

JUSTIFYING ALCOHOL MINIMUM UNIT PRICING©

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The statement that Scotland has a complicated relationship with alcohol is no longer particularly controversial. Policy makers in Scotland have long been concerned with the effect that alcohol has on Scottish society and the public purse.

It will not have escaped the attentions of most that the Scottish National Party has spent virtually its entire time as the Scottish Government attempting to remedy these issues. The manifestation of these efforts was the passing of the Alcohol (Minimum Pricing) (Scotland) Act 2012, which proposed introducing a minimum unit price for alcohol sold in Scotland.

Unfortunately, for the Scottish Government, the legislation has been mired in legal challenges since its inception. The challenges have centred on the notion that there must be a balance between a state's ability to protect the life and health of its population, and the intra-EU trading market. The challenges contend that the Scottish Government has got the balance wrong.

However, there is a degree of light at the end of the tunnel for the Scottish Government. In October, the Inner House of the Court of Session approved, on appeal, the reasoning of the Lord Ordinary at first instance in finding that the 2012 Act was compliant with EU law. However, that is unlikely to be the end of the saga.

HISTORY OF THE LEGISLATION

When elected as the Scottish Government as a minority administration in 2007, the Scottish National Party made clear their intention to seriously consider the introduction of a minimum unit price for which alcohol could be sold in Scotland. The basis for this intention was the perceived link between the price of alcohol and levels of consumption.¹

What is meant by minimum unit pricing is that a base price per unit of alcohol is set, and that alcohol cannot be sold for lower than that price per unit. By extension, the higher alcohol content of a particular type of alcohol, the more expensive it would be. It was posited that this could have the desired effect of

¹ Scottish Government (2008), *Changing Scotland's Relationship with Alcohol: A Discussion Paper on Our Strategic Approach* <<http://www.gov.scot/Resource/Doc/227785/0061677.pdf>>

driving down consumption of alcohol generally, whilst also specifically targeting the inexpensive and strong alcoholic drinks most often consumed by problem drinkers.²

In 2009, the Scottish Government published a policy document entitled *Changing Scotland's Relationship with Alcohol: A Framework for Action*.³ The Scottish Government pointed to statistics, which suggested that, in 2009, alcohol was 70% more affordable in Scotland than it was in 1980.⁴ This increase in affordability was linked to a 19% increase in the consumption of alcohol during the same time period, and a concomitant increase in death and illness.⁵

On October 31st, 2011, the Scottish Government introduced the Alcohol (Minimum Pricing) (Scotland) Bill to the Scottish Parliament. The Bill was tabled with a Scottish Government policy memorandum⁶, the contents of which had been informed by a substantial amount of academic research into the potential effects of minimum unit pricing. The Scottish Government set out in the memorandum that the underlying aims of the Bill were to “help reduce alcohol consumption in Scotland, in particular reducing the consumption of alcohol by harmful drinkers, and reduce the impact that alcohol misuse and overconsumption has on public health, crime, public services, productivity, and the economy as a whole”.⁷

The policy memorandum noted that, in 2010, average alcohol sales were up by 11% on 1994 levels, mostly driven by off-trade sales.⁸ These levels of sales were 23% higher than those in England and Wales, which had seen sales of alcohol drop by 8% since 2005.⁹ In addition, it was estimated that the cost to the Scottish public

² *ibid* pp 18-20

³ Scottish Government (2009) <<http://www.gov.scot/Resource/Doc/262905/0078610.pdf>>

⁴ The Substance Misuse Information Strategy Team Information Services Division (IDS Scotland), *Alcohol Statistics Scotland 2009* <<http://www.ias.org.uk/uploads/pdf/News%20stories/scotland-alcoholstats-2009.pdf>>

⁵ Scottish Government (n 3) p5

⁶ Scottish Parliament (2011) *Alcohol (Minimum Pricing) (Scotland) Bill Policy Memorandum*

<[http://www.parliament.scot/S4_Bills/Alcohol%20\(Minimum%20Pricing\)%20\(Scotland\)%20Bill/Policy_Memo.pdf](http://www.parliament.scot/S4_Bills/Alcohol%20(Minimum%20Pricing)%20(Scotland)%20Bill/Policy_Memo.pdf)>

⁷ *ibid* para 3

⁸ *ibid* para 6

⁹ *ibid*

purse of this increased consumption was £3.56 billion per year in lost productivity, health care, and crime.¹⁰

The Scottish Government surmised that minimum unit pricing was the most effective way to drive down consumption of alcohol in Scotland generally, whilst also targeting harmful and hazardous drinkers.¹¹ The most obvious alternative to minimum unit pricing is increased taxation. However, this was ruled out as an option. First of all, the Scottish Government does not have the ability to alter the tax on alcohol, as this is a matter reserved to the UK Parliament.¹² Secondly, EU Directives 92/83/EEC and 92/84/EEC provide for minimum rates of excise duty on alcohol, and the methods for calculating them. As such, a system of taxation that uniformly levied duties on alcohol of similar strengths would not be compliant with EU law.¹³ Finally, there is no method of taxation available that would allow for inexpensive alcohol to be targeted in the same way as minimum unit pricing is able to.¹⁴

One potential issue with increased taxation is that supermarkets could simply continue to sell alcohol as a loss leader and absorb the increased costs rather than pass them on to the consumer.¹⁵ In these circumstances, the actual price of alcohol to the consumer would not be affected at all. Further, as increased taxation would uniformly impact the cost of alcohol across the board, moderate drinkers would be disproportionately affected.¹⁶ By contrast, minimum unit pricing would primarily impact on the inexpensive alcoholic drinks mostly consumed by harmful and hazardous drinkers.

¹⁰ *ibid* para 11

¹¹ *ibid* para 24

¹² *ibid* para 29

¹³ *ibid*

¹⁴ *ibid*

¹⁵ *ibid*

¹⁶ *ibid*

The Bill was also published with a document known as the Business and Regulatory Impact Assessment for Minimum Price per Unit of Alcohol (BRIA).¹⁷ Whilst the BRIA goes somewhat further in its analysis than the policy memorandum, it also notes that taxation would not have the effect of targeting problem drinkers.¹⁸ The BRIA states that minimum unit pricing would be preferable to taxation as it created certainty, was easier to understand and to enforce, and was not open to absorption by retailers.¹⁹ Further, the BRIA noted that moderate drinkers would not be heavily affected by minimum unit pricing.²⁰

Against this backdrop, the Scottish Parliament passed the Bill, which became known as the Alcohol (Minimum Pricing) (Scotland) Act 2012 (2012 Act) on May 24th, 2012. The 2012 Act subsequently received Royal Assent on June 29th, 2012. What the 2012 Act does is amend the Licensing (Scotland) Act 2005 by inserting a new clause 6A which sets out that alcohol cannot be sold below the minimum price. Subsequently, a draft order was published which set out that the minimum unit price for alcohol would be 50p per unit.²¹

OPINION OF THE EUROPEAN COMMISSION

In terms of the Technical Standards Directive (98/34/EC)²², the Scottish Government is required to notify the European Commission of its intention to introduce minimum unit pricing. Unsurprisingly, many of the countries in the European Union that produce alcoholic drinks responded negatively to the notification. The European Commission published its opinion on minimum unit pricing on September 26th, 2012.²³ The Commission noted that there was nothing within EU law that actively prohibited the setting of a minimum unit price for

¹⁷ Scottish Government (2012) *Framework for action: changing Scotland's Relationship with Alcohol, Final Business and Regulatory Impact assessment for Minimum Price per Unit of Alcohol as Contained in Alcohol (Minimum Pricing) (Scotland) Bill* <<http://www.gov.scot/Resource/0039/00395549.pdf>>

¹⁸ *ibid* para 4.3

¹⁹ *ibid*

²⁰ *ibid*

²¹ The Alcohol (Minimum Price Per Unit) (Scotland) order 2013

²² Article 8

²³ <http://eurocare.org/content/download/13966/76730/version/1/file/Detailed+opinion+EC+on+MUP_final.pdf>

alcohol.²⁴ However, any such minimum price is required to be compatible with other elements of EU law, such as the free movement of goods.²⁵

The Commission stated that EU case law specifically provided that minimum unit pricing would fall within the ambit of article 34 of the Treaty on the Functioning of the European Union (TFEU). Article 34 provides that a member state cannot impose numerical limits on imports of a product to protect domestic products. This is a concept known as ‘quantitative restrictions’.

However, even if a measure does not directly limit imports, it also cannot have an effect that is equivalent to such a restriction. In support of this, the Commission referred to the foundational case of *Procureur de Roi v Dassonville*²⁶, where the European Court of Justice (ECJ) noted that all rules which directly or indirectly hindered inter-EU trade had the equivalent effect to a quantitative restriction.²⁷

In the Commission’s opinion, the 2012 Act would not breach article 34 TFEU if it did not discriminate against imported alcoholic products. However, the Commission reasoned that the 2012 Act did discriminate against imports.²⁸ In this regard, the Commission also considered if the Scottish Government would be able to benefit from the derogation provided for in article 36 TFEU. Article 36 provides that:

The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants...Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Members States.

²⁴ *ibid* page 2

²⁵ *ibid*

²⁶ Case 8/74 *Procureur de Roi v Dassonville* [1974] ECR 837

²⁷ *ibid* [5]

²⁸ Case 82/77 *Openbaar Ministerie v Van Tiggele* [1978] ECR 25

The specific derogation that the Scottish Government seeks to rely on is the protection of health and life of humans. The Commission stated that, in order to benefit from the derogation, “the Member State has to prove that such restrictive measure is necessary to achieve legitimate objectives and is proportionate to this aim i.e. the objective cannot be achieved by any other means less restrictive of intra-Union trade”.²⁹ The Commission was not of the view that a minimum unit price for alcohol would be less distortive to intra-EU trade than increased taxation.

The Commission noted that minimum unit pricing could have a detrimental impact on the importation of alcohol into the United Kingdom. This would represent an impact equivalent to a quantitative restriction to the extent that it prevented the imports lower cost price being reflected in the ultimate retail price.³⁰ In the opinion of the Commission, the 2012 Act breached article 34.

JUDICIAL REVIEW

Shortly after it was passed by the Scottish Parliament, the 2012 Act was challenged by the Scotch Whisky Association, and other drinks industry bodies, by the presentation of a petition for judicial review to the Outer House of the Court of Session. The 2012 Act was challenged on four basic grounds:

1. That the 2012 Act and the draft order setting the minimum unit price at 50p per unit were both in breach of the Acts of Union;
2. That the 2012 Act is outside the competence of the Scottish Parliament as it seeks to modify articles 4 and 6 of the Acts of Union as far as they relate to trade;
3. That the 2012 Act is outside the legislative competence of the Scottish Parliament as it is not compatible with EU law because:
 - a. Minimum unit pricing contravenes article 34 TFEU
 - b. Minimum unit pricing is incompatible with the common organisation of the market relating to wine, other fermented beverages, and produced ethyl alcohol in terms of Regulation (EC) 1234/2007
 - c. Minimum unit pricing is a breach of article 6(2) of Regulation (EC) 110/2008 relating to spirits; and

²⁹ Opinion of the European Commission dated 26 September 2012, page 5; Case 50/83 *Commission v Italy* [1984] ECR 1633

³⁰ *ibid* pp 4-5

4. If the 2012 Act is not within the legislative competence of the Scottish Parliament, then neither is the draft order.³¹

A judicial review hearing took place at the Court of Session in January 2013 before the Lord Ordinary, Lord Doherty. His Lordship delivered his judgment in May 2013, and found entirely in favour of the Scottish Government in rejecting the Scotch Whisky Association's challenge.

The Lord Ordinary found that, in relation to grounds (1) and (2), neither the 2012 Act nor the draft order sought in any way to restrict freedom of trade or give any trading preference to traders in Scotland or England.³² The Lord Ordinary was of the view that neither the Act nor the draft order seeks to modify articles 4 or 6 in any respect. As such, the petitioners' submissions in this respect were without foundation.

In relation to grounds (3) and (4), the Lord Ordinary noted that it was not disputed that the 2012 Act and the draft order would contravene article 34 if they could not be justified in terms of article 36.³³ The petitioners argued that European case law has held that minimum unit pricing could never be justified via article 36.³⁴ The petitioners also argued that, even if minimum unit pricing was not precluded, the appropriate justification was not present in this case.³⁵ In support of this contention, the petitioners noted: (a) the legislation was confused, (b) the aim of reducing consumption across the board could not be reconciled with the desire to target hazardous and harmful drinkers, (c) that it was not certain that raising the price of inexpensive alcohol would reduce consumption by hazardous and harmful drinkers, and (d) there were less restrictive measures which could be adopted such as increases in taxation, coupled with bans on below duty plus VAT sales.³⁶

³¹ *The Scotch Whisky Association v the Lord Advocate* 2013 SLT 776

³² *ibid* [22]

³³ *ibid* [28]

³⁴ *ibid* [32]

³⁵ *ibid* [33]

³⁶ *ibid*

The Lord Ordinary rejected the petitioners' submissions in full. The petitioners relied on, amongst other authorities, the case of *Openbaar Ministerie v Van Tiggele*³⁷ in support of the contention that minimum unit pricing could never be justified under article 36. This case involved consideration of legislation from the Netherlands, which provided for minimum prices for certain alcoholic drinks and whether the minimum prices amounted to a quantitative restriction.

The court held in *Van Tiggele* that a minimum unit price could constitute a quantitative restriction, or an effect equivalent to one, even where it applied equally to domestic and imported goods which may be cheaper if,

[A] minimum price fixed at a specific amount which, although applicable without distinction to domestic products 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.³⁸

In this case, the court ultimately held that imports may be impeded where prices or profit margins are fixed at a level that places imported products at a disadvantage.

However, the Lord Ordinary was able to distinguish *Van Tiggele* from the present case by noting that no article 36 or mandatory requirements justifications were advanced in *Van Tiggele*, or any of the other cases upon which the petitioners relied.³⁹ As such, the petitioners' contention in this regard was without foundation.⁴⁰

With regard to derogation under article 36, the Lord Ordinary made reference to the judgment of an Extra Division of the Inner House of the Court of Session in the case of *Sinclair Collis v Lord Advocate*.⁴¹ In this case, the petitioners were a tobacco vending machine company that challenged the validity of section 9 of the

³⁷ Case 82/77 *Openbaar Ministerie v Van Tiggele* [1978] ECR 25

³⁸ *ibid* [18]

³⁹ Case C-287/89 *Commission v Belgium Ex p. Bene BV* [1991] ECR I-2233; Case C-302/00 *Commission v France* [2002] ECR I-2025; Case C-197/08 *Commission v France* [2010] ECR I-1599; Case C-198/08 *Commission v Austria* [2010] ECR I-1645; Case C-221/08 *Commission v Ireland* [2010] ECR I-1669

⁴⁰ *The Scotch Whisky Association v the Lord Advocate* 2013 SLT 776, [47]

⁴¹ 2013 SC 221

Tobacco and Primary Health Services (Scotland) Act 2010 which prohibited tobacco vending machines. The petitioners contended that this prohibition violated the right to free movement of goods between member states and was, therefore, incompatible with EU law.

In *Sinclair Collis*, the Extra Division considered the decision of the ECJ in *Commission v Italy*⁴², where the court noted that “the national provision must be appropriate for securing the attainment of the objective pursued, and not go beyond what is necessary in order to attain it”.⁴³ The ECJ also stated that it was up to the states to determine the level of protection that they sought to provide, and the means of doing so.⁴⁴

The Extra Division held that any measure taken “must be both ‘appropriate’ (‘suitable’) to secure the objective and ‘necessary’ as a means of doing so”.⁴⁵ The court accepted that the measure would not be necessary if there were a less restrictive means of achieving the same end⁴⁶, but noted that the state was not required to prove that there were no conceivable alternatives to the measure.⁴⁷

The Lord Ordinary reiterated that the aims of the 2012 Act and the draft order were to reduce alcohol consumption generally, whilst also targeting harmful and hazardous drinkers, rather than the complete eradication of alcohol consumption.⁴⁸ In terms of article 36 TFEU, the Lord Ordinary held that these were legitimate aims. The Lord Ordinary further held that the 2012 Act and the draft order were appropriate measures to achieve the aims of the legislation given the surfeit of evidence which points to the relationship between price and alcohol consumption.⁴⁹

⁴² Case C-110/05 *Commission v Italy* [2009] E.C.R. I-519

⁴³ *ibid* [59]

⁴⁴ *ibid* [65]

⁴⁵ *The Scotch Whisky Association v the Lord Advocate* 2013 SLT 776, [56]

⁴⁶ *ibid* [58]

⁴⁷ *ibid* [59]

⁴⁸ *ibid* [53]

⁴⁹ *ibid* [58-60]

The Lord Ordinary found favour with the respondent's submissions in connection with the necessity of the measures. Specifically, the Lord Ordinary noted that for minimum unit pricing to be necessary and proportionate, it would have to be the case that the alternative measures were less effective than minimum unit pricing in achieving the aims of the legislation.⁵⁰ The Lord Ordinary stated that increased taxation would, if simply passed on to consumers, lead to price increases across all alcoholic drinks. This contrasts with minimum unit pricing, which would specifically target inexpensive alcohol.⁵¹

The Lord Ordinary also reiterated the constraints on using taxation to achieve the aims of the 2012 Act and the draft order due to Directives 92/83/EEC and 93/83/EEC. As these directives require uniform rates of taxation, there is no scope for a price cap, and without such a cap, there is no scope to target inexpensive alcohol.⁵² On the basis of the information placed before him, the Lord Ordinary was content that there was an objective justification for derogation in terms of the protection of health and life in accordance with article 36.

Ultimately, the court held that the measures put forward in the 2012 Act and the draft order were objectively proportionate. In other words, they were appropriate and necessary to achieve the aims of the legislation. In the Lord Ordinary's opinion, the Scottish Government had struck the right balance and was entitled to utilise such measures to attain the stated aims of the legislation.

Lastly, the petitioners argued that minimum unit pricing was incompatible with the common organisation of the market in relation to wine, other fermented beverages, and produced ethyl alcohol in terms of Regulation (EC) 1234/2007. The petitioners argued that this market fell within the exclusive competence of the EU, and as such no national measures could be used unless the EU authorised it.⁵³

⁵⁰ *ibid* [66]

⁵¹ *ibid* [67]

⁵² *ibid* [74]

⁵³ *ibid* [86]

The Lord Ordinary accepted that where a matter had been exhaustively harmonised by the EU, the state could not act in relation to that matter. The Lord Ordinary held that agriculture had not been exhaustively harmonised and remained a shared competence. As Regulation (EC) 1234/2007 does not seek to regulate price, or deal with the protection of health, the Lord Ordinary was satisfied that there was no conflict between the regulation and the measures adopted by the Scottish Government.⁵⁴

APPEAL TO THE INNER HOUSE OF THE COURT OF SESSION

Following the publication of the Lord Ordinary's opinion, the petitioners duly appealed his decision to the Inner House of the Court of Session. The petitioners' grounds of appeal were that: (1) the 2012 Act and the draft order represented a breach of article 34 TFEU, and (2) that minimum unit pricing is incompatible with the common organisation of the market relating to wine, other fermented beverages, and produced ethyl alcohol in terms of Regulation (EC) 1234/2007.

A. Reference to the European Court of Justice

Prior to hearing the appeal, the Inner House made a reference to the ECJ in relation to 6 questions on the interpretation of EU law aligned to the two grounds of appeal. The Advocate General, Yves Bot, subsequently issued his opinion on September 3rd, 2015.⁵⁵

In his opinion, the Advocate General held that the 2012 Act and the draft order contravened article 34 as they impaired the ability of importers and producers of inexpensive alcohol to exploit their commercial advantage.⁵⁶ However, the Advocate General accepted that there was derogation available under article 36,

⁵⁴ *ibid* [92-93]

⁵⁵ Case C-333/14 *The Scotch Whisky Association and Ors v the Lord Advocate and the Advocate General for Scotland* [2016] 2 C.M.L.R. 27, Opinion of AG Bot

⁵⁶ *ibid* para 5

provided that the state showed such measures were appropriate and necessary (i.e. objectively proportionate).⁵⁷

The Advocate General was content that the measures put forth in the 2012 Act and the draft order were appropriate for addressing the stated aims of the legislation. However, he stated that it was for the Scottish Government to show that increased taxation would not be sufficient to meet the aims of the legislation.⁵⁸ In his view, increased taxation appeared to be more consistent with the aims of the legislation than minimum unit pricing.

The ECJ issued its opinion on December 23rd, 2015.⁵⁹ It was held that the legislation was capable of being a measure having the equivalent effect to a quantitative restriction as it prevented the price of lower cost products being reflected in the sale price. The ECJ also held that the derogation in article 36 for the protection of health and human life would be available if the measure was appropriate and did not go further than was necessary to achieve the aims of the legislation.

With regard to the common organisation of the market relating to wine, other fermented beverages, and produced ethyl alcohol in terms of Regulation (EC) 1234/2007, the ECJ stated that the member states were not precluded from applying national rules that pursued an objective relating to the protection of health, provided that such rules were proportionate.⁶⁰ The ECJ accepted that the legislation sought to protect health and human life. However, the court stated that the derogation would not be available if the aims could be achieved by means that

⁵⁷ *ibid*

⁵⁸ *ibid* para 149

⁵⁹ Case C-333/14 *The Scotch Whisky Association and Ors v the Lord Advocate and the Advocate General for Scotland* [2016] 2 C.M.L.R. 27

⁶⁰ *ibid* [29]

were less restrictive on trade.⁶¹ On this point, the ECJ posited that it was their view that increased taxation was likely to be less restrictive than minimum unit pricing.⁶²

B. Opinion of the Inner House

The Inner House ultimately refused the appeal in its opinion of October 21st, 2016, written by the Lord President, Lord Carloway.⁶³ The first question that the Inner House considered was whether or not the Lord Ordinary applied the correct test when determining if the legislation could benefit from the derogation in terms of article 36 TFEU.⁶⁴ The Inner House reaffirmed the position as set out in *Commission v Italy*, that a measure had to be appropriate for securing the aims of the legislation, and could not go beyond what was necessary to achieve those aims.⁶⁵ Further, it re-affirmed that the measure would only be appropriate if it sought to attain the objective in a consistent and objective manner⁶⁶, and that life and health could not be protected in a less restrictive way.⁶⁷ Ultimately, the court was unable to find any fault with the Lord Ordinary's application of the test as set out in *Commission v Italy*⁶⁸, and re-affirmed the ECJ's answers to the reference in this case.

The second question that the Inner House considered was whether the Lord Ordinary had identified the correct aim of the legislation.⁶⁹ The Lord Ordinary found that the aims of the legislation were to reduce alcohol consumption generally, whilst also targeting harmful and hazardous drinkers, rather than the complete eradication of alcohol consumption. His view was the same as that set out by the ECJ in their opinion. As such, the Inner House was content that the Lord Ordinary had identified the correct aims.

⁶¹ *ibid* [41]

⁶² *ibid* [47]

⁶³ *The Scotch Whisky Association and Ors v the Lord Advocate and the Advocate General for Scotland* [2016] CSIH 77

⁶⁴ *ibid* [167]

⁶⁵ *Commission v Italy* [1984] ECR I633, [59]

⁶⁶ *Sinclair Collis v Lord Advocate* 2013 SC 221, [54]

⁶⁷ Case C-333/14 *The Scotch Whisky Association and Ors v the Lord Advocate and the Advocate General for Scotland* [2016] 2 C.M.L.R. 27, [43]

⁶⁸ *Commission v Italy* [1984] ECR I633

⁶⁹ *The Scotch Whisky Association and Ors v the Lord Advocate and the Advocate General for Scotland* [2016] CSIH 77, [171]

The third question before the court was the appropriateness of the legislation for achieving those aims.⁷⁰ The Inner House expressed surprise at the petitioners and appellants' position that there was no evidence that a general reduction in a society's alcohol consumption would have a significant health benefit.⁷¹ The court held that there was ample material for the Scottish Government to rely on to contend that there was a link between the price of alcohol and consumption.⁷² It was noted that the ECJ also found the measures to be appropriate given their role in a wider political strategy to reduce alcohol consumption and improve public health. As such, the court could not fault the Lord Ordinary for finding there was sufficient evidence to infer that minimum unit pricing was an appropriate method for achieving the aims of the legislation.⁷³

The fourth question before the court was whether the measures were necessary and if there were less restrictive means of achieving the aims of the legislation. The court noted that minimum unit pricing would involve setting a floor price, below which alcohol could not be sold. One of the benefits of this approach is that hazardous and harmful drinkers would not be able to switch to a cheaper alternative if the price of their usual drink rose⁷⁴. The test adopted by the Lord Ordinary to determine if this measure was necessary was to ask whether or not tax increases would be equally effective.⁷⁵ Minimum unit pricing would have to be the more effective method in order to benefit from the derogation under article 36.⁷⁶

The Inner House was satisfied that the Lord Ordinary gave due consideration to the potentiality of increasing taxes in order to achieve the aims of the legislation.⁷⁷ The court agreed with the Lord Ordinary that increased taxation had no way of setting a minimum unit price for alcohol, as supermarkets could continue to loss

⁷⁰ *ibid* [173]

⁷¹ *ibid*

⁷² *ibid* [175]

⁷³ *ibid* [183]

⁷⁴ *ibid* [186]

⁷⁵ *ibid*

⁷⁶ *ibid* [190]

⁷⁷ *ibid* [193]

lead with alcohol and simply absorb the increased prices rather than pass them on to their customers. Retailers or producers would not be able to do this with minimum unit pricing. The court also noted that a further advantage of minimum unit pricing is its link to the strength of alcohol (i.e. that it targets inexpensive, high strength alcohol).⁷⁸

The court noted that minimum unit pricing was appropriately targeted at hazardous and harmful drinkers who tend to purchase inexpensive alcohol.⁷⁹ Increased taxation cannot be targeted in the same way. Ultimately, the court was persuaded that there was ample evidence, which made out that increased taxation, even with a prohibition on below cost sales, is less effective than minimum unit pricing.⁸⁰

Lastly, the fifth question before the court was whether minimum unit pricing was incompatible with the common organisation of the market relating to wine, other fermented beverages, and produced ethyl alcohol in terms of Regulation (EC) 1234/2007. The court held that it was satisfied with the Lord Ordinary's reasoning on the matter, and that the challenge in this respect fell for the same reason as the challenges in terms of articles 34 and 36.⁸¹

CONCLUSIONS

What the Inner House has, effectively, held is that the 2012 Act and the draft order strike the appropriate balance between protecting life and health, and intra-EU trade. This balance lies at the heart of the interplay between articles 34 and 36 of the TFEU. The court found, without much difficulty, that the Scottish Government achieved the correct balance in introducing a market distorting measure in order to achieve the aim of improving public health.

⁷⁸ *ibid* [198]

⁷⁹ *ibid* [199]

⁸⁰ *ibid* [200]

⁸¹ *ibid* [206]

Unfortunately, for the Scottish Government, the story does not end here. The Scotch Whisky Association have taken up the option of making an application to appeal to the Supreme Court of the United Kingdom. Of course, if they are unsuccessful in that appeal, it would be open to them to appeal the matter again to the ECJ.

It may be some time before we see the 2012 Act actually come into force. In the meantime, the Inner House's comprehensive judgment provides a useful insight into the type of analysis that the courts will undertake when determining if measures taken by the states breach article 34, and what is required to benefit from the derogation under article 36.