

JUDGMENT OF THE COURT (Second Chamber)

23 December 2015 (*)

(Reference for a preliminary ruling — Common organisation of the markets in agricultural products — Regulation (EU) No 1308/2013 — Free movement of goods — Article 34 TFEU – Quantitative restrictions — Measures having equivalent effect — Minimum price of alcoholic drinks calculated according to the alcoholic strength of the product — Justification — Article 36 TFEU – Protection of human life and health — Assessment by the national court)

In Case C-333/14,

REQUEST for a preliminary ruling under Article 267 TFEU, from the Court of Session (Scotland, United Kingdom), made by decision of 3 July 2014, received at the Court on 8 July 2014, in the proceedings

Scotch Whisky Association,

spiritsEUROPE,

Comité de la Communauté économique européenne des Industries et du Commerce des Vins, Vins aromatisés, Vins mousseux, Vins de liqueur et autres Produits de la Vigne (CEEV)

v

Lord Advocate,

Advocate General for Scotland,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the First Chamber, acting as President of the Second Chamber, J.L. da Cruz Vilaça, A. Arabadjiev, C. Lycourgos (Rapporteur) and J.-C. Bonichot, Judges,

Advocate General: Y. Bot,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 6 May 2015,

after considering the observations submitted on behalf of:

- the Scotch Whisky Association, spiritsEUROPE and the Comité de la Communauté économique européenne des Industries et du Commerce des Vins, Vins aromatisés, Vins mousseux, Vins de liqueur et autres Produits de la Vigne (CEEV), by C. Livingstone, Advocate, G. McKinlay, Rechtsanwalt, A. O'Neill QC, J. Holmes and M. Ross, Barristers,
- the Lord Advocate, by S. Bathgate, acting as Agent, and by C. Pang and L. Irvine, Advocates, and G. Moynihan QC,
- the United Kingdom Government, by C.R. Brodie, S. Behzadi-Spencer and M. Holt, acting as Agents, and by A. Carmichael, Barrister,
- the Bulgarian Government, by E. Petranova and D. Drambozova, acting as Agents,

- Ireland, by E. Creedon, A. Joyce and B. Counihan, acting as Agents, and by B. Doherty, Barrister,
- the Spanish Government, by A. Rubio González, acting as Agent,
- the Netherlands Government, by M. Bulterman and M. Gijzen, acting as Agents,
- the Polish Government, by B. Majczyna, M. Szwarc, M. Załęska and D. Lutostańska, acting as Agents,
- the Portuguese Government, by A. Gameiro and L. Inez Fernandes, acting as Agents,
- the Finnish Government, by H. Leppo, acting as Agent,
- the Swedish Government, by A. Falk, C. Meyer-Seitz, U. Persson, N. Otte Widgren, E. Karlsson and L. Swedenborg, acting as Agents,
- the Norwegian Government, by K. Nordland Hansen and M. Schei, acting as Agents,
- the European Commission, by B. Eggers and G. Wilms, acting as Agents,
- the EFTA Surveillance Authority, by J.T. Kaasin, M. Moustakali and A. Lewis, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 September 2015,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Regulation (EU) No 1308/2013 of the European Parliament and the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (OJ 2013 L 347, p. 671; ‘the Single CMO Regulation’), and of Articles 34 TFEU and 36 TFEU.
- 2 The request was made in proceedings between the Scotch Whisky Association, spiritsEUROPE and the Comité de la Communauté économique européenne des Industries et du Commerce des Vins, Vins aromatisés, Vins mousseux, Vins de liqueur et autres Produits de la Vigne (CEEV), on the one hand, and the Lord Advocate and the Advocate General for Scotland, on the other, concerning the validity of the national legislation and a draft order relating to the imposition of a minimum price per unit of alcohol (‘MPU’) with respect to the retail selling of alcoholic drinks in Scotland.

Legal context

EU law

- 3 Recitals 15, 43, 172 and 174 in the preamble of the Single CMO Regulation are worded as follows:
 ‘(15) This Regulation should provide for the possibility of disposal of products bought in public intervention. Such measures should be taken in a way that avoids market disturbances and that ensures equal access to the goods and equal treatment of purchasers.

...

(43) It is important to provide for support measures in the wine sector which strengthen competitive structures. ...

...

(172) In view of the specific characteristics of the agricultural sector and its reliance on the good functioning of the entire food supply chain, including the effective application of competition rules in all related sectors throughout the whole food chain, which can be highly concentrated, special attention should be paid to the application of the competition rules laid down in Article 42 TFEU. ...

...

(174) A special approach should be allowed in the case of farmers' or producer organisations or their associations, the objective of which is the joint production or marketing of agricultural products or the use of joint facilities, unless such joint action excludes competition ...'

4 Article 167(1) of the Single CMO Regulation, that article being headed 'Marketing rules to improve and stabilise the operation of the common market in wines', provides:

'In order to improve and stabilise the operation of the common market in wines, including the grapes, musts and wines from which they derive, producer Member States may lay down marketing rules to regulate supply, particularly by way of decisions taken by the interbranch organisations recognised under Articles 157 and 158.

Such rules shall be proportionate to the objective pursued and shall not:

- (a) relate to any transaction after the first marketing of the produce concerned;
 - (b) allow for price fixing, including where prices are set for guidance or recommendation;
- ...'

United Kingdom law

5 The Alcohol (Minimum Pricing) (Scotland) Act 2012 ('the 2012 Act') provides for the imposition of an MPU, which must be observed by the holder of any licence required for the retail selling of alcoholic drinks in Scotland.

6 The 2012 Act provides that the Scottish Government is to determine the MPU by secondary legislation. In that regard, the Scottish Government drew up a draft order, namely the Alcohol (Minimum Price per Unit) (Scotland) Order 2013 ('the MPU Order'), for the approval of the Scottish Parliament.

7 According to that order, the MPU is to be fixed at pounds sterling (GBP) 0.50 (approximately EUR 0.70). The minimum sale price of a product is thereafter determined by applying the following formula: $MPU \times S \times V \times 100$, where 'MPU' designates the minimum price per unit of alcohol, 'S' designates the strength of the alcohol and 'V' designates the volume of alcohol in litres.

8 The 2012 Act provides that the Scottish Government is to assess the effect of setting an MPU with a view to laying a report before the Scottish Parliament five years after the entry into force of the legislation at issue. Further, the 2012 Act provides that the setting of an MPU will expire six years after the entry into force of the MPU Order unless the Parliament decides to maintain the provisions.

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 9 The 2012 Act has been passed by the Scottish Parliament, but only some formal parts of the act entered into force on 29 June 2012. In accordance with the 2012 Act, the Scottish Ministers adopted the MPU Order, which sets the MPU at GBP 0.50 (approximately EUR 0.70).
- 10 On 25 June 2012 the Scottish Ministers notified the European Commission of that order, under Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998, laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1998 L 204, p. 37). On 25 September 2012 the Commission issued its opinion, that the national measure concerned constituted a quantitative restriction within the meaning of Article 34 TFEU which could not be justified under Article 36 TFEU.
- 11 On 19 July 2012 the applicants in the main proceedings made an application for judicial review of the validity of the 2012 Act and the MPU Order. Their action having been dismissed by the court of first instance, the applicants brought an appeal against that decision before the Inner House of the Court of Session (Scotland). It may be added that the Scottish Ministers have undertaken not to bring into force the MPU provisions before the conclusion of those proceedings.
- 12 In those circumstances, the Court of Session (Scotland) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- ‘(1) On a proper interpretation of EU law respecting the common organisation of the market in wine, in particular Regulation (EU) No 1308/2013, is it lawful for a Member State to promulgate a national measure which prescribes a minimum retail selling price for wine related to the quantity of alcohol in the sale product and which thus departs from the basis of free formation of price by market forces which otherwise underlies the market in wine?
- (2) In the context of a justification sought under Article 36 TFEU, where:
- (i) a Member State has concluded that it is expedient in the interest of the protection of human health to increase the cost of consumption of a commodity — in this case alcoholic drinks — to consumers, or a section of those consumers; and
- (ii) that commodity is one in respect of which the Member State is free to levy excise duties or other taxes (including taxes or duties based upon alcoholic content or volume or value or a mixture of such fiscal measures),
- is it permissible under EU law, and if so under what conditions, for a Member State to reject such fiscal methods of increasing the price to the consumer in favour of legislative measures fixing minimum retail prices which distort intra-EU trade and competition?
- (3) Where a court in a Member State is called upon to decide whether a legislative measure which constitutes a quantitative restriction on trade incompatible with Article 34 TFEU may yet be justified under Article 36 TFEU, on the grounds of the protection of human health, is that national court confined to examining only the information, evidence or other materials available to and considered by the legislator at the time at which the legislation was promulgated? And if not, what other restrictions might apply to the national court’s ability to consider all materials or evidence available and offered by the parties at the time of the decision of the national court?
- (4) Where a court in a Member State is required, in its interpretation and application of EU law, to examine a contention by the national authorities that a measure otherwise constituting a quantitative restriction within the scope of Article 34 TFEU is justified as a derogation, in the interests of the protection of human health, under Article 36 TFEU, to what extent is the national court required, or entitled, to form — on the basis of the materials before it — an objective view of the effectiveness of the measure in achieving the aim which is claimed; the availability of at least equivalent alternative measures less disruptive of intra-EU competition; and the general proportionality of the measure?

- (5) In considering (in the context of a dispute as to whether a measure is justified on grounds of the protection of human health under Article 36 TFEU) the existence of an alternative measure, not disruptive, or at least less disruptive, of intra-EU trade and competition, is it a legitimate ground for discarding that alternative measure that the effects of that alternative measure may not be precisely equivalent to the measure impugned under Article 34 TFEU but may bring further, additional benefits and respond to a wider, general aim?
- (6) In assessing whether a national measure conceded, or found, to be a quantitative restriction in the sense of Article 34 TFEU for which justification is sought under Article 36 TFEU and in particular in assessing the proportionality of the measure, to what extent may a court charged with that function take into account its assessment of the nature and extent to which the measure offends as a quantitative restriction offensive to Article 34 TFEU?

Consideration of the questions referred for a preliminary ruling

The first question

- 13 By its first question, the referring court seeks, in essence, to ascertain whether the Single CMO Regulation must be interpreted as precluding a national measure, such as that at issue in the main proceedings, which imposes an MPU with respect to the retail selling of wines.
- 14 First, it must be recalled that, in accordance with Article 40(2) TFEU, a common organisation of agricultural markets ('CMO') may include all measures required, in particular regulation of prices, to attain the objectives of the common agricultural policy (CAP) set out in Article 39 TFEU.
- 15 Further, as stated in recital 3 of the Single CMO Regulation, the aim of that regulation is to ensure the existence of a CMO for all agricultural products listed in Annex I to the EU and FEU Treaties, one such product being wine.
- 16 Relying on the Court's case-law relating to the legislation of the European Community in force in the 1980s governing the Wine CMO, the applicants in the main proceedings claim, in that regard, that the Single CMO Regulation constitutes a complete system for the regulation of the common market in wines, especially as regards prices. That being the case, the Member States cannot adopt national legislation such as that at issue in the main proceedings. In particular, the applicants claim that a prohibition on Member States imposing unilateral measures that fix the retail prices of wines is expressly stated in Article 167(1)(b) of the Single CMO Regulation.
- 17 It is clear, however, as correctly stated by the Commission in its written observations, that the Single CMO Regulation contains neither provisions that permit the fixing of the retail selling prices of wines, either at national or EU level, nor provisions that prohibit Member States adopting national measures fixing such prices.
- 18 While Article 167(1)(b) of that regulation expressly provides that producer Member States may not allow for price fixing, including where prices are set for guidance or recommendation, that is however solely in the context of laying down marketing rules to regulate supply, particularly by way of decisions taken by interbranch organisations in the common market in wines.
- 19 Consequently, the Member States retain in principle the competence to adopt certain measures which are not provided for in the Single CMO Regulation, provided that those measures are not such as to undermine that regulation or create exceptions to it or interfere with its proper operation (see, to that effect, judgment in *Kuipers*, C-283/03, EU:C:2005:314, paragraph 37 and the case-law cited).
- 20 As regards the setting of a minimum price, as the Advocate General stated in points 31 and 37 of his Opinion, in the absence of a pricing mechanism, the free formation of selling prices on the basis of fair competition is a component of the Single CMO Regulation and constitutes the expression of the principle of free movement of goods in conditions of effective competition.

- 21 In the main proceedings, it must be observed that the effect of imposing an MPU is that it will be impossible, in any event, for the retail selling price of wines, produced locally or imported, to be lower than the obligatory minimum price. Such a measure is therefore liable to undermine competition by preventing some producers or importers from taking advantage of lower cost prices so as to offer more attractive retail selling prices (see, to that effect, judgments in *Commission v France*, C-197/08, EU:C:2010:111, paragraph 37, and *Commission v Ireland*, C-221/08, EU:C:2010:113, paragraph 40).
- 22 In that regard, the Court has previously ruled that the common organisations of the market are based on the concept of an open market to which every producer has free access under conditions of effective competition (judgment in *Milk Marque and National Farmers' Union*, C-137/00, EU:C:2003:429, paragraph 59 and the case-law cited).
- 23 Further, it must be borne in mind that one of the objectives of the CAP is the maintenance of effective competition in the markets for agricultural products (judgment in *Panellinios Syndesmos Viomichanion Metapoisis Kapnou*, C-373/11, EU:C:2013:567, paragraph 37), which is reflected in a number of recitals of the Single CMO Regulation, such as recitals 15, 43, 172 and 174.
- 24 Consequently, it is clear that the national legislation at issue in the main proceedings, which imposes an MPU for the retail selling of wines, is liable to undermine the Single CMO Regulation in that such a measure is incompatible with the principle that is the foundation of that regulation: the free formation of selling prices of agricultural products on the basis of fair competition.
- 25 The Lord Advocate argues, however, that the Single CMO Regulation does not prevent the Scottish authorities adopting the measure at issue in the main proceedings, given that that measure pursues the objective of the protection of human life and health by means of combating the misuse of alcohol, an objective with which the Single CMO Regulation is not directly concerned.
- 26 It is clear, indeed, that the establishment of a CMO does not prevent the Member States from applying national rules intended to attain an objective relating to the general interest other than those covered by that CMO even if those rules are likely to have an effect on the functioning of the common market in the sector concerned (see judgment in *Hammarsten*, C-462/01, EU:C:2003:33, paragraph 29 and the case-law cited).
- 27 That being the case, a Member State may rely on the objective of the protection of human life and health in order to justify a measure, such as that at issue in the main proceedings, which undermines the system, on which the Single CMO Regulation is founded, of free formation of prices in conditions of effective competition.
- 28 A restrictive measure such as that provided for by the national legislation at issue in the main proceedings must, however, satisfy the conditions set out in the Court's case-law with respect to proportionality, that is, the measure must be appropriate for attaining the objective pursued, and must not go beyond what is necessary to attain that objective (see, by analogy, judgment in *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraph 64), which the Court will consider in its examination of the second to sixth questions, which specifically concern the analysis of the proportionality of that legislation. It must be observed that, in any event, the issue of proportionality must be examined by taking into consideration, in particular, the objectives of the CAP and the proper functioning of the CMO, which necessitates that those objectives be weighed against the objective pursued by that legislation, namely the protection of public health.
- 29 Consequently, the answer to the first question is that the Single CMO Regulation must be interpreted as not precluding a national measure, such as that at issue in the main proceedings, which imposes an MPU for the retail selling of wines, provided that that measure is in fact an appropriate means of securing the objective of the protection of human life and health and that, taking into consideration the objectives of the CAP and the proper functioning of the CMO, it does not go beyond what is necessary to attain that objective of the protection of human life and health.

- 30 By its second and fifth questions, which can be examined together, the referring court seeks, in essence, to ascertain whether Articles 34 TFEU and 36 TFEU must be interpreted as not precluding a Member State choosing, in order to pursue the objective of the protection of human life and health by means of increasing the price for the consumption of alcohol, the option of legislation, such as that at issue in the main proceedings, which imposes an MPU for the retail selling of alcoholic drinks, and rejecting a measure that is less restrictive of trade and competition within the European Union, such as increasing excise duties, on the ground that the latter measure may procure additional benefits and respond to an objective that is wider and more general than that of the measure chosen.
- 31 First, it must be observed that, in accordance with settled case-law, all measures of a Member State which are capable of hindering, directly or indirectly, actually or potentially, trade within the European Union are to be considered as measures having an effect equivalent to quantitative restrictions within the meaning of Article 34 TFEU (see, *inter alia*, judgments in *Dassonville*, 8/74, EU:C:1974:82, paragraph 5, and *Juvelta*, C-481/12, EU:C:2014:11, paragraph 16).
- 32 As the Advocate General stated in points 59 and 60 of his Opinion, the fact that the legislation at issue in the main proceedings prevents the lower cost price of imported products being reflected in the selling price to the consumer means, by itself, that that legislation is capable of hindering the access to the United Kingdom market of alcoholic drinks that are lawfully marketed in Member States other than the United Kingdom of Great Britain and Northern Ireland, and constitutes therefore a measure having an effect equivalent to a quantitative restriction within the meaning of Article 34 TFEU (see, to that effect, judgments in *Commission v Italy*, C-110/05, EU:C:2009:66, paragraph 37; *ANETT*, C-456/10, EU:C:2012:241, paragraph 35; and *Vilniaus energija*, C-423/13, EU:C:2014:2186, paragraph 48), as is, it may be said, not disputed by either the referring court or any of the parties who have submitted observations in this case.
- 33 In accordance with settled case-law, a measure having equivalent effect to a quantitative restriction on imports can be justified, for example, on grounds of the protection of the health and life of humans, under Article 36 TFEU, only if that measure is appropriate for securing the achievement of the objective pursued and does not go beyond what is necessary in order to attain it (see, to that effect, judgment in *ANETT*, C-456/10, EU:C:2012:241, paragraph 45 and the case-law cited).
- 34 As regards the objective pursued by the national legislation at issue in the main proceedings, the referring court states that it is apparent from the Explanatory Notes that accompanied the draft of the 2012 Act placed before the Scottish Parliament, and from a recent study, entitled 'Business and Regulatory Impact Assessment', that that legislation pursues a twofold objective, that of reducing, in a targeted way, both the consumption of alcohol by consumers whose consumption is hazardous or harmful, and also, generally, the population's consumption of alcohol. At the hearing before the Court, the Lord Advocate confirmed that twofold objective, which, being aimed at the whole population, includes as targets, albeit only secondarily, drinkers whose consumption of alcohol is moderate.
- 35 It is therefore clear that the legislation at issue in the main proceedings pursues, more generally, the objective of the protection of the health and life of humans that ranks foremost among the assets or interests protected by Article 36 TFEU. It is for the Member States, within the limits imposed by the Treaty, to decide what degree of protection they wish to assure (judgment in *Rosengren and Others*, C-170/04, EU:C:2007:313, paragraph 39 and the case-law cited).
- 36 As regards the appropriateness of that legislation to attaining that objective of the protection of human life and health, it must be observed that, as the Advocate General stated in point 127 of his Opinion, it does not seem unreasonable to consider that a measure that sets a minimum selling price of alcoholic drinks, the very specific aim of which is to increase the price of cheap alcoholic drinks, is capable of reducing the consumption of alcohol, in general, and the hazardous or harmful

consumption of alcohol, in particular, given that drinkers whose consumption can be so described purchase, to a great extent, cheap alcoholic drinks.

- 37 Further, it must be borne in mind that a restrictive measure can be considered to be an appropriate means of securing the achievement of the objective pursued only if it genuinely reflects a concern to secure the attainment of that objective in a consistent and systematic manner (see, to that effect, judgment in *Kakavetsos-Fragkopoulos*, C-161/09, EU:C:2011:110, paragraph 42, and, by analogy, judgment in *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraph 64).
- 38 It is apparent, in that regard, from the material in the file before the Court and from the observations of the Lord Advocate and the arguments heard at the hearing that the national legislation at issue in the main proceedings is part of a more general political strategy designed to combat the devastating effects of alcohol. The imposition of an MPU, provided for by this legislation, constitutes one of 40 measures whose objective is to reduce, in a consistent and systematic manner, the consumption of alcohol by the Scottish population as a whole, irrespective of where that consumption takes place or the nature of that consumption.
- 39 It follows that the national legislation at issue in the main proceedings appears to be an appropriate means of attaining the objective that it pursues.
- 40 As regards whether that national legislation does not go beyond what is necessary in order effectively to protect human life and health, it must be borne in mind that, in this case, that analysis must be undertaken, as stated in paragraph 28 of this judgment, with regard to the objectives of the CAP and the proper functioning of the CMO. However, given the issue to be examined in this case, that analysis will have to be undertaken with reference to proportionality in the context of Article 36 TFEU and will therefore not have to be carried out separately.
- 41 It must, moreover, be stated that national legislation or practice cannot benefit from the derogation laid down in Article 36 TFEU if human life and health can be as effectively protected by measures that are less restrictive of trade within the European Union (judgment in *Rosengren and Others*, C-170/04, EU:C:2007:313, paragraph 43 and the case-law cited).
- 42 In that regard, the referring court refers specifically to a fiscal measure, such as increased taxation on alcoholic drinks, considering that such a measure might be as effective as a measure setting an MPU in attaining the objective of the protection of human life and health, while being less restrictive of the free movement of goods. However, the parties who have submitted observations are not in agreement on the matter.
- 43 On this subject it may, first, be pointed out, as the Advocate General stated in point 143 of his Opinion, that EU law does not preclude, as a general rule, increased taxation on alcoholic drinks. The Member States retain a discretion to apply a general increase of excise duties in order, in particular, to pursue the attainment of specific public health objectives.
- 44 Further, it is clear that tax legislation constitutes an important and effective tool to discourage the consumption of alcoholic drinks and, therefore, to protect public health. The objective of ensuring that the prices of those drinks are set at high levels can adequately be pursued by their increased taxation, since increases in excise duties must sooner or later be reflected in increased retail selling prices, without impinging on the free formation of prices (see, by analogy, judgments in *Commission v Greece*, C-216/98, EU:C:2000:571, paragraph 31, and *Commission v France*, C-197/08, EU:C:2010:111, paragraph 52).
- 45 It must be stated, in that regard, that, contrary to what is argued by the Lord Advocate, the fact that the case-law cited in the preceding paragraph concerns tobacco products does not mean that it is inapplicable to the main proceedings, which concern the trade in alcoholic drinks. In the context of national measures which have as their objective the protection of human life and health, and irrespective of the particular characteristics of each product, an increase in the prices of alcoholic drinks can be achieved, as was the case with respect to tobacco products, by increased taxation.

- 46 Yet a fiscal measure which increases the taxation of alcoholic drinks is liable to be less restrictive of trade in those products within the European Union than a measure imposing an MPU. The reason is, as stated in paragraph 21 of this judgment, that the latter measure, unlike increased taxation of those products, significantly restricts the freedom of economic operators to determine their retail selling prices and, consequently, constitutes a serious obstacle to access to the United Kingdom market of alcoholic drinks lawfully marketed in Member States other than the United Kingdom and to the operation of fair competition in that market.
- 47 Last, as regards the question whether it is possible to prefer the adoption of an MPU to fiscal measures on the ground that the objective pursued could not be attained as effectively by fiscal measures, it must be stated that the fact that increased taxation of alcoholic drinks entails a generalised increase in the prices of those drinks, affecting both drinkers whose consumption of alcohol is moderate and those whose consumption is hazardous or harmful, does not appear, in the light of the twofold objective pursued by the national legislation at issue in the main proceedings, as described in paragraph 34 of this judgment, to lead to the conclusion that such increased taxation is less effective than the measure chosen.
- 48 On the contrary, as the Advocate General stated in point 150 of his Opinion, in such circumstances, the fact that an increased taxation measure may be capable of procuring additional benefits as compared with the imposition of an MPU, by contributing to the achievement of the general objective of combating alcohol misuse, not only cannot constitute a reason to reject such a measure, but is in fact a factor to support that measure being preferred to the measure imposing an MPU.
- 49 It is however for the referring court, which alone has available to it all the matters of fact and law pertaining to the circumstances of the main proceedings, to determine whether a measure other than that provided for by the national legislation at issue in the main proceedings, such as increased taxation on alcoholic drinks, is capable of protecting human life and health as effectively as that legislation, while being less restrictive of trade in those products within the European Union.
- 50 It follows from the foregoing that the answer to the second and fifth questions is that Articles 34 TFEU and 36 TFEU must be interpreted as precluding a Member State choosing, in order to pursue the objective of the protection of human life and health by means of increasing the price of the consumption of alcohol, the option of legislation, such as that at issue in the main proceedings, which imposes an MPU for the retail selling of alcoholic drinks, and rejecting a measure, such as increased excise duties, that may be less restrictive of trade and competition within the European Union. It is for the referring court to determine whether that is indeed the case, having regard to a detailed analysis of all the relevant factors in the case before it. The fact that the latter measure may bring additional benefits and be a broader response to the objective of combating alcohol misuse cannot, in itself, justify the rejection of that measure.

The fourth and sixth questions

- 51 By its fourth and sixth questions, which can be examined together, the referring court raises, in essence, the issue of how Article 36 TFEU is to be interpreted with respect to the extent of the review of proportionality which that court must carry out when it examines national legislation in the light of the justification relating to the protection of the health and life of humans, under that article.
- 52 It must be observed that, in the light of the case-law cited in paragraph 35 of this judgment, it is for the Member States to decide on the level of protection of human life and health which they propose to provide, for the purposes of Article 36 TFEU, while taking into consideration the requirements of the free movement of goods within the European Union.
- 53 Since a prohibition such as that which arises from the national legislation at issue in the main proceedings amounts to a derogation from the principle of the free movement of goods, it is for the national authorities to demonstrate that that legislation is consistent with the principle of proportionality, that is to say, that it is necessary in order to achieve the declared objective, and that that objective could not be achieved by prohibitions or restrictions that are less extensive, or that

are less disruptive of trade within the European Union (see, to that effect, judgment in *Franzén*, C-189/95, EU:C:1997:504, paragraphs 75 and 76, and *Rosengren and Others*, C-170/04, EU:C:2007:313, paragraph 50).

- 54 In that regard, the reasons which may be invoked by a Member State by way of justification must be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State, and specific evidence substantiating its arguments (see, to that effect, judgments in *Lindman*, C-42/02, EU:C:2003:613, paragraph 25; *Commission v Belgium*, C-227/06, EU:C:2008:160, paragraph 63; and *ANETT*, C-456/10, EU:C:2012:241, paragraph 50).
- 55 It must however be stated that that burden of proof cannot extend to creating the requirement that, where the competent national authorities adopt national legislation imposing a measure such as the MPU, they must prove, positively, that no other conceivable measure could enable the legitimate objective pursued to be attained under the same conditions (see, to that effect, judgment in *Commission v Italy*, C-110/05, EU:C:2009:66, paragraph 66).
- 56 In that context, it is for the national court called on to review the legality of the national legislation concerned to determine the relevance of the evidence adduced by the competent national authorities in order to determine whether that legislation is compatible with the principle of proportionality. On the basis of that evidence, that court must, in particular, examine objectively whether it may reasonably be concluded from the evidence submitted by the Member State concerned that the means chosen are appropriate for the attainment of the objectives pursued and whether it is possible to attain those objectives by measures that are less restrictive of the free movement of goods.
- 57 In this case, in the course of such a review, the referring court may take into consideration the possible existence of scientific uncertainty as to the actual and specific effects on the consumption of alcohol of a measure such as the MPU for the purposes of attaining the objective pursued. As the Advocate General stated in point 85 of his Opinion, the fact that the national legislation provides that the setting of an MPU will expire six years after the entry into force of the MPU Order, unless the Scottish Parliament decides that it is to continue, is a factor that the referring court may also take into consideration.
- 58 That court must also 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 European Union, and the effect of such a measure on the proper functioning of the CMO, that assessment being intrinsic to the examination of proportionality.
- 59 It follows from the foregoing that Article 36 TFEU must be interpreted as meaning that, where a national court examines national legislation in the light of the justification relating to the protection of the health and life of humans, under that article, it is bound to examine objectively whether it may reasonably be concluded from the evidence submitted by the Member State concerned that the means chosen are appropriate for the attainment of the objectives pursued and whether it is possible to attain those objectives by measures that are less restrictive of the free movement of goods and of the CMO.

The third question

- 60 By its third question, the referring court seeks, in essence, to ascertain whether Article 36 TFEU must be interpreted as meaning that the review of the proportionality of a national measure, such as that at issue in the main proceedings, is to be confined to examining only the information, evidence or other materials available to the national legislature when it adopted such a measure.
- 61 The referring court states that the parties to the main proceedings disagree as regards the time at which the legality of the national measure at issue is to be assessed. Accordingly, it has doubts as to the material and evidence that it should examine in its assessment of whether that measure is

justified in the light of Article 36 TFEU, where new studies, which were not examined by the national legislature at the time of adoption of that measure are, now, available to the referring court.

- 62 It must be stated at the outset the requirements of EU law must be complied with at all relevant times, whether that is the time when a measure is adopted, when it is implemented or when it is applied to the case in point (judgment in *Seymour-Smith and Perez*, C-167/97, EU:C:1999:60, paragraph 45).
- 63 In this case, it is clear that the national court is called on to examine the compatibility of the national legislation at issue in the main proceedings with EU law although that legislation is not in force within the national legal order. Consequently, that court is bound to assess the compatibility of that legislation with EU law on the date on which it gives its ruling.
- 64 In that assessment, the referring court must take into consideration any relevant information, evidence or other material of which it has knowledge under the conditions laid down by its national law. Such an assessment is all the more necessary in a situation such as that of the main proceedings, where there appears to be scientific uncertainty as to the actual effects of the measures provided for by the national legislation the legality of which is to be reviewed by the referring court.
- 65 Consequently, the answer to the third question is that Article 36 TFEU must be interpreted as meaning that the review of proportionality of a national measure, such as that at issue in the main proceedings, is not to be confined to examining only information, evidence or other material available to the national legislature when it adopted that measure. In circumstances such as those of the main proceedings, the compatibility of that measure with EU law must be reviewed on the basis of the information, evidence or other material available to the national court on the date on which it gives its ruling, under the conditions laid down by its national law.

Costs

- 66 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

- 1. Regulation (EU) No 1308/2013 of the European Parliament and the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 must be interpreted as not precluding a national measure, such as that at issue in the main proceedings, which imposes a minimum price per unit of alcohol for the retail selling of wines, provided that that measure is in fact an appropriate means of securing the objective of the protection of human life and health and that, taking into consideration the objectives of the common agricultural policy and the proper functioning of the common organisation of agricultural markets, it does not go beyond what is necessary to attain that objective of the protection of human life and health.**
- 2. Articles 34 TFEU and 36 TFEU must be interpreted as precluding a Member State choosing, in order to pursue the objective of the protection of human life and health by means of increasing the price of the consumption of alcohol, the option of legislation, such as that at issue in the main proceedings, which imposes a minimum price per unit of alcohol for the retail selling of alcoholic drinks and rejecting a measure, such as increased excise duties, that may be less restrictive of trade and competition within the European Union. It is for the referring court to determine whether that is indeed the case having regard to a detailed analysis of all the relevant factors in the case before it.**

The fact that the latter measure may procure additional benefits and be a broader response to the objective of combating alcohol misuse cannot in itself justify the rejection of that measure.

3. Article 36 TFEU must be interpreted as meaning that, where a national court examines national legislation in the light of the justification relating to the protection of the health and life of humans, under that article, it is bound to examine objectively whether it may reasonably be concluded from the evidence submitted by the Member State concerned that the means chosen are appropriate for the attainment of the objectives pursued and whether it is possible to attain those objectives by measures that are less restrictive of the free movement of goods and of the common organisation of agricultural markets.
4. Article 36 TFEU must be interpreted as meaning that the review of proportionality of a national measure, such as that at issue in the main proceedings, is not to be confined to examining only information, evidence or other material available to the national legislature when it adopted that measure. In circumstances such as those of the main proceedings, the compatibility of that measure with EU law must be reviewed on the basis of the information, evidence or other material available to the national court on the date on which it gives its ruling, under the conditions laid down by its national law.

[Signatures]

* Language of the case: English.