

Minimum Alcohol Pricing in *Scotch Whisky Association v Lord Advocate*

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The Alcohol (Minimum Pricing) (Scotland) Act 2012 empowers the Scottish Ministers, by Order, to set a Minimum Price per Unit of alcohol (MPU). A draft Order setting the MPU at £0.50¹ was immediately challenged by the Scotch Whisky Association² on the basis that it would be contrary to EU law as a restriction on the free movement of goods. The Scottish Government justified the measure as being designed to protect public health. In this piece I will highlight some of the key free movement issues raised by the case.

A. THE JUDGMENT OF THE OUTER HOUSE

The judgment focuses on whether the MPU can be justified. It spends no time discussing how the MPU Order falls within the terms of the prohibition of quantitative restrictions on trade in Art 34 TFEU. Both parties agreed that the MPU Order was a 'measure having equivalent effect' to a quantitative restriction. This followed an EU Commission Opinion on the compatibility of the draft Order with EU law after its notification under the Technical Standards Directive.³ The Commission notes that the Court of Justice of the EU (CJEU) has ruled that measures which fix retail prices fall within the prohibition of quantitative restrictions on imports if they are set at such a level that imported products are placed at a disadvantage when compared to identical domestic products.⁴ The Commission argues that minimum prices do not take into account the costs of production, and therefore disadvantage imported products that have lower production costs than their domestic rivals.⁵ The Commission also argues the measure would have greater impact on new entrants to the market. This echoes the CJEU's position in *Gourmet International*.⁶ In the case of MPU the argument would be that novel products from other Member States would be unable to use pricing promotions, below the MPU, to break into the UK market.

As these issues were not contested, the legal assertions made by the Commission in their Opinion were not scrutinised. However, the Commission Opinion is less than convincing. It was not formally published or subject to any transparent debate or challenge, and yet it appears to have been decisive. If the Commission wishes to play a role in

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¹ The Alcohol (Minimum Price per Unit) (Scotland) Order 2013. The minimum price for a product would be set using the formula: MPU x strength x volume in litres x 100. For a bottle of red wine with 13% alcohol by volume the minimum price would be £4.88 [$£0.50 \times 13 \times 0.75 \times 100$]. For a typical bottle of Scotch whisky the price would be £14.00 [$£0.50 \times 40 \times 0.70 \times 100$].

² *Scotch Whisky Association, Petitioners* [2013] CSOH 70. A reclaiming motion is before the Inner House and a number of questions are to be referred to the CJEU - *SWA & Others v LA* [2014] CSIH 38.

³ Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, [1998] OJ L204/37.

⁴ Case 82/77, *Van Tiggele* [1978] ECR 25.

⁵ See AG Kokott in Cases C-197, 198 & 221/08 *Commission v France & Others* [2010] ECR I-1599.

⁶ Case C-405/98 *Konsumentombudsmannen v Gourmet International Products AB* [2001] ECR I-1795.

developing public policy it should surely do so in a much more transparent and accountable fashion.

The Scottish Government sought to justify the MPU Order as reducing the harm to public health and public disorder caused by problematic alcohol consumption.⁷ The measure was designed to target harmful and hazardous drinkers and reduce their consumption. It argued that the Parliament had considered alternate measures, but had concluded that ‘none of the alternatives suggested would be suitable and appropriate, or as effective, in achieving the aims’.⁸ The central issue was therefore the proportionality of the measure chosen – was there a measure less restrictive of trade which could also protect health and prevent disorder?

(1) Proportionality

The petitioners argued that less restrictive measures were possible. Their main suggestion was a ‘combination of increases in excise duty and bans on below duty plus vat sales, or below cost plus vat sales’.⁹ They also argued it would be wrong to allow the Scottish Parliament any ‘margin of appreciation’ in relation to the measure.¹⁰

The approach of Lord Doherty in the Outer House focused on proportionality, but uses the ‘objective justification’ test from *Trailers*,¹¹ rather than the more traditional ‘necessity’ test from *Cassis*,¹² stating:

‘The crucial question is whether there is objective justification for the measures which are under attack’.¹³

There has been much academic comment on the importance of the distinct approaches taken by the Court in the *Cassis/Keck* line of cases on one hand and the *Trailers* approach on the other.¹⁴ Lord Doherty was not troubled by the potential differences between the two tests; he clearly treats them as equivalent.¹⁵ There may be a simple domestic explanation for the preference: it was the approach previously adopted by the Extra Division in *Sinclair Collis v Lord Advocate*.¹⁶ However, since Lord Doherty’s judgment the CJEU appears to have regularised the *Trailers* approach in several of its cases; notably *Commission v Poland*,¹⁷ *Commission v Lithuania*,¹⁸ and *Commission v Spain*.¹⁹

⁷ Ibid, [35].

⁸ Ibid, [38].

⁹ Ibid, [33].

¹⁰ Ibid, [34].

¹¹ Case C-110/05 *Commission v Italy (Trailers)* [2009] ECR I-519.

¹² Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis)* [1979] ECR 649.

¹³ SWA, n 2, [48].

¹⁴ Cases C-267 & 268/91, *Keck & Mithouard* [1993] ECR I-6069. See E Spaventa, ‘Leaving Keck behind? The free movement of goods after the rulings in *Commission v Italy* and *Mickelsson and Roos*’ (2009) 34(6) ELRev 914-932 and P Wenneras & K Boe Moen, ‘Selling Arrangements, Keeping Keck’ (2010) 35(3) ELRev 387-400.

¹⁵ SWA, n 2, particularly at [51].

¹⁶ [2012] CSIH 80, 2013 SLT 100.

¹⁷ Case C-639/11 *Commission v Poland*, ECLI:EU:C:2014:173.

¹⁸ Case C-61/12 *Commission v Lithuania*, ECLI:EU:C:2014:172.

¹⁹ Case C-428/12 *Commission v Spain*, ECLI:EU:C:2014:218.

(a) A Margin of Appreciation?

The use of the *Trailers* test also gave Lord Doherty opportunity to discuss the ‘margin of appreciation’ available to a Member State when adopting measures. The idea of ‘margin of appreciation’ is commonly associated with human rights jurisprudence but it has a long history of use in EU law.²⁰ The harmonisation goal of the EU could result in a very limited application of any margin of appreciation, but the EU has always had to tread an ‘awkward line’ between a common European approach while respecting difference and divergence between Member States.²¹ As Sweeney puts it, the margin of appreciation, ‘allows the impulses of European commonality and national particularism visibly to interact but never fully to defeat each other’.²² The margin of appreciation afforded to EU Member States is defined, and limited, through the operation of the proportionality principle. In this context we are dealing with a common European aim, the protection of health, but the Scottish Parliament must be given the necessary margin to address that aim within the circumstances and cultural norms of Scots society. Where there is a strong European consensus, and a common culture across the EU, it is not necessary to have a wide margin, and proportionality could be operated more strictly. But that is not the situation with the relationship between health and alcohol consumption.²³ Lord Doherty considered the margin of appreciation to be part of the consideration of proportionality.²⁴

(b) The Aim of the Measure

Lord Doherty identified that the aim of MPU was the ‘reduction of alcohol consumption, but in particular the reduction of such consumption by hazardous and harmful drinkers’.²⁵ He also noted that Scottish Ministers were ‘seeking to strike a reasonable balance between, on the one hand, public health and social benefits, and, on the other, intervention in the market’.²⁶ Perhaps his most important conclusion was that: ‘[t]he major problem is excessive consumption of cheap alcohol’.²⁷ This finding is vital for the rest of the case. As the aim of the measure is narrowly defined, and is defined in the context of an identified problem in Scotland, it centres the rest of the proportionality analysis in that context. By accepting the measure has a narrow purpose Lord Doherty shifted the subsequent analysis into a similarly narrow frame.

The detailed consideration of the proportionality of the measure was split into three sections: first, the legitimacy of the aim; second, the appropriateness of the aim; and, finally, the necessity of the measure. The first of these was dealt with swiftly – there was no disagreement that serious health problems stemmed from alcohol consumption in Scotland. Under the second heading there was disagreement. The petitioners suggested that many ‘harmful and hazardous’ drinkers were in higher income groups and would be unaffected by

²⁰ See, JA Sweeney, ‘A ‘Margin of Appreciation’ in the Internal Market: Lessons from the European Court of Human Rights’ (2007) 34(1) LIEI 27-52.

²¹ Sweeney, *ibid*, 36.

²² *Ibid*, 41

²³ *Ibid*, 47.

²⁴ *SWA*, n 2, [52].

²⁵ *Ibid*, [53].

²⁶ *Ibid*, [54].

²⁷ *Ibid*.

the measure. That argument was rejected by Lord Doherty on the basis of the evidence before Parliament. The most important section of the judgment was therefore devoted to whether the measure was ‘necessary’.

(c) The Necessity of the Measure

The imposition of MPU would be disproportionate if its aim could be achieved equally well by a less restrictive measure. The petitioner advocated the EU Commission’s preferred solution: the increase of general excise duties on all alcohol. The Outer House examined the proportionality question by requiring the parties to discharge a series of alternating evidential burdens.

The first key finding was that an increase in general excise duty would be less restrictive of trade than MPU. The petitioners made this assertion and the respondents challenged it by suggesting that the impact of the change may be ‘more complicated and less predictable’ than suggested.²⁸ That response was considered to be insufficient to displace the petitioner’s argument. However, it is unsatisfactory that a key point was not more fully argued. I suggest that such a rise would be far more restrictive of trade, in that it would affect all alcohol products in the UK, whereas MPU would affect only those priced below the MPU floor. Lord Doherty makes this very point about a general rise in excise duty:

‘[the] *average increase* in the price of alcohol would have to be significantly greater than under minimum pricing (in order to achieve increases in price for the cheapest products of the same order as under minimum pricing). Moderate drinkers and the on-trade would be affected more’.²⁹

The next issue therefore became critical: ‘If the alternative measures would *not* be just as effective as minimum pricing in achieving the legitimate aims, minimum pricing would be necessary and proportionate’.³⁰ After reviewing the evidence presented in in the Bill’s Impact Assessment³¹ and before the Scottish Parliament, Lord Doherty noted that general excise duties are constrained by EU law to have single rates for beverages within a range of alcohol strength. It is therefore impossible for rates to change directly in relation to alcohol content. He concluded that:

‘A system which results in higher prices for higher strength alcohol appears to be more consistent with the legitimate aims than one which will tend to result in similar prices for alcohol of significantly different strengths ... Under minimum pricing alcohol which is cheap relative to strength can be targeted. The directives preclude excise duty being used in that way.’³²

The ability of MPU to target lower priced alcohol was therefore pivotal. General duty increases would have an impact on general alcohol consumption. Lord Doherty took the intention of the measures not to be to lower general consumption, but to target the harm of lower priced alcohol:

²⁸ *Ibid*, [65].

²⁹ *Ibid*, [80]. Emphasis as in the judgment.

³⁰ *Ibid*, [66]. Emphasis as in the judgment.

³¹ Scottish Government, ‘Final Business and Regulatory Impact Assessment for Minimum Price Per Unit of Alcohol as Contained in Alcohol (Minimum Pricing) (Scotland) Bill’, 21 June 2012.

³² *SWA*, n 2, [71].

‘In my opinion there is inherent in the Act and the proposed Order a judgment as to the level of protection of health and life the measures are designed to achieve. There is also a judgment that the best way of maximising reductions in sales, consumption and harm is to focus price increases on cheaper alcohol’.³³

For me the most important feature of the analysis is not the restrictiveness of the measure itself; it is the narrow definition of the measure’s aim. As the measure adopted by the Scottish Parliament was narrowly defined, addressing a particular aim, and the measure – although it was restrictive – was an effective means of achieving that aim, it was therefore proportionate. The fact that a ‘less restrictive’ alternative existed was not relevant when it was not seen as effective; in that it did not address the aim. This brings us back to the ‘margin of appreciation’ which is part of proportionality. The Scottish Parliament have a ‘margin’ to decide, after examining the societal and cultural circumstances within Scotland, which legitimate aim they wish to address. If they take care to ensure that they specifically delineate that aim, and then, most importantly, identify a measure well suited to achieving it, it makes it very difficult to challenge the proportionality of that measure. The problem with the alternate measure was that it was more general and therefore was not able to be targeted. If the aim defined by the Scottish Parliament was less specific it would have given greater scope for challengers to put forward more convincing alternatives.

It is difficult for a challenger to suggest that the Member State has selected the ‘wrong’ aim, or the level of protection desired is too high. There are classic cases, like *Sandoz*³⁴ and *Danish Bottles*,³⁵ where it can be argued that the CJEU overturned measures where the legitimacy of the aim was itself at issue, but in this case the evidence presented to the Scottish Parliament was comprehensive and convincing. Once it was accepted that the measure was targeted at protecting the health of ‘harmful and hazardous’ drinkers, who tended to consume low cost/high alcohol products, the challengers’ task was made much more difficult. In order to defend their restrictive policy the Scottish Government played the game well: they identified a real issue of concern, defined it narrowly, and identified an evidence based measure to specifically address it.³⁶ In reality the ‘margin of appreciation’ for Member States does not leave a ‘grey area’ in which they may adopt broad-based policies – it allows them to adopt policy within a broad area, but once they adopt a policy, to limit the potential for successful challenge, they must be clear and specific about its implementation.

B. CONCLUSIONS

The ‘margin of appreciation’ afforded to the Scottish Parliament was central to the Outer House’s judgment. The application of the proportionality test does not mean that there is a common ‘one size fits all’ approach across the EU. Member States must be able to deal with the diverse problems they face. The Scottish Parliament had identified a particular issue on the basis of strong public health evidence. It was therefore right that the legislature was given scope to identify and prioritise a problem for action without interference from EU

³³ Ibid, [79].

³⁴ Case 174/82, *Sandoz BV* [1983] ECR 2445.

³⁵ Case 302/86, *Commission v Denmark (Danish Bottles)* [1988] ECR 4607.

³⁶ On the importance of an evidence base for measures see *Commission v Poland*, n 17, [62], and *Commission v Lithuania*, n 18, [67].

trade law. But it was also correct that EU law was available to challenge the implementation of that policy to ensure it respected, as far as was possible, the principles of free movement. Most legal scrutiny is given to the operation of the second part of the proportionality principle, but the *SWA* case indicates the importance of clearly identifying the legislative rationale. If the legislator carefully considers the rationale for their action, and then targets their measure at a clear and defined problem, they can significantly narrow the frame of reference of any subsequent challenge. By focusing their policy on 'harmful and hazardous' drinkers the Scottish Parliament successfully framed the issue and effectively limited the subsequent application of the proportionality test.

This will not be the last time the UK courts have an opportunity to consider the legality of minimum alcohol pricing. There is an ongoing appeal against the Outer House judgment, and any attempt to extend the policy to other parts of the UK will also, no doubt, be subject to legal challenge. However, on this first showing the Scottish Parliament appears to have put in place a measure that stands up well to scrutiny.