

## One more round for minimum unit pricing of alcohol

**Josef Cannon and Matt Lewin study the latest chapter in the saga that is minimum unit pricing of alcohol.**

*This is an edited version of a longer article which will appear in the coming edition of the Journal of Licensing (JoL).*

The latest twist in the saga of the attempt to introduce minimum unit pricing for alcohol in Scotland was the decision by the Court of Session in October 2016, following the matter being sent back to it by the CJEU. The outcome? Minimum pricing is lawful – but the decision has been appealed, so the final say will be had by the Supreme Court in London.

The background to minimum pricing is powerfully described in the following extract from the Court of Session’s judgment:

*178. The societal, family and personal effects of excessive alcohol consumption in Scotland are difficult to overestimate. In some comedic settings they form an unfortunate, if distorted, caricature of the Scottish character. The effect of excessive consumption on the nation's health, levels of crime and productivity is notorious and hardly needs exposition, since they are apparent in daily life, especially to those practising in the courts. According to the government, the annual cost of excessive alcohol consumption can be estimated in billions of pounds.*

Minimum unit pricing was introduced by the Scottish government as part of a range of measures primarily intended to reduce levels of hazardous and harmful drinking and, as a secondary outcome, to reduce alcohol consumption generally. In 2012 the Scottish Parliament enacted the Alcohol (Minimum Pricing) (Scotland) Act 2012. In draft secondary legislation, the Scottish government proposed to fix the minimum price per unit of any alcoholic drink sold at retail at 50p. The Act and the draft secondary legislation were challenged by the Scotch Whisky Association and others representing alcohol-related interests.

The most significant aspect of the challenge was whether minimum pricing was lawful under EU law, principally whether it breached Article 34 of the Treaty on the Functioning of the European Union (“TFEU”) which prohibits “quantitative restrictions” (or measures having equivalent effect) on trade between EU member states. In effect, it was argued (and was not disputed by the Scottish Government) that by setting a floor price below which alcohol cannot be sold, minimum pricing legislation impedes the free movement of alcoholic products by preventing the lower cost price of imported drinks from being reflected in the selling price: it potentially prevents products that are lawfully marketed in other EU member states from competing in Scotland (at least at the intended price).

The central issue in the case thus became whether the measure could be justified for public policy reasons under Article 36 TFEU. If it was justified, minimum pricing would be lawful under EU law. Justification under Article 36 TFEU requires that the measure is proportionate: the measure must pursue one of the objectives prescribed by Article 36 TFEU (in this case the protection of human life and health); *and* that the same objective could not be as effectively achieved by an alternative measure which is less restrictive of trade within the EU. Only the second of these two aspects was truly controversial before the CJEU and the Court of Session: minimum pricing pursued the primary aim of reducing consumption by hazardous and harmful drinkers in particular and, as a secondary aim, sought to reduce generally the Scottish population’s consumption of alcohol

As such, the focus for the Court of Session was a comparison between minimum pricing and an increase in the level of tax on alcoholic products (taxation being a less restrictive measure). Could the Scottish Government show that raising tax would be less effective than minimum unit pricing in achieving the aim?

The Court of Session accepted the (largely academic) evidence adduced by the Scottish Government and concluded that increasing tax would not be as effective as minimum pricing. Its reasoning was neatly captured in para [196]: *“The fundamental problem with an increase in tax is simply that it does not produce a minimum price ... [M]any supermarkets, in the past, sold alcohol at below cost. They have absorbed any tax increases by off setting them against the price of other products unrelated to alcohol. Cheap alcohol is perceived as a draw, lure or enticement to pull shopper into the particular retailer’s premises and away from those of the competition.”*

The Court of Session also observed that minimum pricing – unlike tax – targets cheap alcohol and therefore has a much more direct impact on the hazardous and harmful drinkers who tend to purchase those kinds of drinks; increasing tax would result in price rises across all kinds of drink and therefore have a less direct effect on hazardous and harmful drinkers [199], as well as affecting those who do not drink irresponsibly (‘moderate drinkers’) [200].

The decision has been appealed to the Supreme Court. Meanwhile in England - where in 2013 a similar policy was dropped by the UK government on the basis of a lack of empirical evidence that minimum unit pricing worked – things may be shifting.

In December 2016 Public Health England published a detailed Report which concluded that a combination of both minimum pricing *and* an increase in taxation is likely to be most effective in reducing alcohol-related harm: such an approach would be most likely to *“lead to substantial reductions in harm”*, whilst the minimum pricing element would have a *“negligible impact on moderate consumers and the on-trade”* (‘penalising responsible drinkers’ was one of the concerns cited by the UK government in 2013).

Shortly thereafter Sarah Newton MP, a Home Office minister, gave evidence to the House of Lords Select Committee on the Licensing Act 2003. She reiterated the government’s desire to pursue evidence-based policy making, but (in the light of the Court of Session’s decision) said that the UK Government would watch the outcome of the (expected) Supreme Court appeal with interest; and that the Home Office *“would consider minimum pricing if the evidence supports it”*.

Minimum pricing seems to be closer to a reality in Scotland now than ever; and (subject to the Supreme Court’s decision) might signal a change in approach south of the border too: the absence of evidence cited by the UK government in 2013 appears no longer to be the case and the UK government’s own public health advisory body has now come out firmly in favour. Those opposed to minimum unit pricing may be anxiously looking at the clock, fearing last orders may be called soon.

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