



Making markets work in the interest of public health? The Alcohol (Minimum Pricing) (Scotland) Act 2012 and the free movement and internal market rules in the EU”

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Outline

- What is the problem? “managing” the tension between the commitment to the realisation of the EU internal market and the member states’ commitment to protect the health of their populations.
- The Scottish minimum alcohol pricing legislation (2012): a case on point?
- The 2012 Act: a “prime example” of evidence-based legislation...
- ...extensively litigated: the 2013 Court of Session’s decision, the 2015 EU preliminary ruling and (finally?) the 2016 appeal judgment
- Price control rules and Article 36 TFEU: from the EU Court of Justice’s guidance to the “practical” scrutiny on the part of the referring court...
- Does minimum alcohol pricing work? The experience of the Canadian provinces...
- ... and what about Scotland?

Why minimum alcohol pricing?

- Economic arguments:
 - price elasticity, demand and nature of drinking patterns...
 - Using price as a “lever” to reduce demand...
 - ... And to minimise health and societal harm arising from drinking.
- Why minimum pricing?
 - Consumption patterns: “light/moderate” vs hazardous drinkers...
 - ... And cheaper vs “middle of the road” options! Targeting different patterns and goods in different ways...
 - ... And preventing “arbitrage” from taking place...
 - ➔ To the extent that demand can be totally displaced due to the absence of a cheaper option at the lowest end!

Minimum pricing in Scotland at the internal market test: the 2012 Act and the 2015 preliminary ruling

- The 2012 Act: volumetric minimum pricing...
 - Limited to retail sales;
 - Differentiated per type of drink/alcohol content;
 - Supported by substantive and consistent economic evidence—the Sheffield Study...
- The challenge:
 - Vis-a-vis the wine CMO regulation—containing principles leading to the progressive “marketization” of wine trade—freedom to set prices;
 - Vis-a-vis Articles 34/36 TFEU: is it a MEQR? If so, can it be ‘justified’?

Minimum pricing in Scotland at the internal market test: the 2012 Act and the 2015 preliminary ruling

- The CMO argument: member states are not precluded from setting up rules governing the trade in wine, including those affecting prices... So long as freedom to trade is not affected in a way that is discriminatory!
- Article 34: is this a MEQR? Yes—the impact of the ‘market access test’... Just because cost advantages cannot be incorporated in lower prices, does the measure infringe Article 34...
- Article 36? It is for the domestic court to decide, BUT...
 - MUP, an “appropriate” policy tool to reduce “hazardous” alcohol consumption...
 - Is it “necessary”? → depending on whether less restrictive alternatives exist—the “classic candidate”= generalised excise hike!
 - Should “extra positive effects” be taken into account? “targeted health gains” vs “generalised positive impact on public health across the whole population”...

Back in Edinburgh... the 2016 appeal judgment

- Public health as an eminently national competence... the 2012 Act as an “appropriate” response to the Scottish “alcohol malaise”;
- Proportionality → requiring a “structured” review, which should not “second-guess” the Government in its policy assessment, but should still ensure that any restrictions on free movement are the least onerous...
- ...minimum pricing rules as the most effective tool to attain the goals that the Government had set as “appropriate to the needs of the target group” —no other pricing intervention (incl. higher taxation) could achieve the same demand-reduction outcomes and be as “simple to implement”!
- “Minimal” impact on inter-state trade...
- ... and “irrelevant” for moderate drinkers: Government entitled to prioritise health demands of certain groups!

Back in Edinburgh... the 2016 appeal judgment

- Article 36 TFEU “in action” ...
 - Price competition is not “the be all and end all” of the internal market!
 - The “appropriateness” scrutiny of a measure rests in primis with the member states... and its judicial assessment must take account of the nature of the powers enjoyed by them in each policy area;
 - “Proportionality” → must take into account the degree of discretion enjoyed by the national authorities... and entail a “structured”, limited comparative assessment of available options!

National Courts or EU Courts? Both...

- Between national autonomy and the full effect of EU Law...
- The Inner House as an EU Court:
 - egalitarian, not hierarchical relation with the Court of Justice;
 - Maintaining its independence, especially in the assessment of complex evidence...
 - ... while being faithful to the preliminary ruling!

Alcohol minimum pricing... does it work?

- The experience of the Canadian provincial liquor control legislation...
- The “target audience”: “hazardous drinkers” → least “elastic demand” (i.e. Least likely to abstain in response to a price increase... But more likely to “switch downward to a cheaper option), more likely to source “cheapest options”;
- Nature of the scale: determined on the basis of objective criteria linked to alcoholic strength;
- Objective=eroding consumption “at the lowest end of the scale”!
- Does it work? Evidence from British Columbia—positive: + 10% on beer prices → about 15% less demand; +10% across the board → 3.4% less demand;
- Evidence from Saskatchewan: particularly effective at the lowest end of the scale... +10% price on high strength lager → 22% less demand.

Alcohol minimum pricing... does it work? Tentative conclusions...

- And what about Scotland?
 - Mesas 2016: evidence of “flattening” of hitherto falling consumption rates...
 - ... linked to increasing affordability...
 - ... in turn linked with, inter alia, low pricing in supermarkets and wide availability of alcohol sold off-the-premises (in off-licenses);
 - Evidence also of growing consumption (again!) among more disadvantaged groups, especially of higher-strength drinks, e.g. spirits...
- 2016, NHS Scotland: only minimum pricing rules can reverse this trend → “cheap & strong” drinks outright unaffordable.