

Analysis

Scotch Whisky Association: justifying barriers to trade

Speed read

The recent judgment of the Court of Justice in *Scotch Whisky Association and Others v Lord Advocate and Advocate General for Scotland* (C-333/14) (23 December 2015) provides further guidance on how national courts in the EU should review legislation restricting trade. The CJEU decided that excise duty, rather than a minimum selling price, was the correct mechanism to combat the evils of alcohol abuse. In doing so, the court applied a much more stringent proportionality test when deciding whether measures equivalent to quantitative restrictions could nevertheless be justified under TFEU article 36. However, in applying this strict proportionality test and considering alternative measures, the court showed no regard for the member state's devolution arrangements and the actual powers of the authority by which the contested measure was adopted. The case highlights the complexities of policy making where both the legislative competence of a devolved administration and compatibility with EU law need to be considered.



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The Alcohol (Minimum Pricing) (Scotland) Act 2012 ('the Act'), an Act of the Scottish Parliament that received royal assent in June 2012, provides for a minimum price per unit of alcohol (MPU) for retail sales of alcoholic drinks in Scotland. It also grants an Order-making power to the Scottish ministers to specify the MPU.

The Scottish ministers adopted an Order – never in force – setting the MPU at 50 pence ('the Order') and notified the European Commission of this. In September 2012, the Commission issued an opinion that this measure constituted a quantitative restriction within the meaning of article 34 of the Treaty on the Functioning of the European Union (TFEU) which could not be justified under TFEU article 36. Meanwhile, the Scotch Whisky Association and

a number of other industry bodies made an application for judicial review of the validity of the Act and the Order.

Readers will recall that TFEU article 34 prohibits quantitative restrictions on imports between member states and all measures having equivalent effect. However, by virtue of article 36, this does not preclude prohibitions or restrictions justified on certain grounds, including the protection of the health and life of humans, provided such prohibitions or restrictions do not 'constitute a means of arbitrary discrimination or a disguised restriction on trade between member states'.

The Outer House of the Court of Session rejected the challenge at first instance (*The Scotch Whisky Association v Lord Advocate* 2013 SLT 776), finding that the article 36 justification was made out: there was 'objective justification supporting the proportionality of the Act and the proposed minimum price'. Following an appeal, the Inner House of the Court of Session referred the matter to the Court of Justice (*Scotch Whisky Association and Others v The Lord Advocate and The Advocate General for Scotland* 2014 GWD 17-309).

By this stage, there was no dispute that the MPU was capable of hindering the access to the UK market of alcoholic drinks lawfully marketed in other EU member states and was therefore a measure having an effect equivalent to a quantitative restriction. Nor was there any dispute that the legislation pursued the objective of the protection of the health and life of humans.

The decision of the Court of Justice

The key issues remaining for the Court of Justice within the context of the article 36 justification related to the proportionality of the measures. EU case law makes it clear that a measure can only be justified under article 36 if it is appropriate for securing the achievement of the objective pursued and does not go beyond what is necessary in order to attain it.

It was clear from the reference that the measures had a twofold objective: reducing, in a targeted way, both the hazardous or harmful consumption of alcohol; and also generally reducing the population's consumption of alcohol. The Court of Justice found that the measures adopted were an appropriate means of achieving this. However, as to whether a member state could opt for legislation imposing an MPU and reject a fiscal measure that might be as effective while being less restrictive of the free movement of goods, the court considered the alternative measures set out in the reference.

Developing its reasoning from cases concerning minimum pricing for tobacco products *Commission v Greece* (Case C-216/98) and *Commission v France* (Case C-197/08), the court found that tax legislation constitutes an important and effective tool to discourage the consumption of alcoholic drinks and, therefore, to protect public health. The court held that a fiscal measure which increases the taxation of alcoholic drinks, i.e. an excise duty, is liable to be less restrictive of trade in those products within the EU than a measure imposing an MPU. This is because an MPU significantly restricts the freedom of economic operators to determine their retail selling prices and thus constitutes an obstacle to access to the UK market and to the operation of fair competition in it.

Further, the court found that the fact that increased taxation might entail a generalised increase in prices, procuring additional benefits and providing a broader response to the objective of combating alcohol abuse, did not appear to lead to the conclusion that such a measure was less effective than the measure chosen; and could not in itself justify the rejection of that measure. If anything, that should count in favour of this option.

This is not at odds with the principle that the national court is in a better position to identify the aims of the legislation, and determine whether they might be achieved as effectively by less restrictive measures, because the referring court had already identified the twofold objective. The Outer House of the Court of Session had, however, failed to do so, which had led it to conclude that fiscal measures would be ineffective, affording a greater level of protection of health and life than thought to be appropriate and proportionate by the member state, taking into account socioeconomic considerations, such as concerns for the on trade and moderate drinkers.

In doing so, the Outer House explicitly stated that socioeconomic concerns could not be used to justify measures which were more restrictive of free movement. It implicitly recognised that an MPU would be more restrictive and, as a result, disproportionate from an EU perspective, where proportionality does not so much concern the impact on certain socioeconomic groups but the extent of any restrictions and their effect on intra-EU trade.

Nonetheless, the Court of Justice concluded that it was for the national court, which alone had available to it all the matters of fact and law pertaining to the circumstances of the main proceedings, to determine whether taxation was as effective as an MPU, while being less restrictive of trade in alcoholic drinks within the EU.

In practice, however, the Court of Justice's judgment may make it difficult for the Scottish Court to decide that an MPU is proportionate. When compared to some previous cases like *Konsumentombudsmannen v Gourmet International Products* (Case C-405/98), which concerned a general prohibition on alcohol advertising, there appears to be little room left for the national court to carry out its own assessment. That said, perhaps the *Scotch Whisky* case may be contrasted with cases such as *Åklagaren v Mickelsson* (Case C-142/05) or *Visnapuu* (Case C-198/14), where local factual or legal circumstances were relevant to the analysis. (In one case, these concerned local environmental conditions and byelaws relating to inland waterways; in the other, the ability of the national authorities to monitor compliance with restrictions on the sale of alcoholic beverages.)

Why is this case important?

Despite the steer given to the national court, the Court of Justice has also provided helpful guidance on how the national court should undertake a proportionality analysis. The burden of proof is on the national authorities; there is, however, no need for them to provide positive proof that there is no other conceivable measure enabling the legitimate objective to be attained. The national court must, however, determine the relevance of the evidence adduced. It must examine objectively, on the basis of the information, evidence or other material available to it on the date on which it gives its ruling, not just material available when the measures were adopted:

- whether it may reasonably be concluded from it that the means chosen are appropriate for attainment of the objective pursued; and
- whether it is possible to attain those objectives by measures less restrictive of the free movement of goods.

In this particular case, the referring court could take into account the possible existence of scientific uncertainty and the sun-setting provisions in the Act. The referring court would also have to assess the nature and scale of the restriction on the free movement of goods resulting from a measure such as the MPU, by comparison with other possible measures which are less disruptive of trade within the EU.

This case will clearly be of assistance to the UK courts, which have sometimes struggled to identify and apply the correct proportionality test in an EU law context.

For example, in *R (Lumsdon) v Legal Services Board* [2015] 3 WLR 121, a case concerning the lawfulness of a quality assurance scheme for advocates in the criminal courts, the Supreme Court noted there are different tests depending upon what is being reviewed, i.e. EU measures, national measures relying on derogations from general EU rights or national measures implementing EU law. The Supreme Court identified a number of cases where the wrong test had been applied, e.g. the application of the 'manifestly inappropriate' test when testing the legitimacy of state measures against fundamental principles contained in the EU Treaties.

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Indeed, in the *Scotch Whisky* case, at first instance the UK government expressly indicated that it made a concession only in the *Scotch Whisky* case, and for the purposes of the first hearing that the test was not whether national measures were 'manifestly inappropriate'.

The impact on the UK's devolution arrangements

An article on this case cannot ignore devolution and what will happen if the Scottish Court finds the MPU to be disproportionate in light of the Court of Justice's analysis. Unsurprisingly, the Court of Justice did not refer to the fact that the alternative measure was outside the Scottish Parliament's legislative competence. Although the UK government and devolved administrations have entered into a memorandum of understanding dated October 2013, which deals with the financial consequences of infraction proceedings, the Court of Justice does not generally concern itself with which of the constituent elements of a member state has enacted a particular measure (see, for example, *Aragonesa de Publicidad Exterior and Publivia v Departamento de Sanidad y Seguridad Social de Cataluña* (joined cases C-1/90 and C-176/90)).

It will be interesting to see how the policy issues in this case are solved from a political perspective and whether the Scottish government will now push for control of excise duties. The legislative competence in this case is clearer than in *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61, where the issue was whether Scottish legislation restricting the display of tobacco products or smoking related products and prohibiting the sale of tobacco products by vending machine related to 'the sale and supply of goods to consumers' and 'product safety'.

It will also be interesting to see how the EU law issues potentially arising from the further devolution of tax powers will be handled. Devolving any tax rate varying power must of course satisfy the criteria in the 'Azores case' of institutional, fiscal and procedural autonomy (*Portugal v Commission* (Case C-88/03)), so that regional differences in direct taxation do not involve state aid, but there are likely to be other issues that will emerge in time. ■

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