.<sup>20</sup> It is the interaction between the LA and independent retailers which is of relevance to this paper.

Both the Local Government Association's (LGA) guidance on such schemes<sup>21</sup> and the CMA's policy documents<sup>22</sup> indicate that there are competition law risks associated with the operation of such schemes. It is unlikely the LA itself will be considered an 'undertaking' and therefore subject to the competition law rules, but all local retailers will be undertakings. The competition law concern is that such a scheme could become a vehicle for unlawful collusion between these independent retailers. The difficulty for the LA is that it needs to encourage as many as possible of the retailers within the locality to become part of the scheme. The LGA stress that LAs have a duty of care to retailers to ensure that the actions of the LA do not put retailers in a position where they may breach the competition rules, even inadvertently.<sup>23</sup> The LGA guidance goes on to state:

"The key point is to ensure that retailers are aware they must make individual and independent decisions about whether to participate in such schemes. Specifically they should avoid engaging in any form of co-ordinated action or in agreements or concerted practices that would reduce or prevent competition between them."<sup>24</sup>

In order to protect the retailers the LAs are advised to employ certain strategies in their engagement with retailers, including: setting out the competition law risk at the beginning of any discussions; preferring bilateral meetings with retailers, rather than in groups, and if meeting more than one retailer to close down any conversation which appears to give rise to co-ordination; in bilateral discussions LAs should not encourage participation by referring to other businesses which plan to participate; and, retailers should not be asked to publically commit to or advertise their participation before the launch of the scheme.<sup>25</sup> It is therefore important that the LAs must encourage individual retailers to participate in the scheme to contribute towards the public policy goal and each business must decide entirely independently to become part of the scheme. Through that process the LA is acting in its regulatory capacity to achieve a public policy goal and does not, inadvertently or otherwise, facilitate co-ordination or collusion between retailers.<sup>26</sup> The result of the intervention may be a lessening of competition in the locality, as many, or all, retailers decide not to stock certain products, but there is no anticompetitive conduct within the situation.

### *The Limits of the State Exception*

The EU competition law 'State exemption' operates when the State is not considered as a commercial undertaking which is subject to the competition rules. The State must therefore

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<sup>20</sup> LGA, n 18, 10. Glass containers are not preferred because of the risk of breakage in areas where drinkers sleep, or because of their potential use as a weapon.

<sup>21</sup> Ibid.

<sup>22</sup> Competition and Markets Authority, *High-strength alcohol schemes: competition law issues for retailers* (2015) and Competition and Markets Authority, *Local authority initiatives: advice on competition law* (2014)

<sup>23</sup> LGA, n 18, 14.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid, 14-15.

<sup>26</sup> An example of a 'naked' private interest can be seen in an agreement in 2011 within Newquay to fix minimum prices for alcoholic drinks. See Newquay Uncovered, 'Pubs and Clubs Start Price Fixing Again' (*Newquay Uncovered*, 5 May 2011) <<http://newquayuncovered.com/News-Uncovered/Local-News/Pubs-and-Clubs-Start-Price-Fixing-Again.html>> accessed 6 November 2012.

be very careful to limit their intervention in the market to ‘public interest’ regulatory purposes. As pricing is one of the most sensitive commercial issues any intervention by the State will face comprehensive scrutiny. There are two key problem areas where the State works with other stakeholder groups to put in place an intervention. First, it must be clear that the intervention is put in place to deal only with the relevant public policy issue. If there is any concern that the private interests of stakeholders have influenced the final policy it may deprive the intervention of its protected public character. In order to protect the public nature of the intervention the State must ensure that both the adoption process and the intervention measure itself are closely associated with a strict adherence to the public policy goal. Secondly, the State should ensure that they do not, through their interaction with stakeholder groups, create a vehicle for co-ordination within the industry. They should make sure their processes do not become an illicit communication channel between independent undertakings which could be used for anti-competitive ends.

## **Price Competition as Part of the EU Trade Rules**

In some sectors of the economy State intervention in the market is the norm, rather than the exception. It is therefore instructive to see how EU law deals with that more structured intervention, and what limits are placed on intervention in relation to pricing. There are a great many rules across various sectors, but I will focus on two sectors where pricing issues have caused controversy: the trade rules in the wine and tobacco sectors.

### *Common Market Organisations in Agriculture*

Agricultural markets, which include wine as an agricultural product, are heavily regulated and subject to a high degree of State intervention. Across the EU this is coordinated through the common organisation of agricultural markets, known as the Single CMO, established in 2007.<sup>27</sup> The current CMO Regulation was adopted in 2013,<sup>28</sup> and allows for cooperation in many areas across agricultural markets. The rules are comprehensive and detailed, but I will highlight a number of areas where pricing issues are relevant. The Regulation sets out on Recital 10 that:

“In order to stabilise the markets and to ensure a fair standard of living for the agricultural community ... [t]here continues to be a need to maintain market support measures whilst streamlining and simplifying them.”

Specifically in relation to the wine sector the Regulation is to provide “support measures ... which strengthen competitive structures”.<sup>29</sup> One of the other key features of the Regulation is the setting of “marketing standards” in sectors.<sup>30</sup> The Regulation recognises the role that producers and other actors in the supply chain, through vehicles such as producer organisations or “interbranch organisations”, can play in the development of standards and best practices.<sup>31</sup> There are therefore mechanisms to recognise those

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<sup>27</sup> Council Regulation (EC) 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation), [2007] OJ L299/1.

<sup>28</sup> Parliament and Council Regulation (EU) 1308/2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007, [2013] OJ L347/671.

<sup>29</sup> Ibid, recital 43.

<sup>30</sup> Ibid, recital 71.

<sup>31</sup> Ibid, recitals 131-132 and arts.157 & 158.

organisations and allow their decisions to be extended beyond their membership, effectively giving them legal force.<sup>32</sup> While there is recognition of the value of the contribution stakeholders can make to the development of the industry, there is also a clear indication that there is a risk to such collaboration and cooperation to the continued effectiveness of competition. At recital 137 it states:

“In order to improve the operation of the market for wines, Member States should be able to implement decisions taken by interbranch organisations. The scope of such decisions should, however, exclude practices which could distort competition.”

In the wine sector art.167(1) sets out provisions for marketing rules to stabilise the common market in wines. Member States may lay down marketing rules to regulate supply, “particularly by way of decisions taken by interbranch organisations”, but those rules must not, “allow for price fixing, including where prices are set for guidance or recommendation”.<sup>33</sup>

Outside of the wine sector decisions of interbranch organisations can only be extended beyond their membership for limited purposes set out in the art.164, and those decisions cannot, “be otherwise incompatible with Union law” including the competition rules. There are limited competition law exceptions for producer organisations and interbranch organisations in arts.209 & 210 of the Regulation, but in both cases agreements and decisions to fix prices are specifically excluded from those exceptions.<sup>34</sup>

From the above it is clear that that within agriculture markets, and the wine sector in particular, there is recognition of the importance of cooperation to improve productivity and the marketability of European agricultural products. There are clear benefits in the sharing of information and best practices, and putting in place marketing provisions to ensure that products are produced to high quality standards that can be communicated to consumers in a consistent fashion. The Regional regulatory systems in wine production are classic examples of that cooperation.<sup>35</sup> The CMO rules facilitate that cooperation, and allow for it to become part of the formal regulatory system, but there are obvious competition concerns when producer and other stakeholder organisations are involved in the promulgation of binding measures. Therefore the Regulation makes it clear that competition rules still apply, and while it grants some exceptions to the competition rules to allow producer and interbranch organisations to carry out their functions in the CMO, there are provisions that explicitly prohibit any measure which fixes prices. Price competition is of such importance to the CMO that it should not be restricted by either Member States or interbranch organisations.<sup>36</sup>

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<sup>32</sup> Ibid, art.167(1) on ‘Marketing rules to stabilise the operation of the common market in wines’.

<sup>33</sup> The impact of art.167 on the Scottish Government’s attempt to introduce Minimum Unit Pricing for alcohol will be considered later in this paper.

<sup>34</sup> Regulation (EU) 1308/2013, n 28, art.209(1)(iii) and art.210(4)(d).

<sup>35</sup> See for example the National Institute of Appellations of Origin (INAO) system in France, and the Denominazione di Origine Controllata e Garantita (Denomination of Controlled and Guaranteed Origin) and Denominazione di Origine Controllata (Denomination of Controlled Origin) systems in Italy.

<sup>36</sup> There are systems of public price intervention which operate at an EU-wide level in Section 2 of Regulation (EU) 1308/2013, n 28.

## *Harmonisation of Tobacco Taxation*

The harmonisation of taxes across the EU has played an important part of the EU trade rules designed to improve the operation of the internal market. The harmonisation of the taxation rules of both tobacco and alcohol have led to interesting case law. In this section of the paper I will deal with the disputes that have arisen from the tobacco tax harmonisation, the ongoing dispute which involves alcohol duties will be discussed subsequently.

Harmonisation of tobacco taxes has been a feature of the EEC since 1972.<sup>37</sup> The current Directive dates from 2011,<sup>38</sup> but the key judgments come from its pre-cursor, the 1995 Directive.<sup>39</sup> Although there have been some technical changes the system has been consistently structured since 1995.<sup>40</sup> The harmonisation of taxes has multiple purposes, as set out in the Directive's Recitals, but perhaps the main goal is set out in Recital 2 as follows:

“the objective of the Treaty is to establish an economic union within which there is healthy competition and whose characteristics are similar to those of a domestic market; and, as regards manufactured tobacco, achievement of this aim presupposes that the application in the Member States of taxes affecting the consumption of products in this sector does not distort conditions of competition and does not impede their free movement within the Community”.

The importance of price competition to the Directive is noted in recital 7, where it states that, “the imperative needs of competition imply a system of freely formed prices for all groups of manufactured tobacco”. Therefore the policy is to harmonise taxes,<sup>41</sup> which constitute a significant proportion of tobacco products costs, to ensure that those taxes do not distort competition, and also to ensure that final consumer prices are still freely set by the market. The only reference to pricing in the operational part of the Directive can be found in art.9(1), paras 2 & 3:

“Manufacturers ... shall be free to determine the maximum retail selling price for each of their products for each Member State for which the products in question are to be released for consumption.

The second paragraph may not, however, hinder implementation of national systems of legislation regarding the control of price levels or the observance of imposed prices, provided that they are compatible with Community legislation.”

### **The Tobacco Tax Harmonisation Cases**

In March 2010 the Court of Justice handed down three judgments relating to the 1995 Directive – *Commission v France*, *Commission v Austria*, and *Commission v Ireland*.<sup>42</sup> All

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<sup>37</sup> Council Directive 72/464/EEC on taxes other than turnover taxes which affect the consumption of manufactured tobacco, [1972] OJ English special edition: Series I Volume 1972(31.12), L303/3.

<sup>38</sup> Council Directive (EU) 2011/64 on the structure and rates of excise duty applied to manufactured tobacco, [2011] OJ L176/24.

<sup>39</sup> Council Directive (EC) 95/59 on taxes other than turnover taxes which affect the consumption of manufactured tobacco, [1995] OJ L291/40.

<sup>40</sup> The permissible levels of duty established by reference to price in the 1995 Directive was between 5% and 55%. Under the 2011 Directive, after 1 January 2014, the levels are 7.5% and 76.5%.

<sup>41</sup> The harmonisation provisions are to be found in art.16 of Directive 95/59/EC, n 39.

<sup>42</sup> Case C-197/08 *Commission v France* ECLI:EU:C:2010:111, [2010] ECR I-1599, Case C-198/08 *Commission v Austria* ECLI:EU:C:2010:112, [2010] ECR I-1645, and Case C-221/08 *Commission v Ireland* ECLI:EU:C:2010:113, [2010] ECR I-1669. An early case, Case C-216/98 *Commission v Greece*



three cases revolved around remarkably similar national provisions, which imposed minimum retail prices on tobacco products. In each case the relevant minimum price was set by reference to an average price calculated for that type of tobacco product. The retail price could not be below 95% of the average in France, 92.75% in Austria, or 97% in Ireland.<sup>43</sup> As all the cases are very similar I shall only detail the factual situation in the leading judgment, *Commission v France*. All three judgments adopted the same approach.

France amended its Code général des impôts (General Tax Code - 'CGI') to include a provision in which the retail price of cigarettes could not be below a certain percentage of the average price of those products.<sup>44</sup> The percentage price was fixed by decree at 95%.<sup>45</sup> Selling products below this price floor was considered a promotional price which was unlawful under the French Code on Public Health.<sup>46</sup> The lowest price that could therefore be charged was only a small amount below the average price across the whole market. An individual manufacturer's ability to set a competitive price was highly constrained by the price points adopted by their rivals.<sup>47</sup> Price competition could exist, but only within a narrow margin, and any competitive price cutting would be constrained by the price set by luxury brands or less efficient producers.<sup>48</sup> When the Commission formally notified the French Government that they considered the provision to be incompatible with Art 9(1) of the Directive, the French Government responded by arguing that the measure was justified by the objective of public health protection laid down in Article 30 EC (now Art 36 TFEU).

The Court first set out that the Directive is part of a harmonisation policy designed to prevent the distortion of competition, and consequently to open up national markets.<sup>49</sup> It also stressed, relying on Recital 7, that the "imperative needs" of competition "imply a system of freely formed prices".<sup>50</sup> Harmonisation allows the operation of the competitive process generally, and price competition in particular, to act as a mechanism to open up national markets. As differential taxation could distort that process it is to be harmonised. The Court reiterated the argument made by the AG that the freedom to set prices ensures that undertakings could make effective use of any competitive advantage they gained

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ECLI:EU:C:2000:571, [2000] ECR I-8921, also discussed minimum prices in tobacco, but the argument was less centred on the health related context of the latter cases.

<sup>43</sup> Although rule looks to be more restrictive in Ireland, there is a clear suggestion in the Irish Regulation that the average is to be calculated for a particular brand, rather than on the basis of a national average as in the France or Austria. If the average was set at brand level there would still be inter-brand price competition, and only intra-brand competition would be effectively restricted. This would still be a restriction on competition, but a less significant one. This point was, however, not picked up in the argument of the parties, the AG's Opinion, or the Court's judgment.

<sup>44</sup> Article 38, paragraph II, of Law No 2004-806 of 9 August 2004 on public health policy (Journal Officiel de la République Française (JORF), 11 August 2004, 14277).

<sup>45</sup> Article 1 of Decree No 2004-975 of 13 September 2004 applying the first paragraph of Article 572 of the CGI (JORF, 18 September 2004, 16264).

<sup>46</sup> Article L. 3511-3, first para, Code de la santé publique (CSP).

<sup>47</sup> As they would be used in the calculation to determine the baseline 'average price'.

<sup>48</sup> This is based on the assumption that an efficient producer seeking to compete aggressively on price would begin to be constrained by the high prices of luxury brands, which are not primarily competing on price, or less efficient producers who are unable to cut prices as far, or as fast, as their more efficient rivals.

<sup>49</sup> *Commission v France*, n 42, 33.

<sup>50</sup> *Ibid*, 35.

through having lower costs.<sup>51</sup> Minimum pricing was not compatible with the Directive as it impaired any cost-based competitive advantage and therefore distorted competition.<sup>52</sup>

When the Court turned to look at France's attempt to justify the imposition on minimum prices on the basis of the protection of health as set out in art.30 EC (now 36 TFEU) it was also dismissive. It simply stated that art.30 EC could not be understood as authorising measures "other than quantitative restrictions", and that in the present case the Commission has not argued the measure was a such as restriction. It suggested that if Member States wanted to protect health they could do so within the terms of the Directive by increasing levels of taxation without causing competitive distortion. The effect of art.30 EC was therefore confined to the law regarding quantitative restrictions on imports, and did not extend to other areas of EU law.

What we see in these judgments is the importance of competition to this harmonisation measure; and price competition as the obvious expression of the competitive process. Improved competition, between previously segregated and highly regulated markets is the purpose of these measures, which explicitly protect against direct state interference in the market's ability to find a competitive price point. That is not to say that States are barred from influencing pricing. The ability to set excise duties, at very high levels if desired, is not affected by the Directive. But State action can only influence where the competitive 'playing field' sits. They must allow those players with a cost advantage to play the game with their competitive advantage intact. The exclusion of the use of the free movement derogations in art.30 EC is perhaps not surprising given that the Directive is framed as using price competition to open up markets. Protection of public health is not ignored, but it is limited to operation within the specific frame of the competition inspired obligations of this harmonisation measure. Levels of excise duties can increase, and consumption can therefore be discouraged, but price competition between manufacturers is still to be protected.

Italy's attempts to impose minimum tobacco prices were also unsuccessful before the Court. In *Commission v Italy* the setting of a simple minimum price set at 92.11% of the weighted average price of cigarettes was declared to be incompatible with the Directive.<sup>53</sup> A rather more subtle attempt to affect the pricing of tobacco was seen in *Yesmoke Tobacco*.<sup>54</sup> In this case Italy had set a differential levy of 115% of the base levy placed on cigarettes for products with a retail price below the average retail price in the most popular price category calculated under the national legislation. Yesmoke, a manufacturer of tobacco products retailing below that of the most popular category price, challenged the legislation. The differential levy which would have imposed a higher level of duty on cheaper products resulted in a distortion of competition which was also counter to the harmonisation purpose of the 2011 Directive.<sup>55</sup>

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<sup>51</sup> Ibid, 36.

<sup>52</sup> Ibid, 38.

<sup>53</sup> Case C-571/08 *Commission v Italy* ECLI:EU:C:2010:367, [2010] ECR I-84.

<sup>54</sup> Case C-428/13 *Ministero dell'Economia e delle Finanze and Amministrazione Autonoma dei Monopoli di Stato (AAMS) v Yesmoke Tobacco SpA* ECLI:EU:C:2014:2263.

<sup>55</sup> Ibid, 34. Council Directive (EU) 2011/64, n 38.

## *The Role of Price Competition in EU Trade Rules*

The examples above indicate that price competition has an important role in the systems that have been created to regulate pan-European trade in products like wine and tobacco. Competition is seen as being an important mechanism central to the EU project, and while it is recognised that there are occasions where certain types of cooperation may be of value, it is a clear that price competition is always to be maintained. The difference between the organisation of the wine and tobacco measures is their starting point. The Single CMO Regulation, which covers the wine market alongside many other agricultural products, is a broad measure that covers a great many potential areas of co-ordination and co-operation. It is mindful of competition, but recognises the need for exceptions to the competition rules. The Tobacco Directive is at heart a measure to ensure that the free play of competition is protected. The harmonisation of taxation is undertaken to facilitate competition. In that regard it is much narrower in scope, and the Court strongly protects the central role of price competition within the Directive. Price competition is part of the CMO Regulation, the fixing of prices being explicitly outside the ambit of inter-branch organisations, but it is essentially peripheral; the heart of the Regulation is the stability of strategically important markets.

The specific nature of these measures was confirmed by the Court of Justice in the *SWA Reference*,<sup>56</sup> where it made it clear that the establishment of the CMO did not prevent Member States from applying national rules that intended to attain an objective “relating to the general interest other than those covered by that CMO”.<sup>57</sup> Where a general interest is being protected, one beyond the scope of the specific purpose of the trade rules, the general EU law provisions will be applicable.<sup>58</sup>

## **Direct State Intervention in Pricing**

Direct State action is not subject to the application of EU competition law, and EU trade rules only apply in their designated market sectors, but general EU law provisions apply to other market sectors where Member States seek to directly influence prices. In these cases the free movement of goods provisions, found in arts.34-36 TFEU, can apply if the measure affecting pricing can be seen a measure having equivalent effect to a quantitative restriction on trade between Member States.

The classic case which established this route for intervention was *Van Tiggele*.<sup>59</sup> This case resulted from a criminal prosecution brought against Van Tiggele for selling alcoholic beverages below the minimum prices set by a Dutch Royal Decree. The products in question - ‘new hollands gin’ and ‘vieux’ – had a long history of price control either by agreement between manufacturers or, latterly, through Royal Decree.<sup>60</sup> The Dutch Produkschap which adopted the measure, rather differently than the Osservatorio in the *API* case,<sup>61</sup> was made

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<sup>56</sup> Case C-333/14, *Scotch Whisky Association v LA* ECLI:EU:C:2015:845, [2016] 2 CMLR 27.

<sup>57</sup> *Ibid*, n 26.

<sup>58</sup> *Ibid*, 28.

<sup>59</sup> Case C-82/77 *Openbaar Ministerie (Public Prosecutor) v Jacobus Philippus van Tiggele* ECLI:EU:C:1978:10, [1978] ECR 25, [1978] 2 CMLR 528.

<sup>60</sup> In light of our previous discussion of wine as an agricultural product falling within the Single CMO, it is important to note that spirits are not considered agricultural products and therefore fall outside the CMO system.

<sup>61</sup> *API*, n 11.

up of half of its members from employers across the spirits sector, and half from employees.<sup>62</sup> The Chair of the Produkschap was a crown appointee. Because of the equal representation of employers and employees, and presumably the casting vote from the chair, the Produkschap was seen as being independent of the industry, and not an association of undertakings subject to the competition rules.<sup>63</sup>

As *Van Tiggele* was the first case of its nature it was important to establish if fixed minimum prices were a 'measure having equivalent effect to a quantitative restriction' (MEEQR) under the *Dassonville* formula.<sup>64</sup> In his Opinion AG Capotorti focused on the potentially discriminatory impact of minimum prices:

"a price fixed by the authorities, even if applied without distinction to domestic and foreign products, may constitute a measure having an effect equivalent to a quantitative restriction, if it is fixed at such a level as to make the marketing of imported products impossible or perhaps merely more difficult than that of domestic products".<sup>65</sup>

He continued:

"If the national court were to find that the minimum price in question was fixed at a level which was excessively high having regard to the costs of products imported from other Member States so that such products are placed at a disadvantage, from the point of view of their actual ability to compete, as against corresponding domestic products, this would of itself constitute an infringement of the prohibition".<sup>66</sup>

The judgment of the Court itself was very brief, and largely devoid of useful context; simply stating, at 18, that a fixed minimum price:

"although applicable without distinction to domestic and imported products, is capable of having an adverse effect on the marketing of the latter in so far as it prevents their lower cost price from being reflected in the retail selling price."<sup>67</sup>

There was evidence that the Produkschap set the minimum price with reference to the costs of domestic production to allow a profit to be made; therefore, the level chosen was such as to offer domestic products protection from lower cost imports coming from other Member States.<sup>68</sup>

It is no surprise that such an obviously protectionist measure, which was adopted in the short term to protect against ruinous competition and allow industry to "adapt their methods of operation and the level of their costs ... to those of modern, efficient and well-managed undertakings",<sup>69</sup> was seen as having a negative impact of imported products and was therefore contrary to the prohibition.

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<sup>62</sup> Including representatives from producers, distribution, wholesale and retail.

<sup>63</sup> This issue was not formally raised in the case, but was canvassed by the AG, *Van Tiggele*, n 59, Opinion of AG Capotorti ECLI:EU:C:1977:205, 5.

<sup>64</sup> Case 8/74 *Procureur du Roi v Dassonville* ECLI:EU:C:1974:82, [1974] ECR 837, [1974] 2 CMLR 436, 5.

<sup>65</sup> AG Capotorti, *Van Tiggele*, n 63, 3.

<sup>66</sup> *Ibid*, 7.

<sup>67</sup> *Van Tiggele*, n 59, 18.

<sup>68</sup> AG Capotorti, *Van Tiggele*, n 63, 7.

<sup>69</sup> Royal Decree (Koninklijk Besluit) No 51 of 18 December 1975.

## *A Contemporary Case of State Price Fixing – Scottish MUP*

A contemporary, and much more complex, example of a dispute surrounding direct State intervention in pricing can be seen in the ongoing dispute regarding Minimum Unit Pricing (MUP) for alcohol in Scotland. The Alcohol (Minimum Pricing) (Scotland) Act 2012 was passed by the Scottish Parliament and received royal assent in June 2012. The Scots, as a population, have always had a problematic relationship with alcohol. Consumption levels are some of the highest in Europe, and the health consequences for the population are worrying.<sup>70</sup> The adoption of MUP was one of Government 40 actions designed to address alcohol related harm.<sup>71</sup> Policies adopted included, for instance, a prohibition of volume related promotions, such as ‘buy one, get one free’, for alcohol products.<sup>72</sup> The evidence that increased alcohol consumption leads to increased harms is strong.<sup>73</sup> There is also clear evidence that there is a link between consumption and price.<sup>74</sup> One of the key issues identified by the Scottish Government was the increasing affordability of ‘off-trade’ alcohol in Scotland.<sup>75</sup> An academic Report, which was commissioned to investigate the impact of different pricing interventions on consumption in Scotland,<sup>76</sup> argued that MUP targets cheap alcohol which tends to be consumed by harmful drinkers.<sup>77</sup>

The approach adopted by the Act was that alcohol products could not be sold at any retail outlet below a minimum price set by the following formula:<sup>78</sup>

$$\text{Minimum Price} = \text{MUP} \times \text{Strength(ABV)} \times \text{Volume(l)} \times 100$$

In a draft Order the MUP was set at £0.50 per unit.<sup>79</sup> That Order was immediately challenged by the Scotch Whisky Association (SWA), in *Scotch Whisky Association, Petitioners*,<sup>80</sup> on the basis that it was a breach of art.34 TFEU and contrary to the CMO Regulation.

### **The argument on art.34 TFEU**

At first instance, in Outer House of the Court of Session, the vast majority of the discussion was on potential justification of the measure. That is a point I will return to, but it was disappointing that neither the parties to the dispute or the Court took time to address whether a pricing intervention is still a MEEQR.

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<sup>70</sup> See Scottish Government, *Changing Scotland’s relationship with alcohol: a discussion paper on our strategic approach* (2008), and Scottish Government, *Changing Scotland’s Relationship with Alcohol: A Framework for Action* (2009).

<sup>71</sup> Scottish Government, *Final Business and Regulatory Impact Assessment for Minimum Price Per Unit Of Alcohol As Contained In Alcohol (Minimum Pricing) (Scotland) Bill* (2012), 2.8.

<sup>72</sup> Ibid, 2.9.

<sup>73</sup> Ibid, 2.18 et seq.

<sup>74</sup> Ibid, 2.31 et seq.

<sup>75</sup> Ibid, 2.43. That is alcohol sold for consumption away from, or ‘off’, the premises where which it is sold. This does not include bars or restaurants, where alcohol is consumed ‘on’ the premises.

<sup>76</sup> Robin Purshouse and others, *Model-Based Appraisal of Alcohol Minimum Pricing and Off-Licensed Trade Discount Bans in Scotland* (SchARR, University of Sheffield, 2009)

<sup>77</sup> *Business and Regulatory Impact Assessment*, n 71, 2.46.

<sup>78</sup> Alcohol (Minimum Pricing) (Scotland) Act 2012, s 1(2). The Act itself refers to MPU (Minimum Price per Unit), but all the other literature refers to MUP. For consistency I shall adopt ‘MUP’ throughout.

<sup>79</sup> The Alcohol (Minimum Price per Unit) (Scotland) Order 2013. For a bottle of red wine with 13% alcohol by volume the minimum price would be £4.88 [£0.50 x 13 x 0.75 x 100]. For a typical bottle of Scotch whisky the price would be £14.00 [£0.50 x 40 x 0.70 x 100].

<sup>80</sup> *Scotch Whisky Association, Petitioners* [2013] CSOH 70.

### ***Does MUP Come Within the Prohibition?***

The argument made by the petitioner was that, following *Van Tiggele* and the tobacco tax cases, that minimum pricing was always unlawful.<sup>81</sup> The respondent's arguments focused on the legitimate aim which justified the introduction of the measure.<sup>82</sup> All of the art.34 TFEU cases raised in the dispute predate two important developments in the law of the free movement of goods; those in *Keck* and *Italian Trailers*.<sup>83</sup> Both of those cases redefined the *Dassonville* formula, as applied in *Van Tiggele*, and therefore should have been considered before a finding on art.34 TFEU was made.

The lack of consideration of *Keck*, in particular, is surprising in that a discussion of its impact is to be found in the Commission Opinion on the Scottish MUP which seems to have played an important role in proceedings.<sup>84</sup> I cannot see how *Van Tiggele* is unaffected by *Keck*. A national measure which purports to control the pricing of a product is clearly a 'selling arrangement' in the sense that it only has impact of the manner in which the product is sold within the domestic market.<sup>85</sup> That does not mean that *Van Tiggele* is no longer of any relevance, but it does mean that the argument needs to be re-framed in light of the *Keck* judgment; whereby 'selling arrangements' are not prohibited:

"so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States".<sup>86</sup>

This would therefore require a clear argument as to how such a measure was discriminatory; why, in the context of this market, MUP has a disproportionate impact on imported products in comparison with their domestic rivals.

The Commission, in their Opinion, put forward a potential argument how the MUP provision could have a disproportionate impact on imports. They argued that minimum prices do not take into account the costs of production, and therefore disadvantage imported products that have lower production costs compared to their domestic rivals.<sup>87</sup> This was obvious in *Van Tiggele*; where a high cost domestic industry sought protection from low cost imports through price controls. But for the case to be made out it must be clear that the price control was discriminatory. This is where the Commission's argument becomes considerably

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<sup>81</sup> Ibid, 32-34.

<sup>82</sup> Ibid, 35-38.

<sup>83</sup> Cases C-267 & 268/91 *Keck & Mithouard* ECLI:EU:C:1993:905, [1993] ECR I-6069, [1995] 1 CMLR 101 and Case C-110/05 *Commission v Italy (Trailers)* ECLI:EU:C:2009:66, [2009] ECR I-519, [2009] 2 CMLR 34. For the relationship between these cases see, E Spaventa, 'Leaving Keck behind? The free movement of goods after the rulings in *Commission v Italy* and *Mickelsson and Roos*' (2009) 34 *European Law Review* 914, and P Wenneras and K.B. Boe Moen, 'Selling Arrangements, Keeping Keck' (2010) 35 *European Law Review* 387.

<sup>84</sup> The Commission asserted, notwithstanding the changes in *Keck*, that the position in *Van Tiggele* stood. The Opinion - European Commission, *Communication from the Commission - SG(2012) D/52513* (26 November 2012) - was delivered to the UK Government and not formally published, a version can now be found on the Eurocare – European Alcohol Policy Alliance website, 'Minimum Unit Pricing' (*Eurocare - European Alcohol Policy Alliance*) <[http://eurocare.org/resources/policy\\_issues/minimum\\_unit\\_price\\_mup](http://eurocare.org/resources/policy_issues/minimum_unit_price_mup)> accessed 6 August 2015. The Commission Opinion was referred to in *SWA (CSOH)*, n 80, 29.

<sup>85</sup> It is not a classic 'product requirement' restriction as seen in the *Cassis* line of cases - Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis)* ECLI:EU:C:1979:42, [1979] ECR 649, [1979] 3 CMLR 494.

<sup>86</sup> *Keck*, n 83, 16.

<sup>87</sup> The argument of AG Kokott in *Commission v France*, n 42, is cited in support.

less convincing. The example they used was competition between French brandy and Scotch whisky. It claimed that whisky is a higher cost product as the minimum maturation time is a period of 3 years, whereas the maturation time for brandy is as little as 6 months. This, they argued, means that lower cost brandy is much more likely to be effected by the MPU than its Scottish rival. That may be true – to some extent – but the example belies a number of assumptions which are dubious. Why are we only comparing brandy and whisky? The case law talks of ‘similar’ products, but where is the evidence that whisky and brandy are sufficiently similar to be treated as rivals in this way? There is a good argument that the products are very different.<sup>88</sup> But even if one accepts that whisky and brandy are sufficiently similar to be used as comparators it does not explain why those two spirits are picked out amongst all others. One could equally argue that expensive French brandy is being protected from domestic gin, which has no required period of maturation.<sup>89</sup> The impact of MUP is likely to be as strongly felt by domestic gin and vodka producers as it is by overseas brandy producers.<sup>90</sup> To make out a case that this measure has a discriminatory effect in relation to production costs the Commission would need to set out a much more detailed case which shows there is a real impact rather than simply rely on an unconvincing and unrepresentative example.

The other argument used by the Commission probably has more merit. This argument focuses on the impact the measure would have on new entrants to a market. This has echoes of the position of the Court in *Gourmet International*.<sup>91</sup> In that case a Swedish ban on the advertising of alcoholic beverages to consumers was ruled to be discriminatory as domestic products were much more likely to be known to Swedish consumers and the ban would make it much more difficult for novel products from other Member States to establish themselves on the Swedish market. In the case of MUP the argument would be that novel products from other Member States would be denied the opportunity to use pricing promotions, below the minimum price, to help to establish their products in the UK market. One can see the logic in this proposition, but the argument is much weaker than that in *Gourmet International*. Here the restriction is not on all advertising, just on one particular form of promotion; aggressive pricing below a certain level. There are many cases dealing with different promotional techniques that have not been seen as discriminatory.<sup>92</sup> Again the example chosen by the Commission to illustrate their point is problematic. They use the example of Irish and Swedish imports entering the UK cider market; but the brands in those cases, while they may have used some price promotions, have certainly not been competing in head-to-head competition with low-cost domestic cider production. The successful entry of brands like Magners, Rekorderlig, and Kopparberg are at the premium end of the market. The continuing availability of very cheap, industrially produced, domestic

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<sup>88</sup> Those familiar with competition law will see a comparison here with the assessment of the ‘relevant product market’ in that jurisprudence, but here I accepted that a much weaker form of similarity rather than substitution is probably being used.

<sup>89</sup> Scottish gin production, often using the white spirit generated by whisky distillers, is dramatically increasing, see Brian Ferguson, ‘Scottish gin proves real tonic for UK exports’ (*The Scotsman*, 10 August 2015) <<http://www.scotsman.com/news/scotland/top-stories/scottish-gin-proves-real-tonic-for-uk-exports-1-3853915>> accessed 11 August 2015.

<sup>90</sup> The figures in the MUP BRIA assessment suggest that a large majority of the products affected would be domestically produced - *Business and Regulatory Impact Assessment*, n 71, 5.119 et seq.

<sup>91</sup> Case C-405/98 *Konsumentombudsmannen v Gourmet International Products AB* ECLI:EU:C:2001:135, [2001] ECR I-1795, [2001] 2 CMLR 31.

<sup>92</sup> The genesis of this line of cases, *Keck*, n 83, deals with a restriction on below-cost sales promotions.

cider is one of the mischiefs which MUP is specifically designed to target. An example is a 3 litre bottle of UK cider which retailed at as little as £3.50;<sup>93</sup> if the MUP was set at £0.50, it would be forced to increase its price to £11.70. It should also be noted that MUP only impacts retail prices, it does not stop producers using cost advantages, and lower prices, to make their products more attractive at the wholesale level.<sup>94</sup>

On the basis of the discussion above I argue that the Commission has not made out a convincing case as to how MUP would be a 'dynamic', or discriminatory, selling arrangement within the terms of *Keck*. The figures which appear in the Scottish Government *Business and Regulatory Impact Assessment* appear to show that great deal of domestic alcohol production will be affected by the MUP.<sup>95</sup> If that is the case it may be very difficult to show that imports are effectively subject to discrimination.

If it is difficult to show discrimination there is now an alternative MEEQR test set out in *Trailers*.<sup>96</sup> In that case, which involved an Italian prohibition of the use of motorcycle trailers, the Court of Justice focused on whether the measure's "effect is to hinder access to the ... market" for products lawfully marketed in other Member States.<sup>97</sup> This approach does not require measures to be categorised into particular types, such as selling arrangements, as it focuses on the measure's effects. This issue was not addressed at all in *SWA* in the Outer House but was raised by AG Bot in his Opinion on the *SWA* reference.<sup>98</sup> The AG argued that MUP would remove any low cost competitive advantage from imported products, following the argument in *Van Tiggele*, and that was, in itself, enough to amount hindrance to market access and bring the restriction within the art.34 TFEU prohibition.<sup>99</sup> He went on to argue that it was not then necessary to show that the measure was discriminatory as required by *Keck*.<sup>100</sup> This simple, and elegant, mechanism was also adopted by the Court of Justice.<sup>101</sup> The radical element in this approach is that it elevates the status of price competition within the free movement rules and gives it high level of protection. Any attempt to move away from the free setting of prices in the market will be seen as affecting market access, and the measure will therefore come within the prohibition. It is possible to draw a direct line from the original *Van Tiggele* argument, through the rationale of the Tobacco Harmonisation Directives, seeking to use price competition as a driver of integration, to this new mechanism to protect price competition, as a driver of market access, under art.34 TFEU. The move away from a discrimination based rationale is very important. The new focus is on the importance of retail price competition, as of itself, across European markets. Any challenge to the free setting of prices, in so far as it reduces the ability to exploit cost advantages, is problematic.

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<sup>93</sup> 'Frosty Jacks' is produced by one of the UK's leading cider producers, Aston Manor.

<sup>94</sup> The 'windfall' gain from increased profit margins on cheap imported products, which now have to be sold at the higher minimum retail price, may encourage retailers to stock, and promote, these profitable lines.

<sup>95</sup> *Business and Regulatory Impact Assessment*, n 71, § 5.

<sup>96</sup> *Trailers*, n 83.

<sup>97</sup> *Ibid*, 58. In subsequent cases, such as Case C-639/11 *Commission v Poland* ECLI:EU:C:2014:173, [2014] 3 CMLR 26, the *Trailers* approach appears to becoming the new-normal.

<sup>98</sup> AG Bot, *SWA* (CJEU), n 56, ECLI:EU:C:2015:527.

<sup>99</sup> *Ibid*, 59-60.

<sup>100</sup> *Ibid*, 58.

<sup>101</sup> *SWA* (CJEU), n 56, 32.



### ***Can the Measure be Justified?***

The rest of the judgment in the Outer House of the Court of Session focused on the potential justification of the measure. The technicalities surrounding the mechanism for justification are somewhat outwith the scope of this paper,<sup>102</sup> but the arguments surrounding proportionality are instructive. The Outer House decided that the measure was ‘objectively justified’<sup>103</sup> on the basis of the protection of health. It accepted the Scottish Government’s argument that the measure was proportionate, no more restrictive than was necessary, as it was designed to target cheap and strong alcohol which was likely to be consumed by harmful and hazardous drinkers.<sup>104</sup> The Court accepted that MUP was better targeted at that particular health and social issue, that the Scottish Government had good evidence to back up this assertion,<sup>105</sup> and therefore that it was a proportionate; even if the Commission could point to other measures that would arguably be less restrictive on trade and competition.

The Commission and the SWA argued that more proportionate measure would be an ‘across-the-board’ increase in alcohol excise duty. They argued that such an increase, which could force retail prices to levels at or near the £0.50 MUP, would be preferable as they would not ‘single out’ cheap alcohol.<sup>106</sup> The central concern that drives this preference is the belief that a generally applicable duty would be less distortive to competition, but the art.34 TFEU prohibition is supposed to be concerned with the effect on trade between Member States, not its effect on competition. After higher duties are applied producers with cost advantages would still retain their competitive retail price advantage. All producers would be affected equally. But what is the impact on trade, or the market in a wider context? It is simple argument, but I suggest any general excise increase, particularly to the level suggested,<sup>107</sup> would have a greater impact on the market overall and must therefore be more restrictive with regard to trade between Member States, rather than less. It would affect all products, including luxury brands and on-sales products unlikely to be effected by MUP. It must be more restrictive, simply in the sense that it affects many more products. I would argue that the Commission’s preferred measure is not really about trade *per se*, but rather about ensuring that price competition is maintained across the market, even if the market has considerably higher levels of duty and retail prices. Price competition would be maintained; however, total market activity may decrease because of higher prices. The Outer House rejected the argument advocating a general excise increase because it was less ‘effective’ at dealing with the Scottish Government’s aim of targeting cheap and strong alcohol. As a general increase in excise duty could not be targeted, it was less effective at achieving the Scottish Government’s policy goal.<sup>108</sup>

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<sup>102</sup> For a fuller discussion see, Angus MacCulloch, ‘Minimum Alcohol Pricing in Scotch Whisky Association v Lord Advocate’ (2015) 19 Edinburgh Law Review 106.

<sup>103</sup> SWA (CSOH), n 80, 48.

<sup>104</sup> See, in particular, *ibid*, 71 & 79.

<sup>105</sup> *Ibid*, 71.

<sup>106</sup> *Ibid*, 33.

<sup>107</sup> To the level where all products retail at the level or MUP, or higher. For these purposes I ignore the possibility that retailers may decide, for commercial reasons, to absorb the impact of higher duties and keep retail prices low, or cross subsidise from other products. This is one of the problems in sole use of excise duties to address health concerns.

<sup>108</sup> I have argued elsewhere that the narrowing of the proportionality discussion to a particular frame, was central the Scottish government’s success in the Outer House, but the Scottish Government proposals and

As the matter of justification was central to the case on appeal to the Inner House of the Court of Session<sup>109</sup> a number of questions regarding the justification and proportionality were referred to the Court of Justice of the EU for a preliminary reference.<sup>110</sup> In his Opinion on the *SWA* reference the AG was less convinced by the targeting of the measure at harmful and hazardous drinkers. The AG recognised that it was for the Member States to decide on the degree of protection they wished to afford public health,<sup>111</sup> and that it was necessary to take into account the complexity of the assessments required.<sup>112</sup> When addressing the aim of the measure the AG expressed the view that there was ‘ambiguity’ in the evidence presented as to whether the measure had a specific or more general aim.<sup>113</sup> This is perhaps surprising when you consider the view on targeting expressed by Lord Doherty in the Outer House, but when one examines the full text of the BRIA you see that while targeting is mentioned several times as a benefit of MUP, it is not presented by the Scottish Government as its singular goal.<sup>114</sup> He went on to consider the suitability of the measure and stated that it was not ‘unreasonable’ for a Member State to consider MUP as a policy tool,<sup>115</sup> but was less convinced as to the necessity of the measure. He suggested that when weighing up whether it is necessary to impose a particular measure in order to achieve a particular aim, it might also be necessary to consider whether a less restrictive alternative might also bring additional benefits to a more general objective.<sup>116</sup> The Court largely followed the approach suggested by the AG. Rather than suggest there was ‘ambiguity’ in the aim of the measure the CJEU took the view that it has a ‘twofold objective’, both targeting these ‘harmful and hazardous’ drinkers, while also reducing general alcohol consumption in the wider population ‘albeit only secondarily’.<sup>117</sup> On that basis it came to the conclusion that the MUP may well not be the least restrictive measure possible to achieve both objectives:

“the fact that increased taxation of alcoholic drinks entails a generalised increase in the prices of those drinks, affecting both drinkers whose consumption of alcohol is moderate and those whose consumption is hazardous or harmful, 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.”<sup>118</sup>

The Court and the AG appear to have been strongly swayed by the type of reasoning in the *Tobacco* cases, discussed above, and not convinced by the Lord Advocate’s arguments<sup>119</sup> that, unlike the Tobacco Directives, MUP is not primarily designed to facilitate trade or to

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associated BRIA were not as clear as the judgement in the Outer House might have suggested. See MacCulloch, n 102, and *Business and Regulatory Impact Assessment*, n 71.

<sup>109</sup> *Scotch Whisky Association & Others v LA* [2014] CSIH 38.

<sup>110</sup> *SWA* (CJEU), n 56.

<sup>111</sup> AG Bot, n 98, 83.

<sup>112</sup> *Ibid*, 84.

<sup>113</sup> *Ibid*, 117-118.

<sup>114</sup> *Business and Regulatory Impact Assessment*, n 71.

<sup>115</sup> *Ibid*, 127.

<sup>116</sup> *Ibid*, 136.

<sup>117</sup> *SWA* (CJEU), n 56, 34.

<sup>118</sup> *Ibid*, 47.

<sup>119</sup> The LA’s argument in relation to the distinction between tobacco and alcohol products was explicitly rejected by the CJEU at 45.

reduce general alcohol consumption.<sup>120</sup> The Tobacco Directives are much more specific legislation, which are explicitly designed to maintain retail price competition in tobacco while allowing Member States to increase excise duties to protect health. It is unsurprising that the Court, in the *Tobacco* cases, stopped Member States from going against the explicit aim of those measures. Art.34 TFEU is a much more general provision which gives Member States much wider discretion in their policy goals.<sup>121</sup> Tobacco and alcohol are associated with different problems. All tobacco consumption is harmful, and all consumption is essentially the same. That is not true of alcohol: consumption in bars and restaurants can pose very different problems when compared to alcohol purchased for consumption in the home or on the streets. Different types of alcohol also tend to be consumed quite differently. The different problems will likely require different policy interventions. The Court was not convinced by the Lord Advocate's argument as to the intention of the Scottish Parliament in adopting the measure to focus on a single narrow aim. One reading is that that is a unwarranted intervention in the discretion afford to the Member States to protect price competition, another is that the Scottish Government had not set out the true aim of the policy sufficiently clearly;<sup>122</sup> however, the Lord Ordinary in the Outer House of the Court of Session, hearing the case at first instance, did not seem to find any 'ambiguity' in the evidence before it. When the case returned to the Inner House of the Court of Session the court, after considering a great deal of updated scientific and statistical evidence, upheld the Lord Ordinary's determination that the measure had a "targeted objective".<sup>123</sup>

The Court of Justice's preference for a hybrid solution, which takes into account both the general and specific health concerns, is seen in its final analysis. The Court follows the AG's argument that in light of its "twofold objective" an increase in taxation would no "less effective" in protecting health.<sup>124</sup> It argued that increased taxation may also have "additional advantages" in relation the general objective which may be "a factor to support the measure".<sup>125</sup> The Court finally recognising that it is the role of the national court to identify "all matters of fact", including the aim of the measure, and its proportionality.<sup>126</sup>

I am not convinced by the Court or the AG's argument. The flaw in their approach could be explained in two possible ways. First, the conflation of the two possible goals: tackling harmful and hazardous drinking, or an improvement in general health of the population.

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<sup>120</sup> Ibid, 147.

<sup>121</sup> The relationship between the general free movement provisions and the narrower measures, like the CMO Regulations, was discussed by the Court in the *SWA* (CJEU), n 56, 25-26.

<sup>122</sup> There is, perhaps, a potential explanation for the Court's thinking, at 38, where it notes that MUP is "part of" a general alcohol strategy. That, however, does not mean that this general strategy is the objective of MUP. The Scottish Government could, and perhaps should, have been much clearer on that point throughout the adoption of MUP.

<sup>123</sup> *The Scotch Whisky Assoc & Others v LA* [2016] CSIH 77, 185. See Angus MacCulloch, 'MUP in *The Scotch Whisky Association v LA*' (2017) 21 *Edinburgh Law Review*, forthcoming. The SWA have been given permission by the Inner House to appeal to the UK Supreme Court: Scotch Whisky Association, 'MUP leave to appeal' (21 December 2016) <<http://www.scotch-whisky.org.uk/news-publications/news/mup-leave-to-appeal/#.WJCzEtKLSpo>> accessed 31 January 2017

<sup>124</sup> Ibid, 47.

<sup>125</sup> Ibid, 48. This is less directive than the phrase "decisive factor" used by the AG - AG Bot, n 98, 150.

<sup>126</sup> Ibid, 49. For the AG's more strident view see AG Bot, n 98, 151. It was very important for the appeal, *SWA* (CSIH), n 123, that proportionality was to be addressed on the basis of all evidence available at the time of court's ruling, not only that which was available at the time a measure was adopted; see *SWA* (CJEU), n 56, 65. A great deal of new evidence was considered by the Inner House before it delivered its judgment.

The Court sees the measure as having a ‘twofold objective’ and makes the mistake of conflating the general issue, of overall consumption, and the specific concern, of harmful and hazardous drinking, simply because they are intertwined. The existence of a connection does not mean that a measure must be designed to achieve both objectives. It is perfectly possible to design a measure with a specific objective, or tackling a specific problem, which will also have an impact as part of a greater overall policy – in wider society beyond the targeted group. It is also possible to see specific measures having a positive externality without doubting its specific objective. This does not alter the objective of the measure, but it is simply recognition that in complex policy fields measures are not deployed in a vacuum; possible externalities, either positive or negative, must be properly considered.

The second explanation of the Court’s approach is a strong preference for the maintenance of price competition bleeding into free movement law. The maintenance of competition in the internal market is an EU objective,<sup>127</sup> but this sees that desire for the maintenance of competition, and retail price competition in particular, potentially elevated to be given a high degree of protection in free movement law. Not only does any attempt to interfere with pricing trigger the prohibition, as seen above, but any such attempt is also likely to be seen as disproportionate if there is another measure which could potentially address the policy problem, and which does not interfere with free retail pricing; even if that measure is less effectively targeted and has a wider impact.

I do not have an objection to the protection of price competition, but I think the Court’s judgment in the *SWA* Reference is unhelpful; especially if it is read as denying Member States the opportunity to employ effective regulatory responses to real societal problems, like problem drinking. The most significant flaw in the judgment lies in the conflation of the specific objective of MUP within wider alcohol policy, rather than the importance of price competition. Whether a measure can be justified must be a question of fact that that the domestic courts should be allowed to address based on a proper examination of the policy evidence available. Where there is good evidence that price controls are the best regulatory tool to deal with a real problem the free movement rules should not restrict their availability. The robust response of the Inner House to the Reference indicates that domestic courts are equipped to undertake a detailed and comprehensive proportionality analysis, even where the Court has sought to influence the domestic question.<sup>128</sup>

### *Direct Intervention by the State in Price Competition*

The protection of price competition plays an important role in EU law control of Member States’ market intervention. Over time it has been possible to track an initial expansion in the application of the free movement rules to cover more and more of Member States regulatory law, and more recently a retrenchment of its jurisprudence to see some rules, notably ‘selling arrangements’, fall outside the art.34 TFEU prohibition. The recent re-examination of the position of minimum pricing suggests that, in contrast to the recent relaxation in the treatment of non-product related rules, the treatment of minimum pricing under art.34 TFEU will continue to be strict; both in the sense that such measures will almost always fall within the prohibition, and also that proportionality will be strictly applied. This hard line on pricing restriction seems firmly rooted in the perceived

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<sup>127</sup> Formerly in art.3(1)(g) EC, but now in Protocol 27 TFEU.

<sup>128</sup> *SWA* (CSIH), n 123.

importance of retail price competition as a driver of trade, and therefore integration, within the internal market.

## Conclusions

Undistorted competition has always been an objective of the EU, and it should be no surprise therefore that price competition, which will generally be of benefit to European consumers, is given protection under EU law. Traditional forms of direct price regulation are no longer a feature of most European markets, as the European project has encouraged liberalisation and the opening of most sectors to pan-European competition, but price remains an important mechanism through which consumer behaviour can be shaped. Regulatory thinking<sup>129</sup> and empirical evidence<sup>130</sup> suggest that one of the most effective ways of achieving behavioural change in consumers is through intervention in their incentives through pricing. The analysis above makes it clear that no matter how a Member State seeks to intervene in pricing it will have to consider carefully the compatibility of its policy with EU law.

The process through which the measure is adopted will determine whether competition law comes into play. A measure is likely to be struck down as an anti-competitive if it is not clearly adopted by the State in relation to a public policy goal, or private interests could be seen as having tainted the 'public' nature of the measure. Even if the measure is a legitimate State measure, and benefits from the 'State exception' to the competition rules, there are several sectors, like tobacco, where EU trade rules explicitly protect price competition. In the tobacco Directives price competition is seen as an important mechanism which protects and encourages trade across the EU, and price competition must therefore be protected as a vital facet of the internal market. This holds even in cases where Member States have a legitimate interest in imposing high levels of duty to discourage consumption of a harmful product. Duty can be high, but must be applied consistently to all products allowing retail price competition to continue. Beyond specific sectoral regulation, the generally applicable free movement provisions also constrain a Member State's ability to impose minimum prices. The Court of Justice, in *SWA*, accepted the argument that all measures that impose minimum retail prices should be prohibited unless they are necessary to achieve a clear public policy goal. In its proportionality analysis it expressed a very clear preference for alternate measures, such as increased taxation, which have less impact on price competition; even if there is good evidence that such alternates would be less effective in achieving the stated policy than minimum pricing.

This analysis indicates that there is a continuum of complementary mechanisms to control direct price regulation across EU law. Any attempt by a Member State to impose a minimum price on particular products will either be prohibited as a matter of course, because it is not an independent State measure or because sectoral regulation prohibits price controls, or, in cases where the measure is public policy measure adopted qua State, the measure will likely fall within the prohibition under art.34 TFEU and will be subject to a strict proportionality test. The Court's approach to proportionality in its preliminary reference ruling favours the

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<sup>129</sup> The most well know examples are, perhaps: Richard H Thaler and Cass Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Penguin 2009), and Daniel Kahneman, *Thinking, Fast and Slow* (Penguin 2012).

<sup>130</sup> For example, as seen in relation to pricing and alcohol in Purshouse, n 76.

maintenance of price competition on the market, even where the maintenance of price competition limits the effectiveness of the public policy measure. I suggest that this goes too far to maintain retail price competition. Member States should be allowed discretion to use pricing as a mechanism to achieve a legitimate public policy goal. The proportionality test is necessary, but should rightly be used, as it was by the Inner House in *SWA*, to ensure that the Member State has good evidence to support minimum pricing as an effective means to achieving the particular policy they have set out to achieve.<sup>131</sup>

It is also interesting to note that in this area we see the free movement rules being influenced by competition policy. For many years the influence of the market integration goal has been a subject of controversy in relation to EU competition law. Concerns have been raised that the market integration had too great an influence in EU competition policy, especially in relation to territorial restrictions in vertical restraints.<sup>132</sup> It now appears that the pendulum has swung in the other direction, and now a desire to protect competition is influencing free movement cases. The state exception from the direct application of the antitrust prohibitions has been tempered in relation to any measure which affects an undertaking's ability to exploit cost advantages through retail prices. Competition law may not apply, but through the free movement rules this element of competition policy has found a new mechanism for enforcement.

Member States will be well advised to ensure that their measures have a clear public policy basis and clear evidence of effectiveness if they wish pricing regulation measures to withstand EU law scrutiny. In adopting measures it will be vital that they are very careful to ensure that any engagement with privately interested stakeholders is handled with care. If private interests are perceived to be removing the true 'public policy' nature of the measure, either in process of outcome, it will make the measure much more difficult to bring within the 'state exception' or justify in relation to proportionality. In both the Outer and Inner Houses of the Court of Session the Scottish Government was able to present a convincing proportionality case; notwithstanding the doubts of the Court of Justice. Retail price competition is an important feature of EU law, but it is vital to maintain a proper balance between price competition as the driver of integration and other EU policy objectives.

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<sup>131</sup> *SWA* (CSIH), n 123.

<sup>132</sup> See, for instance, Hans Henrik Lidgard, 'Territorial Restrictions in Vertical Relations' (1997) 21 *World Competition* 71.

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