

Minimum Unit Pricing in Scotland

Briefing on Court of Session Judgement

1.

Background

The Alcohol (Minimum Pricing) (Scotland) Act was passed by the Scottish Parliament in May 2012 and received Royal Assent the following month. The law was passed with support from the Scottish National Party; the Conservatives; the Liberal Democrats and the Green Party. The Labour Party abstained in the vote.

Minimum Unit Pricing (MUP) is proposed for the following reasons:

- MUP will target ‘hazardous and harmful’ drinkers who consume the cheapest, strongest alcohol as drinkers will not be able to ‘trade down’ to cheaper drinks.
- MUP is more effective in reducing hazardous and harmful drinking than general taxation on alcohol.
- Changes in general taxation on alcohol would be especially difficult for the ‘on-trade’ where the price of alcohol is already higher than in the ‘off-trade’.
- Raising duty on the cheapest products would lead to a substantial increase in prices and this would distort the market.

MUP was due to come into force in Scotland in April 2013 but has been delayed due to a legal challenge by trade bodies representing alcohol producers. The Scotch Whisky Association (SWA), the European Spirits Association (previously CEPS now renamed Spirits Europe) and Comite Europeen des Entreprises, Vins (CEEV) petitioned the Court of Session for a Judicial Review of the Act.

2.

Legal Process

Petitioners for Judicial Review are heard by one judge in the Outer House of the Court of Session, Scotland’s supreme civil court. The MUP case was heard by Lord Doherty in January and his judgement was issued on 3rd May 2013. Lord Doherty refused the petition and the SWA have now lodged an appeal which will be heard by three judges in the Inner House of the Court of Session. If the appeal judges uphold Lord Doherty’s judgement, the SWA may decide to pursue the case to the Supreme Court. The Supreme Court is the final Court of Appeal for Judicial Reviews of Acts of

administrations and the petitioners will be unable to appeal the decision of the UK Supreme Court. The petitioners have indicated that they believe that the case will end up in the European Court of Justice (ECJ). The ECJ could become involved if a UK court referred the case or, in a separate legal process, if either the European Commission (EC) or a member state of the EU brought a case directly to the ECJ.

3.

Industry Challenge and Court of Session Judgement

The petitioners challenge to the Alcohol (Minimum Pricing) (Scotland) Act 2012 was based on the following grounds:-

1. The Act was in breach of the Acts of Union of the United Kingdom.
2. The Act was outside the legislative competence of the Scottish Parliament because it purports to modify Articles 4 and 6 so far as they relate to trade.
3. The Act is outside the legislative competence of the Scottish Parliament because it is incompatible with EU law.

4.

Act of Union and Legislative Competence

On legal procedural issues, the Court dismissed the industry case that the Minimum Pricing Act was in breach of the Act of Union (which formed the United Kingdom in 1707) and the Scotland Act 1998 which formed the Scottish Parliament.

The Court concluded that there was good evidence to suggest MUP would be an effective measure and the public health benefits justified the measure. Lord Doherty wrote:

I am in no doubt that reduction of alcohol consumption generally, and reduction of consumption by hazardous and harmful drinkers in particular, are both legitimate aims in terms of Article 36.

In comparing the expected effect of MUP with other measures, in particular, increased excise duties, Lord Doherty determined:

The constraints in the excise duty directives mean that excise duty can't be used to achieve the same outcomes as minimum pricing.

The Judge went into some depth on the structure of excise duties and 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.

Another consideration is that MUP was not open to “absorption” unlike excise duty increases which retailers may not pass on to the purchaser.

In summary, the Court’s judgment was that there was good evidence to suggest that MUP was an effective measure, targeted to achieve the Government’s aim of reducing harmful and hazardous drinking. Other pricing mechanisms were less certain in their effect and more likely to affect people who the Government did not wish to affect.

5.

Compatibility with EU law

The Court of Session also considered the compatibility of the measure with EU law. This would depend on whether the trade restrictions of minimum price (Article 34) were justified by the public health benefits of the measure (Article 36). Lord Doherty carefully considered whether MUP was a proportionate measure, and whether the benefits of minimum price could be achieved by other measures.

The Court’s finding was:

It follows that in my opinion the Article 36 justification has been made out. There is objective justification supporting the proportionality of the Act and the proposed minimum price.

As regards suggestions that MUP was protectionist, the Court found that:

The petitioners do not suggest that the measures attacked are a disguised restriction on trade. It is very plain that both the Parliament and the Ministers have proceeded in good faith with the very best of intentions in an effort to address the harm caused by current levels and patterns of alcohol consumption in Scotland. It is also clear that the initiative has been conceived and developed as a health initiative and that it enjoys prodigious support from health professionals and health agencies. There is not the slightest suggestion that it is a disguised restriction on trade.”

As regards the competence of a national court to consider the MUP Bill, Lord Doherty said that the European Court of Justice,

affords a measure of respect... to the decisions of national authorities” and that “It is well established that the national court is in a better position than the Court of Justice to examine and determine all the circumstances bearing upon proportionality ... It follows that, in relation to Article 36 too, I do not consider it necessary or appropriate to refer any question to the Court of Justice for a preliminary ruling.

In other words, this is a legal decision which it is appropriate for a Scottish court to make.

The finding dismissed the petitioners claims that EU regulations on wine and spirit market arrangements made MUP illegal and used strong language with regards to the industry's case on these grounds, describing one of their arguments as "startling." The Court took the view that these EU regulations are trade harmonising measures. They do not deal with pricing or health, which remain matters for member states to deal with.

6.

Conclusions

The opinion of the Court of Session was therefore that:

Alcohol pricing was an issue on which member states have authority to pass legislation.

- Restrictions on trade can be justified on health grounds.
- There must be good grounds to expect that the measure proposed will achieve the government's stated aims.
- The expected effectiveness of the measure must be well grounded and likely to be more effective than other measures in achieving the aims of the legislation.
- European legislation regarding trade harmonisation do not deal with health considerations which remain the responsibility of member states.

The opinion concludes:

In my opinion none of the challenges to the minimum pricing measures is well founded. There is no proper basis for the petitioners being granted any of the remedies which they seek. The petition is refused.

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