OPINION OF ADVOCATE GENERAL
BOT
delivered on 3 September 2015 (1)

Case C-333/14

The Scotch Whisky Association and Others
v
The Lord Advocate
The Advocate General for Scotland

(Request for a preliminary ruling from the Court of Session, Scotland (United Kingdom))

(Reference for a preliminary ruling — Free movement of goods — Quantitative restrictions — Measures having equivalent effect — National rules imposing a minimum retail price of alcoholic beverages — Justification — Protection of health — Proportionality)

1. In order to reduce the consumption of alcohol, the Scottish Parliament passed, on 24 May 2012, the Alcohol (Minimum Pricing) (Scotland) Act 2012, (2) prohibiting the sale of alcohol at a price below a minimum price calculated on the basis of the content in alcohol. Following the enactment of that law, the Scottish Ministers drafted the Alcohol (Minimum Price per Unit) (Scotland) Order 2013, (3) fixing the minimum price per unit of alcohol (4) ('minimum unit price') (5) at pounds sterling (GBP) 0.50.

2. In proceedings brought by three associations of producers of alcoholic beverages, namely The Scotch Whisky Association, the Confédération européenne des producteurs de spiritueux and the Comité européen des entreprises vins (CEEV), (6) against the Lord Advocate and the Advocate General for Scotland, the Court of Session has asked the Court to give a preliminary ruling on whether the establishment of a minimum price is compatible with Regulation (EU) No 1308/2013 of the European Parliament and of 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 (7) and with Articles 34 TFEU and 36 TFEU.

3. In this Opinion, I shall examine, in the first place, the compatibility of the rules at issue with the 'single CMO' regulation. In that regard, I shall maintain that that regulation must be interpreted as meaning that it does not preclude national rules, such as those at issue in the main proceedings, that presents a minimum retail price for wines according to the quantity of alcohol in the product sold, provided that those rules are justified by the objectives of the protection of human health, and in particular the objective of combating alcohol abuse, and do not go beyond what is necessary in order to achieve that objective.

4. I shall then analyse, in the second place, the rules at issue in the light of Articles 34 TFEU and 36 TFEU.

5. After finding that those rules constitute an obstacle within the meaning of Article 34 TFEU, since they are such as to deprive certain producers or importers of alcoholic beverages of the commercial advantage that may result from lower cost prices, I shall show that, in order to assess whether a measure satisfies the principle of proportionality, it is for the national court:

– to ascertain whether it may reasonably be concluded on the evidence which the Member State is required to place before the national court that the means chosen are appropriate for attaining the objective pursued and that, in making that choice, the Member State did not exceed its discretion, and

– to take into account the extent to which that measure impedes the free movement of goods when it is compared with alternative measures that would enable the same objective to be attained and when all the interests involved are weighed up.

6. I shall show, moreover, that when, as in the circumstances of the main proceedings, it is dealing with an application for judicial review of national rules which have not yet come into force and remain, in part, at the draft stage, the national court must, in order to assess the proportionality of those rules to the objective pursued, examine not only the material available to and considered by the national authorities when the rules were being drawn up, but also all the factual information existing on the date on which it determines the matter. I shall observe that there are no particular restrictions on the national court's power to examine that material, other than those that result from the application of the *inter partes* principle and, subject to the principles of equivalence and effectiveness, from the national procedural provisions governing the production of evidence in judicial proceedings.

7. I shall explain, last, that a Member State can, in order to pursue the objective of combating alcohol abuse, which forms part of the objective of the protection of public health, choose rules that impose a minimum retail price of alcoholic beverages that restricts trade within the European Union and distorts competition, rather than increased taxation of those products, only on condition that it shows that the measure chosen has additional advantages or fewer disadvantages than the alternative measure. I shall add that the fact that the alternative measure of increased taxation is capable of procuring additional advantages by contributing to the general objective of combating alcohol abuse does not justify rejecting that measure in favour of the MUP measure.

I – Legal framework

A – *EU law*

1. The FEU Treaty

8. According to Article 39(1)(c) and (e) TFEU, the objectives of the common agricultural policy (CAP) are, in particular, to stabilise markets and to ensure that supplies reach consumers at reasonable prices.

9. Article 40 TFEU provides that, in order to attain the objectives set out in Article 39 TFEU, a common organisation of agricultural markets (8) is to be established, which may include, in particular, 'regulation of prices'.

10. Article 43(3) TFEU provides that the Council of the European Union, on a proposal from the Commission, is to adopt, inter alia, 'measures on fixing prices'.

2. The CMO

11. The ‘single CMO’ regulation establishes a CMO which covers, inter alia, wines.

12. Article 167 of that regulation, entitled ‘Marketing rules to improve and stabilise the operation of the common market in wines’, provides in paragraph 1:

‘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;

…’

B – *United Kingdom law*

13. Under section 1(2) of the 2012 Act, alcohol must not be sold at a price below a minimum price calculated according to the formula ‘Minimum price = MUP x S x V x 100’. (9)

14. The 2012 Act empowers the Scottish Ministers to determine the amount of the MUP and also the date on which it is to enter into force.

15. The Scottish Ministers drew up the 2013 draft order for approval by the Scottish Parliament, fixing the amount of the MUP at GBP 0.50.

II – The main proceedings and the request for a preliminary ruling

16. Following the enactment of the 2012 Act, The Scotch Whisky Association and Others lodged an application for judicial review of that act and of the 2013 draft order.

17. That application was dismissed at first instance by the Outer House of the Court of Session. The Scotch Whisky Association and Others lodged an appeal.

18. By decision of 3 July 2014, the Extra Division of the Inner House of the Court of Session, 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 the “single CMO” regulation, 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:

– 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 case alcoholic drinks — to consumers, or a section of those consumers; and

– 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?'

III – My analysis

A – *The Court's jurisdiction*

19. The present request for a preliminary ruling has the unusual feature of having been made in the context of an action for judicial review of a national act which has not yet entered into force and an implementing order which is still at the draft stage.

20. That unusual feature is not such as to call into question the admissibility of the request, which meets an objective need for the outcome of a dispute before the national court. That dispute is not a hypothetical one.

21. In that regard, it should be borne in mind that the Court has already recognised the admissibility of questions referred for a preliminary ruling in preventive actions seeking declaratory relief and that, in ruling on the admissibility of requests for a preliminary ruling made in judicial review proceedings brought under United Kingdom law, it has recognised that it is open to individuals to plead the invalidity of an EU act of general application before the national courts, even where that act has not in fact already been the subject of implementing measures adopted pursuant to national law. The Court has held that it is sufficient, in that respect, if the national court is seised of a genuine dispute in which the question of the validity of such an act is raised on indirect

grounds. (10)

22. In the present case, it is apparent from the order for reference that the Scotch Whisky Association and Others initiated judicial review proceedings before the Court of Session in order to challenge the compatibility, under EU law, of a measure adopted by the Scottish legislature, the actual implementation of which is subject to the adoption by the Scottish Ministers of an implementing order, and also of the draft implementing order itself.

23. In order to settle the dispute in the main proceedings, which is not hypothetical, the referring court must therefore resolve a question of interpretation of EU law in order to ascertain whether the proposed national rules are or are not compatible with EU law.

24. It follows that the Court has jurisdiction to answer the request for a preliminary ruling referred by the Court of Session.

B – *The questions for a preliminary ruling*

1. The compatibility of the MUP with the 'single CMO' regulation

25. By its first question, the referring court asks, in essence, whether the provisions of the 'single CMO' regulation must be interpreted as meaning that they preclude national rules, such as those at issue in the main proceedings, which prescribe a minimum retail price of wine according to the quantity of alcohol in the product sold.

26. In support of that question, the Court of Session states that a national measure establishing a minimum retail price is prima facie incompatible with the 'single CMO' regulation where, as is the case of the present CMO in the wine sector, the market is organised on the basis of the free formation of prices. However, it expresses doubts in that respect, querying, in particular, the effect of the entry into force of the Treaty of Lisbon, which brought the CAP within the area of shared competence between the European Union and its Member States.

27. I would point out, first of all, that to my mind the fact that the CAP henceforth, in accordance with Article 4(2)(d) TFEU, comes within a competence shared between the European Union and the Member States does not necessarily have an impact on the answer that must be given to the question. Although that development is not without its consequences, (11) the competence conferred on the Member States can, however, as stated in Article 2(2) TFEU, be exercised only 'to the extent' that the Union has not exercised its competence or has decided to cease exercising it. (12) What is a shared competence by nature can therefore become an exclusive competence by exercise when the European Union adopts measures in the relevant area and, accordingly, deprives the Member States of their power to legislate owing to the pre-emptive effect associated with the 'occupation of the ground' by the measures adopted at EU level.

28. It remains to be determined whether the European Union has exercised its competence and, accordingly, has deprived the Member States of their power to legislate.

29. In connection with the CAP, the Court has considered, generally, that the provisions governing, in the 1980s, the CMO in wine constituted a 'complete system', 'especially as regards prices and intervention, trade with non-member countries, rules on production and oenological practices and as regards requirements relating to the designation of wines and labelling'. (13) The Court has concluded that, subject to any special provision to the contrary, the Member States no longer had any powers in that field. (14)

30. In addition, as regards, more particularly, the rules on the determination of prices by the CMOs, the Court, proceeding on the assumption that those organisations are based on the concept of an open market to which every producer has free access under genuinely competitive conditions and

the functioning of which is regulated solely by the instruments provided for in the CMOs, has repeatedly held that, in a sector covered by a CMO, *a fortiori* where that CMO is based on a common pricing system, Member States can no longer take action, through national provisions taken unilaterally, affecting the machinery of price formation by the CMO. (15) According to that case-law, the provisions of a Community agricultural regulation comprising a price system applicable at the production and wholesale stages leave Member States free to take appropriate measures relating to price formation at the retail and consumption stages, without prejudice to other provisions of the Treaties. (16)

31. However, the CMOs have undergone a profound change over the last 20 years. Whereas the underlying rationale initially consisted in guaranteeing the income of the farmers concerned by a system of prices and intervention, (17) the CMO in wine has seen many amendments which, as the Commission emphasises, have gradually led to the dropping of the classic intervention systems in favour of the liberalisation of the market in wine with prices being freely determined in accordance with supply and demand.

32. Thus, as regards the present characteristics of the CMO in wine, which is now a simple component of the single CMO, it should be observed that it is no longer based on a common system of prices the functioning of which might be altered by the intervention of measures adopted unilaterally by the Member States.

33. While it is the case that the 'single CMO' regulation contains, in Article 167(1)(b), a provision on price fixing, according to which the Member States are not to allow for price fixing, including where prices are set for guidance or recommendation, it must be stated that, as the Lord Advocate, the United Kingdom Government, Ireland and the European Commission correctly submit, that provision, which reproduces in identical terms Article 67(1)(b) of Regulation (EC) No 479/2008, (18) is of limited scope, since it is intended solely to define the scope of the power conferred on Member States by the first sentence of Article 167(1) of the 'single CMO' regulation to lay down marketing rules to regulate supply. In accordance with the objective of free competition, that power cannot be understood as authorising the adoption of national rules having, inter alia, the object of allowing or favouring the implementation of decisions whereby interbranch organisations fix the price of wine. That interpretation is supported by recital 44 in the preamble to Regulation No 479/2008, which states that although, in order to improve the operation of the market for wines, Member States should be able to implement decisions taken by interbranch organisations, the scope of such decisions should, however, exclude practices which could distort competition.

34. I therefore arrive at the conclusion that there is no longer, in the 'single CMO' regulation, a system for price-fixing the existence of which would have the effect that rules imposing a minimum retail price of alcoholic beverages, including wine, would by their very nature be contrary to the system and be directly harmful to it.

35. As the possibility of a head-on collision between the rules at issue in the mean proceedings and the 'single CMO' regulation has been ruled out, it remains to determine whether those rules constitute a breach of the principle in Article 4(3) TFEU because they would jeopardise the objectives or the operation of the 'single CMO' regulation in the wines sector. It has consistently been held that, where there is a regulation on the common organisation of the market in a given sector, the Member States are under an obligation to refrain from taking any measures which might undermine or create exceptions to it. (19)

36. The Commission maintains that measures adopted by the Member States in relation to retail sales, such as a system of minimum prices, could undermine the CMO in wine in two different ways, either by preventing operators from taking full advantage of the competitive advantages encouraged by a less interventionist CMO, or by having an impact on the 'delicate web of support programmes to farmers' (20) which are dependent, in part, on factors which depend on the ultimate consumer demand for the products of the vineyards, which is directly influenced by the retail price.

In the Commission's submission, if the MUP system were valid, and were then adopted in several Member States, the legislative assumption of the current 'single CMO' regulation, based on a balanced supply and demand structure where prices are the result of market forces, would be ineffective.

37. In that regard, it should be emphasised that, while pointing out that it follows from Article 39 TFEU that both the primacy of the agricultural policy over the objectives of the Treaty in the area of competition and the Council's power to decide the extent to which the rules on competition are to apply in the agricultural sector are recognised, the Court has stated on a number of occasions that the CMOs 'are not competition-free zones' (21) and that 'the maintenance of effective competition in the markets for agricultural products is one of the objectives of the CAP'. (22) Thus, in the absence of a pricing mechanism, the free formation of prices is the expression, in the sectors covered by a CMO, of the principle of free movement of goods in conditions of effective competition.

38. It does not seem to me to be open to dispute that the fixing by one or more Member States of a minimum retail price of a product is capable of undermining the competitive advantage that may result from lower cost prices and thus distorting competition between producers in different Member States. In that regard, it should be observed that the Court has repeatedly established and taken into account the anti-competitive effect of rules fixing a minimum price. (23)

39. Contrary to Ireland's contention, I therefore think that the referring court was correct to take the view that a national measure that undermines the principle of free formation of prices by the effect of supply and demand is, in principle, incompatible with the 'single CMO' regulation, which, since it no longer contains a price-fixing mechanism, is based on the maintenance of effective competition between producers of the same product.

40. However, the Court has held on a number of occasions that the establishment of a CMO does not prevent the Member States from applying national rules which pursue an objective of general interest other than those covered by the CMO, even if those rules are likely to have an effect on the functioning of the common market in the sector concerned. (24) The pursuit of a legitimate objective such as the protection of public health is therefore capable of justifying the action of the national authorities, even where a CMO has been established.

41. Although the Court has repeatedly held that efforts to achieve objectives of the CAP 'cannot disregard' requirements relating to the public interest such as the protection of the health and life of animals (25) and that the protection of health 'contributes to the attainment of objectives of the [CAP]' (26) which are laid down in Article 39(1) TFEU, particularly where agricultural production is directly dependent on demand amongst consumers who are increasingly concerned to protect their health, (27) and although the 'single CMO' regulation contains a number of provisions that take account of the concerns for the protection of human or animal health, (28) the fact none the less remains that that regulation is not specifically intended to attain at EU level the objective of the protection of health, in general, and that of combating the dangerous or excessive consumption of alcoholic beverages, in particular.

42. Thus, although it constitutes an actual objective of the CAP, the protection of health none the less remains ancillary, in such a way that that objective may be relied on by the Member States in order to justify national rules which have an impact on the functioning of the CMO in the sector concerned.

43. That is *a fortiori* so because Article 168(5) TFEU excludes any harmonisation of laws and regulations of the Member States designed to protect and improve human health and because other provisions of primary law may not be used as a legal basis in order to circumvent that express exclusion. (29)

44. In the light of the foregoing considerations, I consider that the existence of a CMO covering the wine sector does not prevent the national authorities from taking action in the exercise of their competence in order to adopt measures to protect health and, in particular, to combat alcohol abuse. However, where the national measure constitutes a breach of the principle of the free formation of selling prices that constitutes a component of the 'single CMO' regulation, the principle of proportionality requires that the national measure must actually meet the objective of the protection of human health and must not go beyond what is necessary in order to attain that objective.

45. As the Commission suggests, I consider that the examination of the proportionality of the measure must be undertaken in the context of the analysis that must be carried out by reference to Article 36 TFEU.

46. Consequently, I propose that the answer to the first question should be that the 'single CMO' regulation must be interpreted as meaning that it does not preclude national rules, such as those at issue in the main proceedings, which prescribe a minimum retail price for wines according to the quantity of alcohol in the product sold, provided that those rules are justified by the objectives of the protection of human health, and in particular the objective of combating alcohol abuse, and do not go beyond what is necessary in order to achieve that objective.

2. The compatibility of the MUP with Article 34 TFEU

a) Preliminary observations

47. It should be noted that the referring court proceeds on the assumption that the measure at issue must be characterised as a 'measure having equivalent effect to a quantitative restriction on imports' prohibited by Article 34 TFEU. The fact that the parties in the main proceedings are agreed on that characterisation does not to my mind relieve the Court from ascertaining whether that assumption is correct, since if it is not, the Court would not be required to assess whether the measure in question is justified under Article 36 TFEU.

48. In order to be able to answer the question raised by the referring court, it is therefore necessary to ascertain whether the MUP is a measure having equivalent effect to a quantitative restriction on imports.

b) The existence of a measure having equivalent effect to a quantitative restriction on imports

49. The issue which an examination of the rules at issue in the light of Article 34 TFEU gives rise to makes it necessary to compare the developments in the general case-law relating to the interpretation of the concept of measure having equivalent effect to quantitative restrictions on imports with to the case-law specific to rules relating to prices.

50. I do not propose to dwell at length on the well-known developments in the case-law on the interpretation of that concept.

51. I shall merely observe, in outline, that, in its judgment in *Dassonville*, (30) the Court defined measures having equivalent effect to quantitative restrictions on imports, within the meaning of Article 34 TFEU, as 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade'. (31)

52. Then, in its judgment in *Keck and Mithouard*, (32) the Court considered that the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to constitute such an obstacle, so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and the marketing of products from other Member States. (33)

53. The Court then stated, in its judgment in *Commission* v *Italy*, (34) that measures adopted by a Member State which have the object or the effect of treating products coming from other Member States less favourably are to be regarded as measures having an effect equivalent to quantitative restrictions on imports, as are rules that lay down requirements to be met by such goods, even if those rules apply to all products alike. According to that judgment, '[a]ny other measure which hinders access of products originating in other Member States to the market of a Member State' is also covered by that concept. (35)

54. The second judicial construction against which the nature of the rules at issue should be assessed is that relating to the interpretation of rules concerning the fixing of prices, in particular those that impose a minimum price. According to that case-law, which stems from the judgment in *van Tiggele*, (36) national rules which impose a minimum price constitute a measure having equivalent effect to quantitative restrictions on imports, prohibited by Article 34 TFEU, in so far as, while applying without distinction to domestic products and imported products, they are capable of having an adverse effect on the marketing of imported products by preventing their lower cost price from being reflected in the retail selling price. (37)

55. A comparison of those two lines of decisions gives rise to two new sets of questions, relating, on the one hand, to the object of the price-regulating measures and, on the other, to the criteria of the obstacle. On the one hand, must rules such as those at issue in the main proceedings be characterised as a mere 'selling arrangement', within the meaning of the judgment in *Keck and Mithouard*? (38) On the other hand, does the criterion connected with the existence of an obstacle preventing a possible competitive advantage from being derived from the lower cost price of the imported products by comparison with domestic products correspond to the criterion of discrimination or the criterion of access to the market?

56. In that regard, most of the interested parties who have submitted observations, relying mainly on the judgment in *van Tiggele*, (39) support the interpretation according to which the rules at issue in the main proceedings must be characterised as an obstacle to trade between Member States, prohibited by Article 34 TFEU. However, Ireland maintains in its written observations that the rules amount to a mere 'selling arrangement', within the meaning of the judgment in *Keck and Mithouard*, (40) and thus fall outside the scope of Article 34 TFEU. The Finnish Government considers that there is some doubt on the matter. For its part, the Commission maintains that case-law resulting from the judgment in *van Tiggele* (41) continues to apply where minimum prices give rise to discrimination against imports by preventing or impeding their access to the market.

57. I do not consider it necessary to examine the measure at issue in the main proceedings in the light of the distinction between two categories of rules, namely those that determine the conditions which the products must satisfy and those that limit or prohibit certain selling arrangements.

58. I am aware that the concept of measure having equivalent effect covers any measure that impedes access to the market of one Member State by products from other Member States. According to the formula now usually employed in the case-law, Article 34 TFEU reflects the obligation to comply with the principles of non-discrimination and of mutual recognition of products lawfully manufactured and marketed in other Member States, as well as the principle of ensuring free access of EU products to national markets. (42) I infer from that standard formula that a national measure may constitute an obstacle not only when, as a selling arrangement, it is discriminatory, in law or in fact, but also when, irrespective of its nature, it impedes access to the market of the Member State concerned. It follows that, where an obstacle to market access is found to exist, there is no need to undertake a comparative examination between the situation of the domestic products and that of the imported products in order to establish the existence of a difference in treatment between them.

59. To my mind, the fact that the competitive advantage resulting from importation is cancelled out, which is the distinctive criterion of price regulation, characterises in itself the effect of an

obstacle to access to the market. The prohibition of retail sale below a minimum price deprives traders from other Member States of the possibility of marketing their products at a selling price reflecting their lower cost price and thus impedes their access to the market in question.

60. The rules at issue in the main proceedings, which are acknowledged to apply without distinction to all the operators concerned who carry out their activity on the national territory, must therefore be regarded as a measure having effect equivalent to a quantitative restriction on imports contrary to Article 34 TFEU in that they are capable of constituting an obstacle to access to the market, solely because they prevent the lower cost price of the imported products from being reflected in the selling price to consumers.

61. It is therefore purely in the interest of completeness that I shall examine the nature of the measure at issue in the main proceedings in the light of the distinction resulting from the judgment in *Keck and Mithouard*. (43)

62. In its judgment in *Fachverband der Buch- und Medienwirtschaft*, (44) the Court considered that, in so far as national provisions on book pricing which prohibited, in particular, importers from fixing a price below the retail price fixed or recommended by the publisher for the State of publication 'do not concern the characteristics of those goods, but solely the arrangements under which they may be sold', they must be regarded as concerning selling arrangements within the meaning of the judgment in *Keck and Mithouard*. (45) (46)

63. In my view the same applies to the rules at issue in the main proceedings. In support of that theory, it should be observed that the judgment in *Keck and Mithouard* (47) itself concerned a prohibition of reselling at a loss, while the judgment in *Belgapom*, (48) in line with that case-law, characterised as 'selling arrangements' rules prohibiting sales yielding only a very low profit margin. National rules which prohibit the sale of a product at a price below a price calculated by reference to the alcoholic content seem to me to have the same restrictive effect on the freedom to fix prices, by requiring the seller to apply a minimum profit margin. Like those rules or the national rules at issue in *Fachverband der Buch- und Medienwirtschaft*, (49) those rules may therefore be placed in the category of selling arrangements.

64. However, the fact that it is characterised as a 'selling arrangement' does not mean that the measure at issue in the main proceedings could not constitute a barrier for the purposes of Article 34 TFEU. While it is common ground that the measure applies to all the operators concerned, it is still necessary to demonstrate that, in the words used in the judgment in *Keck and Mithouard*, (50) it affects 'in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States'. (51) Where there is discrimination, the measure therefore does not fall outside the scope of Article 34 TFEU.

65. The question is therefore whether the criterion identified in the judgment in *van Tiggele*, (52) entailing the cancelling-out of the competitive advantage resulting from imports, which most certainly characterises the effect of a barrier to access to the market, is also capable of establishing the existence of discrimination. The scope of that criterion has given rise to uncertainty in legal writing which shows the difficulty of seeing it from the aspect of discrimination. (53) While it seems to me to be more consistent and logical to assume that the objective of that criterion is to detect directly the effect of a barrier to access to the market, independently of any consideration relating to an unequal effect on imported products by comparison with domestic products, I none the less consider that it also allows discrimination to be shown. The wording of the judgment in *van Tiggele* (54) allows an interpretation from the standpoint of discrimination, since the Court stated that 'imports may be impeded in particular when a national authority fixes prices or profit margins at such a level that *imported products are placed at a disadvantage in relation to identical domestic products* … because the competitive advantage conferred by lower cost prices is cancelled out'. (55) The reasoning therefore seems to be based on a comparison between two identical products, one a domestic product and the other an imported product which benefits from a competitive advantage

that is cancelled out by the measure in question.

66. The order for reference contains the elements of a comparative analysis which, in any event, demonstrates the discriminatory nature of the rules at issue. It is clear from the findings of the Court of Session that, according to statistics on the percentage of 'off sales' of alcoholic beverages at a price below the MUP, a higher percentage of wines imported from Member States than of wine from the United Kingdom was sold at a price below the MUP. Furthermore, although it notes that it does not have statistics for other alcoholic beverages, the referring court none the less states that it is not disputed that significant volumes of beer and spirits from Member States other than the United Kingdom are sold at unit prices below GBP 0.50.

67. By depriving operators from other Member States who market imported products hitherto sold at a price below the MUP of the possibility of marketing those products at a selling price that reflects their lower cost price, the prohibition of retail sales at below a minimum price places those products at a disadvantage by comparison with identical domestic products.

68. The rules at issue in the main proceedings, which are recognised as applying without distinction to all the operators concerned who carry out their activity on the national territory, must therefore be regarded as a measure having equivalent effect to a quantitative restriction on imports.

69. Ultimately, from whatever standpoint they are analysed, the rules at issue in the main proceedings appear to be contrary to Article 34 TFEU.

70. It is now appropriate to ascertain whether that obstacle is objectively justified.

c) The justification for the barrier to the free movement of goods

71. A barrier to the free movement of goods may be justified on one of the public interest grounds set out in Article 36 TFEU or in order to meet overriding requirements. In either case, the restrictions imposed by the Member States must none the less satisfy the conditions laid down in the Court's case-law as regards their proportionality.

72. In that regard, in order for national rules to comply with the principle of proportionality, it is necessary to ascertain not only whether the means which they implement are appropriate to ensure attainment of the objective pursued, but also that those means do not go beyond what is necessary to attain that objective. (56)

73. Although the words generally used by the Court seem most frequently to result in only two different stages of the control of proportionality being distinguished, the intellectual exercise followed in order to determine whether a national measure is proportionate is generally broken down into three successive stages.

74. The first stage, corresponding to the test of suitability or appropriateness, consists in ascertaining that the act adopted is suitable for attaining the aim sought.

75. The second stage, relating to the test of necessity, sometimes also known as the 'minimum interference test', entails a comparison between the national measure at issue and the alternative solutions that would allow the same objective as that pursued by the national measure to be attained but would impose fewer restrictions on trade.

76. The third stage, corresponding to the test of proportionality in the strict sense, assumes the balancing of the interests involved. More precisely, it consists in comparing the extent of the interference which the national measure causes to the freedom under consideration and the contribution which that measure could secure for the protection of the objective pursued.

77. Before applying that threefold test to the rules at issue in the main proceedings and thus answering the second and fifth questions submitted by the referring court, it is necessary to make some preliminary points about the procedure for exercising the review of proportionality in order to answer the third, fourth and sixth questions.

i) The procedure for exercising the review of proportionality

78. The fourth and sixth questions, which concern, generally, the role of the national court in the exercise of the review of proportionality, will be examined before the third question, which concerns more specifically the evidence on which the national court may rely.

– Fourth question

79. By its fourth question, the Court of Session asks to what extent the national court, which must determine whether national rules are justified by an objective provided for in Article 36 TFEU, must form an objective view on the suitability of the measure for achieving the objectives claimed, the possibility of achieving those objectives by other, less restrictive, means and the general proportionality of the measure.

80. In support of that question, the referring court observes that, while the parties in the main proceedings do not dispute that a Member State has a discretion in deciding on the level of health protection it wishes to have, they are divided on the question whether the national court may make its own assessment or whether it must leave to the legislative or regulatory power concerned a broad discretion to assess both whether an alternative measure at least as effective but less disruptive is possible and whether the proposed measure generally meets the test of proportionality. It further observes that the appellate courts of the United Kingdom have adopted diverging interpretations of the case-law of this Court, some applying a test requiring the absence of manifest inappropriateness of the decision of the national authorities, while others merely determine whether, objectively, there is material that justifies the measure by reference to the objective pursued.

81. In the context of the division of powers between the Court of Justice, on a reference for a preliminary ruling under Article 267 TFEU, and the national courts, the final assessment of proportionality is a matter for the referring court, which alone has jurisdiction to assess the facts of the case before it and to interpret the applicable national legislation. It is therefore ultimately for the national court to determine whether the national measure at issue in the main proceedings is an appropriate means of ensuring the attainment of the objective pursued and whether it does not go beyond what is necessary to attain that objective. However, it is for the Court of Justice, to provide the referring court with information to guide it in its interpretation, in particular as regards the criteria which it must take into account when forming its assessment.

82. To my mind, there are two reasons why judicial review of the proportionality of the measure should be marked by a certain degree of restraint.

83. First, account should be taken of the fact that it is for the Member States to decide on the degree of protection which they wish to afford to public health and on the way in which that degree of protection is to be achieved. Since the level of protection may vary from one Member State to another, Member States must be allowed discretion in that area.(57) That discretion is necessarily represented by a certain relaxation of control, representing the national court's concern not to substitute its own assessment for that of the national authorities.

84. Second, it is necessary to take into account the complexity of the assessments to be carried out and the degree of uncertainty which exists as to the effects of measures such as those at issue in the main proceedings.

85. Third, the Lord Advocate stated, in his written observations, that the 2012 Act requires the

Scottish Ministers to evaluate the effect of the fixing of the MUP and to submit a report five years after entry into force of the rules at issue in the main proceedings, which in any event will cease to have effect after six years unless the Scottish Parliament decides that they should continue. It seems to me that the somewhat experimental or fixed-term nature of those rules is a factor to be taken into consideration by the national court, since it seems to establish in advance that the rules will be revised in the event that the reasons that led to their adoption have changed.

86. However, the discretion left to the Member States cannot have the effect of allowing them to render the principle of free movement of goods devoid of substance. In so far as Article 36 TFEU includes an exception to that principle, it is for the national authorities, even where they have a discretion, to show that the measure satisfies the principle of proportionality. While that discretion may be more or less broad, depending on the legitimate interests concerned, so that it is difficult to make generalisations as to the extent of the review that the national court must carry out, it does not seem to be sufficient to be satisfied with a mere demonstration that the measure is manifestly disproportionate, which, ultimately, would amount to reversing the burden of proof.

87. Furthermore, whatever the extent of that discretion, the fact none the less remains that the reasons that may be invoked by a Member State by way of justification must be accompanied by an analysis of the suitability and proportionality of the restrictive measure adopted by that State and of the precise evidence on which its argument is based. (58)

88. I therefore propose that the answer to the fourth question should be that, in order to assess whether a measure satisfies the principle of proportionality, it is for the national court to ascertain whether the evidence which the Member State must adduce reasonably permits the view that the means chosen are suitable for attaining the objective pursued and that, in making that choice, the Member State did not exceed its discretion.

– Sixth question

89. By its sixth question, the referring court asks, in essence, whether the degree to which a national measure adversely affects the free movement of goods must be taken into account in an assessment of its proportionality.

90. The referring court explains that its question is prompted by the position of the Lord Advocate, who considers that, once a measure has been recognised as constituting a restriction of trade, any assessment of the nature and effects of the distortion of competition is excluded from the examination of proportionality.

91. While it is unrelated to the appropriateness test, which assumes that, independently of its restrictive effect, the measure is likely to contribute effectively to the attainment of the objective pursued, the degree to which the national measure affects the free movement of goods must be taken into consideration in the two following stages of the review of proportionality.

92. The balancing test implied by the principle of proportionality assumes an assessment of the more or less restrictive nature of the measure chosen when it is compared with the alternative measures that might have been implemented. It therefore calls for an assessment of whether there is not another measure that would enable the same result to be attained while having less of an adverse effect on the free movement of goods.

93. However, it is also necessary to take account of the degree of impediment when examining the proportionality in the strict sense of the national measure, which assumes a balancing of the advantages and disadvantages of that measure while ascertaining, in particular, whether the extent of the restriction on trade within the European Union is proportionate to the importance of the objectives pursued and the expected gains.

94. Consequently, the answer to the sixth question should be that the degree to which the national measure affects the free movement of goods must be taken into account when it is compared with the alternative measures that would have enabled the same objective to be attained and when a balance is struck between all the relevant interests.

– Third question

95. By its third question, the referring court asks, in essence, whether the proportionality of a national measure must be assessed solely on the basis of the facts available to the authorities of the Member State on the date of adoption of that measure and whether there are any other restrictions on the power of the national court.

96. The referring court explains that the parties in the main proceedings disagree as to the time at which the lawfulness of the measure at issue must be assessed and, accordingly, as to the evidence which the national court may examine in the context of the review of proportionality. It observes that the question is of importance in the present case, since it has before it new studies which could not be considered either by the national legislature or, in the case of some of those studies, by the first-instance court.

97. Unlike the Lord Advocate, who maintains that the national court must assess the lawfulness of the measure as at the time of its adoption, from which he infers that it cannot take into consideration any material not considered by the national legislature, I consider, as do The Scotch Whisky Association and Others, Ireland and the Norwegian Government, and also the Commission and the European Free Trade Association (EFTA), that the national court, in circumstances such as those of the case at issue in the main proceedings, must take account of all the data before it at the time when it hears and determines the case, irrespective of whether the data in question existed at the time when the measure was adopted, but were not brought to the knowledge of the national legislative or regulatory authority or used by it, or whether the data post-dated the adoption of the measure.

98. An argument in favour of the theory defended by the Lord Advocate may, it seems, be drawn, by analogy, from the established case-law according to which, in an action for annulment, the legality of an EU measure must, in principle, be assessed on the basis of the facts and the law as they stood at the time when it was adopted. (59) According to the same case-law, that legality 'cannot depend on retrospective considerations of its efficacy' (60) and, when the EU legislature is obliged to assess the future effects of rules to be adopted and those effects cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to the legislature at the time of the adoption of the rules in question. (61)

99. However, two convergent arguments lead me to support the opposite position.

100. The first argument concerns the principles of the primacy and effectiveness of EU law.

101. As the Court observed in its judgment in *Seymour-Smith and Perez*, (62) the requirements of EU law must be complied with 'at all relevant times, whether that is the time when the measure is adopted, when it is implemented or when it is applied to the case in point'. (63)

102. It follows from that case-law that the review of legality of measures adopted by the national authorities in reliance on the reasons of general interest set out in Article 36 TFEU must not be static but dynamic when it involves, as in the main proceedings, the consideration of data which may evolve in time in accordance with numerous social parameters, such as drinking habits or the incomes of purchasers, or the state of scientific knowledge concerning the phenomenon being studied.

103. The Court has held, moreover, that where a Member State adopts national rules which come

within the context of a policy of protecting human and animal health, it must review those rules if it appears that the reasons that led to their adoption have changed as a result, in particular, of further information becoming available through scientific research. (64)

104. That case-law is reflected in the case-law relating to the application of the precautionary principle by the EU institutions. While accepting that, where there uncertainty as to the existence or the extent of risks to human health, the EU institutions, applying the precautionary principle and the principle of preventive action, may take protective measures without having to wait until the reality and gravity of those risks are fully demonstrated, the Court has held, conversely, that when new elements change the perception of a risk or show that the risk can be contained by less restrictive measures than the existing measures, it is for the EU institutions, and in particular the Commission, which has the power of legislative initiative, to bring about an amendment to the rules in the light of the new information. (65)

105. It is true that the fact that Member States are under an obligation to adjust or update the rules as new scientific data become available does not necessarily mean that a provision which has become inappropriate should be declared illegal and therefore annulled with retroactive effect.

106. However, it should be observed — and this is the second argument — that the application for judicial review lodged by The Scotch Whisky Association and Others has, as I have already pointed out, the unusual feature of having been brought against a law which has not yet entered into force and an order which is still at the draft stage.

107. In those specific circumstances, it is logical to take as the relevant time for the assessment of compatibility with EU law the time when the national court hears and determines the application. It scarcely makes sense to take the date of adoption of the rules, since the order, which is none the less an integral part of the rules alleged to be incompatible with EU law, has not yet been adopted. Nor can the date of application of those rules to the present case be taken into account, since they have not yet been applied.

108. I conclude that the national court must examine all the relevant material in existence at the time when it hears and determines the case. Furthermore, there are no particular restrictions on the power of the national court to examine that material other than those resulting from the application of the *inter parties* principle and, subject to the principles of equivalence and effectiveness, from the national procedural principles governing the submission of evidence.

109. I propose, therefore, that the answer to the third question should be that when, as in the circumstances of the main proceedings, it has received an application for judicial review of national rules which have not yet entered into force and remain, in part, at the draft stage, the national court must, in order to assess the proportionality of those rules to the objective pursued, examine not only the material available to and examined by the national authorities when the rules were drafted, but also all the factual information in existence on the date on which it hears and determines the case. There are no particular restrictions on the national court's power to examine that material, other than those that result from the application of the *inter partes* principle and, subject to the principles of equivalence and effectiveness, from the national procedural rules governing the production of evidence in judicial proceedings.

110. I now turn to the actual implementation of the review of proportionality.

ii) The implementation of the review of proportionality

111. As they are closely connected, the second and fifth questions submitted by the referring court should be examined together.

112. By its second question, the referring court asks, in essence, whether and, if so, on what

conditions a Member State may, in order to pursue the objective of combating alcohol abuse, which forms part of the objective of protecting public health, choose to adopt rules which impose a minimum retail price of alcoholic beverages, which distort trade within the European Union and competition, rather than to increase the taxes and duties on those products.

113. By its fifth question, the referring court asks, in essence, whether a measure which enables the same objective as the rules at issue in the main proceedings to be attained while being less restrictive of the free movement of goods may be discarded on the ground that it may bring further, additional benefits and respond to a wider, general aim.

114. I note that those questions relate exclusively to the second test in the review of proportionality, consisting in assessing whether the national measure cannot be replaced by an alternative measure, equally effective but less disruptive of the free movement of goods. However, it is apparent from the order for reference that the national court questions, more specifically, the precise objective of the rules at issue in the main proceedings and their suitability for attaining the aim sought. In my view, in order to provide a helpful answer, it is necessary to clarify those questions.

– Identification of the objective of the rules at issue in the main proceedings

115. It is necessary to identify the objective pursued by the measure at issue in the main proceedings in order to determine whether the measure is proportionate to that objective.

116. The referring court observes that the measures at issue were presented in explanatory notes accompanying the draft legislation laid before the Scottish Parliament as being intended to implement the general and targeted strategies and interventions aimed at the population in general and at 'harmful' drinkers, in particular, that is to say, those with a consumption of more than 50 units of alcohol per week for men and more than 35 units for women. However, the referring court adds that a more recent study placed before the Scottish Parliament, entitled 'Business and Regulatory Impact Assessment', states that the objectives of the measures include combating 'hazardous' consumption, defined as being more than 21 units of alcohol per week for men and more than 14 units per week for women. That study concludes that the introduction of a minimum price enables the objective of reducing the consumption of alcoholic beverages which are cheap in relation to their alcohol strength to be attained, as hazardous or harmful drinkers are more affected than moderate drinkers, in terms of the amount they drink, the amounts spent and the benefits obtained from the reduction in harm to their health. The Court of Session observes, however, that when the measures were notified to the Commission pursuant to Directive 98/34/EC, (66) they were presented as being restricted to the targeting of hazardous or harmful drinkers.

117. The ambiguity that emerges from that development in the presentation of the objectives of the measure by the national authorities is not made any clearer by the written observations of the Lord Advocate, since, while observing that a measure fixing an MUP is introduced in order to attain the twofold objective of targeting the part of the population whose health is at greatest risk and having a positive effect on the health of the entire population, they recognise that the justification for such a measure is based solely on the first of those objectives.

118. That persistent ambiguity gives the false impression that the objective of reducing the consumption of alcohol, in general, is deliberately ignored so that the measure at issue may more readily pass the 'necessity' test, when compared with a fiscal measure leading to a general increase in the price of alcoholic beverages.

119. I would point out that it is indeed ultimately for the national court, which alone has jurisdiction to assess the facts of the dispute before it and to interpret the applicable national legislation, to identify the objective which that legislation pursues. (67)

120. In the present case, it will be for the national court to assess whether the measure pursues a

twofold, general and targeted, objective or pursues only a targeted objective, while it should be made clear, moreover, that, far from being contradictory, those objectives may be perfectly complementary. In order to provide the referring court with a helpful answer that will enable it to give a ruling on the dispute in the main proceedings, I shall examine those two premisses in what follows.

– The suitability of the measure for attaining the objective sought

121. The restrictions imposed by the Member States must first of all meet the 'suitability' test, by being appropriate for ensuring the attainment of the objective pursued.

122. In that context, it has repeatedly been held that national legislation is appropriate for ensuring the attainment of the objective pursued only if it genuinely reflects a concern to attain that objective in a 'consistent and systematic' manner. (68)

123. It also follows from the Court's case-law that it is the Member State wishing to rely on an objective capable of justifying a restriction that must supply the court called on to rule on that question with all the evidence of such a kind as to enable it to be satisfied that the national rules do indeed comply with the requirements deriving from the principle of proportionality. (69)

124. The Lord Advocate submits that the MUP will have a direct impact only on products retailed at below the MUP and that as that impact is progressive, the cheapest products per unit of alcohol will be subject to the greatest increases.

125. The Polish Government maintains that there is no objective and scientifically based evidence to show that hazardous or harmful drinkers mostly consume cheap alcohol relative to its strength. It submits that the Scottish legislation will affect only those on low incomes and will have no effect on the consumption of alcohol by high earners, although they drink hazardously or harmfully even more frequently than low earners. The Polish Government infers that the objective pursued by the Scottish authorities will not be attained effectively.

126. The Commission maintains that, in the light of the discretion enjoyed by the Member States in that respect, the MUP is not a manifestly unreasonable measure as part of a campaign aimed at reducing overall alcohol consumption or consumption by hazardous, or indeed harmful, drinkers, in particular.

127. In the light of the discretion recognised to the Member States not only in the choice to pursue a particular public health policy objective, but also in the definition of the measures capable of attaining that objective, and also of the scientific controversy mentioned by the referring court (70) concerning the degree of price/tax elasticity of demand and, accordingly, of the uncertainty as to the effectiveness of public policies based on price control or higher taxation of alcoholic beverages in reducing consumption, it does not seem unreasonable to me that those States should consider that a measure such as the imposition of an MUP may be an appropriate means of attaining the abovementioned objectives.

128. On the other hand, it seems to me that the consistent and systematic nature of that measure is more debatable.

129. In that regard, it follows from the order for reference that, according to the results of surveys related to the incomes and affluence of hazardous or harmful drinkers, it appears that that type of consumption, just like, moreover, consumption of alcoholic beverages in general, increases with income since, in particular, whereas in the part of the population in the lowest income quintile 4.8% of drinkers are classed as harmful drinkers and 10.9% as hazardous drinkers, those figures increase to 7.7% and 25.7% respectively in the part of the population in the highest income quintile.

130. In addition, according to the data based on purchases of alcoholic beverages in England and Wales at a price below GBP 0.45 and not at the price of GBP 0.50, finally adopted in the rules at issue, the quantity of cheapest alcoholic beverages purchased per week falls as the incomes of hazardous or harmful drinkers rise.

131. The referring court adds that, according to the results of that survey, the annual consumption of alcohol could be reduced by 300 units of alcohol per year for the category of consumers classed as harmful drinkers in the lowest income quintile, whereas it would be reduced by only 34 units for consumers in the highest income quintile. That reduction would be 42 units of alcohol for the category of consumers classed as hazardous drinkers in the lowest income quintile, while, strangely, consumption would increase by 5 units for consumers in the highest income quintile.

132. Thus, according to the data analysed by the referring court, although the imposition of a minimum price might reduce alcohol consumption by hazardous or harmful drinkers, the effect would, however, be much greater in the group of low income drinkers than among highest income drinkers.

133. In answer to the written questions put by the Court, the Lord Advocate explained that a complementary survey of consumption of alcoholic beverages in Scotland at a price per unit of alcohol of below GBP 0.50 showed that the consumption of alcoholic beverages purchased at a price per unit of alcohol of below GBP 0.50 was much greater for hazardous or harmful drinkers living in poverty than for harmful or hazardous drinkers not living in poverty. (71)

134. Referring, moreover, to a number or surveys carried out both in Scotland and in the United Kingdom and internationally, he maintained that there is evidence that young drinkers, occasional drinkers and harmful drinkers tend to choose the least expensive drinks. At the same time he emphasised that alcohol had become more affordable nowadays than in 1980 and that beer, wine and spirits consumption had increased since 1994 by 45% in the off-trade while, in the on-trade, sales had fallen by almost 40%. In his view, the explanation lies in the fact that heavy drinkers, who seek the greatest quantity of those cheap drinks by comparison with their alcoholic content, have altered their behaviour in order to drink as much as possible with the available money. The imposition of an MUP would therefore have the advantage of preventing heavy drinkers from seeking less expensive alternatives in order to maintain their current levels of consumption.

135. I am finally convinced by the detailed explanations supplied by the Lord Advocate in answer to the question put by the Court and at the hearing and I consider that he shows that the measure meets the objective of combating alcohol abuse in a consistent and systematic manner by maintaining, in particular, that the measure forms part of a more general strategy of combating the harm caused by alcohol, including other measures such as the prohibition of specific promotional offers, and that the targeting of cheap alcoholic beverages may be justified by the fact that hazardous or harmful drinkers, including, in particular, the young, whose protection as a matter of priority is a legitimate concern, to a large extent consume that category of drinks.

– The necessity for the measure

136. The question that arises is whether the objective of protecting public health pursued by the Scottish authorities could not be attained in a less restrictive and equally effective manner by a fiscal measure. In other words, would a higher tax on alcoholic beverages enable the same objective to be attained as rules imposing a minimum price, while being less restrictive of trade? In order to answer all the questions submitted by the referring court, it is appropriate, moreover, to determine, if the answer is in the affirmative, whether that less restrictive alternative may be discarded on the ground that it may bring additional advantages and satisfy a wider, more general objective.

137. Supported by The Scotch Whisky Association and Others and also by the Bulgarian, Polish and Portuguese Governments, the theory that an increase of the excise duties on alcoholic products

would be a more appropriate measure may apparently find support in the Court's case-law on minimum retail prices for manufactured tobacco products, since, in a number of judgments, the Court has held that the objective of protecting public health could appropriately be pursued by an increased tax on those products, preserving the principle of the free formation of prices.

138. However, the Lord Advocate and EFTA, supporting of the opposite theory, claim that the 'tobacco' case-law cannot be applied by analogy to alcoholic beverages, since it is based on the specific conditions of Directive 95/59/EC (72) that were taken into account and since, whereas the objective of reducing tobacco consumption is a universal objective, aimed at the entire population, the objective of imposing an MUP is different, since the intention is not to reduce overall consumption but to attain the targeted objective of reducing alcohol consumption by hazardous or harmful drinkers.

139. As for the Finnish Government and the Commission, they maintain that the choice between fixing a minim price and increased taxation is a matter for the discretion which the Member States enjoy when deciding on the level at which they intend to ensure the protection of public health and also the way in which that level must be attained.

140. Referring to the approach taken by the Court in its case-law on tobacco products, the referring court considers that the objective of protecting health pursued by the rules at issue in the main proceedings could be attained by the adoption of a fiscal measure that would be less disruptive of trade between Member States, would distort competition less and, in addition, would have the advantage of leading to a general increase in the prices of alcoholic beverages, which would result in a reduction in consumption and the attendant social costs.

141. It is only where the Member State has a choice between different measures suitable for attaining the same aim that it is under an obligation to have recourse to the measure least restrictive of freedom of trade within the European Union.

142. Before considering whether a fiscal measure is also suitable for attaining the objective of protecting health pursued by the rules at issue in the main proceedings and whether it has effects less restrictive of the free movement of goods, it is necessary to ascertain whether EU law allows a Member State to have recourse to such a measure.

143. In that regard, it is sufficient to state that Directives 92/83/EEC (73) and 92/84/EEC (74) merely require Member States to apply a minimum excise duty. The Member States therefore retain a sufficient discretion to apply a general increase of excise duties in order, in particular, to pursue the attainment of specific public health objectives, provided that the taxation system which they establish for that purpose may be considered compatible with Article 110 TFEU, which assumes that it is organised in such a way as to preclude, in any event, imported products being taxed more heavily than national products and, accordingly, that it does not in any case have discriminatory effects.

144. It remains to be determined whether increased taxation on alcoholic beverages constitutes a less restrictive measure.

145. In the case of tobacco products, the Court has repeatedly held that fiscal legislation is an important and effective instrument for discouraging consumption of tobacco products and, therefore, for the protection of public health, and that the objective of ensuring that a high price level is fixed for those products may adequately be attained by increased taxation of those products, the excise duty increases sooner or later being reflected in an increase in the retail selling price, without undermining the freedom to determine prices. (75)

146. Can that case-law be applied by analogy to the rules at issue in the main proceedings, relating to the price of alcoholic beverages?

147. I am not convinced by the two arguments on which the Lord Advocate and EFTA rely in order to oppose such application by analogy, based on the particular provisions in Directive 95/50 and on the targeted nature of the objective of reducing alcohol consumption pursued by the rules at issue in the main proceedings, which are aimed only at hazardous or harmful drinkers.

148. In the first place, it should be observed that, in its judgment in *Commission* v *Greece*, (76) in an action for failure to fulfil obligations, the Court, after finding that the national measures were contrary to Directive 95/59, none the less considered whether they might be justified under Article 36 TFEU and concluded that the objective of protecting public health might be adequately pursued by the increased taxation of manufactured tobacco products, which would safeguard the principle of free formation of prices. Thus, even in a sector not governed by a provision of secondary law expressly laying down the principle of free formation of prices, increased taxation that is less restrictive of trade while enabling the objective pursued to be attained must be preferred to a measure fixing a minimum price, which gives rise to a greater obstacle.

149. In the second place, on the assumption that the objective of the rules at issue in the main proceedings is genuinely confined to combating the hazardous and harmful consumption of alcoholic beverages, which it is for the referring court to determine, I consider that it is for the those responsible for the drafting of those rules to show that increased taxation is not capable of meeting that targeted objective. However, they adduce no serious evidence to show that, as they maintain, increased taxation would have a 'disproportionate' impact by comparison with the objective sought. It must be stated that they claim, principally, that such a measure would have an 'unnecessary' effect on moderate drinkers who do not incur the same degree of risk. Like the referring court, I am unable to see how that collateral effect of a general increase in taxes might be seen as negative in the context of combating hazardous or harmful alcohol consumption, when, in addition, the scientific studies seem to show that hazardous or harmful consumption rises in line with the increase in consumer income, while, at the same time, the quantity of the cheapest alcoholic beverages bought per week falls with the increase in the income of hazardous or harmful drinkers.

150. On the assumption that the rules at issue in the main proceedings pursue the targeted objective of hazardous or harmful consumption of alcohol and at the same time the more general objective of combating alcohol abuse, the fact that the alternative 'increased taxation' measure is capable of procuring additional advantages by contributing to the attainment of that general objective would even constitute a decisive factor that would justify the choice of that measure rather than the MUP measure.

151. While it is ultimately for the national court to identify the precise objectives of the measure in question, to examine the merits and disadvantages of an 'increased taxation' measure and to ascertain whether that alternative presents a better cost-benefit outcome than the setting of a minimum price, I feel that, having regard to the principle of proportionality, it is difficult to justify the rules at issue, which appear to me to be less consistent and effective than an 'increased taxation' measure and may even be perceived as being discriminatory.

152. Consequently, I propose that the answer to the second and fifth questions should be that, in order to pursue the objective of combating alcohol abuse, which forms part of the objective of protecting public health, a Member State can choose rules imposing a minimum retail price of alcoholic beverages, which restricts trade within the European Union and distorts competition, rather than increased taxation of those products, only on condition that it shows that the measure chosen presents additional advantages or fewer disadvantages by comparison with the alternative measure. The fact that the alternative measure entailing increased taxation is capable of procuring additional advantages by contributing to the general objective of combating alcohol abuse does not justify discarding that measure in favour of the MUP measure.

IV – Conclusion

153. In view of the foregoing considerations, I propose that the Court should answer the questions referred by the Court of Session as follows:

(1) Regulation (EU) No 1308/2013 of the European Parliament and of 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 meaning that it does not preclude national rules, such as those at issue in the main proceedings, which prescribe a minimum retail price for wines according to the quantity of alcohol in the product sold, provided that those rules are justified by the objectives of the protection of human health, and in particular the objective of combating alcohol abuse, and do not go beyond what is necessary in order to achieve that objective.

(2) In order to ascertain whether a measure satisfies the principle of proportionality, it is for the national court:

– to ascertain whether it may reasonably be concluded on the evidence which the Member State is required to place before the national court that the means chosen are appropriate for the attainment of the objective pursued and that, in making that choice, the Member State did not exceed its discretion, and

– to take into account the extent to which that measure impedes the free movement of goods when it is compared with alternative measures that would enable the same objective to be attained and when all the interests involved are weighed up.

(3) When, as in the circumstances of the main proceedings, it is dealing with an application for judicial review of national rules which have not yet come into force and remain, in part, at the draft stage, the national court must, in order to assess the proportionality of those rules to the objective pursued, examine not only the material available to and considered by the national authorities when the rules were being drawn up, but also all the factual information existing on the date on which it determines the matter. There are no particular restrictions on the national court's power to examine that material, other than those that result from the application of the *inter partes* principle and, subject to the principles of equivalence and effectiveness, from the national procedural provisions governing the production of evidence in judicial proceedings.

(4) Articles 34 TFEU and 36 TFEU must be interpreted as meaning that they preclude a Member State, for the purpose of pursuing the objective of combating alcohol abuse, which forms part of the objective of the protection of public health, from choosing rules that impose a minimum retail price of alcoholic beverages that restricts trade within the European Union and distorts competition, rather than increased taxation of those products, unless that Member State shows that the measure chosen has additional advantages or fewer disadvantages than the alternative measure. The fact that the alternative measure of increased taxation is capable of procuring additional advantages by contributing to the general objective of combating alcohol abuse does not justify rejecting that measure in favour of the measure imposing a minimum price.

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1 – Original language: French.

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2 – 'The 2012 Act'.

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3 – 'The 2013 draft order'.

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4 – One unit of alcohol corresponds to 10 millilitres of pure alcohol.

5 – ‘MUP’.

6 – ‘The Scotch Whisky Association and Others’.

7 – OJ 2013 L 347, p. 671; ‘the “single CMO” regulation’.

8 – ‘CMO’.

9 – ‘S’ designates the alcoholic content and ‘V’ the volume of alcohol in litres.

10 – See, to that effect, judgments in *British American Tobacco (Investments) and Imperial Tobacco* (C−491/01, EU:C:2002:741, paragraphs 36 and 40); *Intertanko and Others* (C−308/06, EU:C:2008:312, paragraphs 33 and 34); and *Gauweiler and Others* (C−62/14, EU:C:2015:400, paragraph 29).

11 – See, regarding those consequences, *Politique agricole commune et politique commune de la pêche, Commentary by J. Mégret*, 3rd Edition, University of Brussels, point 68, p. 59.

12 – See, to that effect, judgment in *Panellinios Syndesmos Viomichanion Metapoiisis Kapnou* (C−373/11, EU:C:2013:567, paragraph 26).

13 – See judgments in *Prantl* (16/83, EU:C:1984:101, paragraphs 13 and 14) and *Ramel and Others* (89/84, EU:C:1985:193, paragraph 25).

14 – Ibid.

15 – See, in particular, judgments in *Antonini* (216/86, EU:C:1987:322, paragraph 6); *Commission* v *Greece* (C−110/89, EU:C:1991:227, paragraph 21); *Commission* v *Greece* (C−61/90, EU:C:1992:162, paragraph 22 and the case-law cited); and *Kuipers* (C−283/03, EU:C:2005:314, paragraph 42 and the case-law cited).

16 – See, in particular, judgments in *Antonini* (216/86, EU:C:1987:322, paragraph 6) and *Lefèvre* (188/86, EU:C:1987:327, paragraph 11).

17 – See, in particular, Title I of Council Regulation (EEC) No 816/70 of 28 April 1970 laying down additional provisions for the common organisation of the market in wine (OJ English special edition 1970(I), p. 234).

18 – Council Regulation of 29 April 2008 on the common organisation of the market in wine, amending Regulations (EC) No 1493/1999, (EC) No 1782/2003, (EC) No 1290/2005, (EC) No 3/2008

and repealing Regulations (EEC) No 2392/86 and (EC) No 1493/1999 (OJ 2008 L 148, p. 1).

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19 – See, in particular, judgments in *Industrias de Deshidratación Agrícola* (C−118/02, EU:C:2004:182, paragraph 20 and the case-law cited) and *Kuipers* (C−283/03, EU:C:2005:314, paragraph 37 and the case-law cited) and order in *Babanov* (C−207/08, EU:C:2008:407, paragraph 24 and the case-law cited).

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20 – Paragraph 34 of the observations of the Commission.

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21 – See, inter alia, order in *SPM* v *Council and Commission* (C−39/09 P, EU:C:2010:157, paragraph 47 and the case-law cited).

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22 – See judgment in *Panellinios Syndesmos Viomichanion Metapoiisis Kapnou* (C−373/11, EU:C:2013:567, paragraph 37).

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23 – See, as regards a minimum selling price of Hollands gin, judgment in *van Tiggele* (82/77, EU:C:1978:10); as regards a minimum retail price of manufactured tobacco products, judgments in *Commission* v *Belgium* (C−287/89, EU:C:1991:188); *Commission* v *France* (C−197/08, EU:C:2010:111); *Commission* v *Austria* (C−198/08, EU:C:2010:112); *Commission* v *Ireland* (C−221/08, EU:C:2010:113); and *Commission* v *Italy* (C−571/08, EU:C:2010:367); as regards a minimum price for the retail sale of fuel, judgment in *Cullet and Chamber syndicale des réparateurs automobiles et détaillants de produits pétroliers* (231/83, EU:C:1985:29); and, as regards a minimum selling price of bread, judgment in *Edah* (80/85 and 159/85, EU:C:1986:426).

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24 – See judgments in *Hammarsten* (C−462/01, EU:C:2003:33, paragraph 29 and the case-law cited) and *Kuipers* (C−283/03, EU:C:2005:314, paragraph 38 and the case-law cited) and order in *Babanov* (C−207/08, EU:C:2008:407, paragraph 25).

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25 – See judgment in *Viamex Agrar Handel and ZVK* (C−37/06 and C−58/06, EU:C:2008:18, paragraph 23 and the case-law cited).

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26 – See judgment in *Commission* v *Council* (C−269/97, EU:C:2000:183, paragraph 49 and the case-law cited).

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27 – Ibid.

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28 – See, in particular Articles 23(3), 80(3)(b) and 220.

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29 – See order in *Commission* v *Germany* (C−426/13 P(R), EU:C:2013:848, paragraph 75 and the case-law cited).

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30 – 8/74, EU:C:1974:82.

31 – Paragraph 5.

32 – C−267/91 and C−268/91, EU:C:1993:905.

33 – Paragraph 16.

34 – C−110/05, EU:C:2009:66.

35 – Paragraphs 35 and 37.

36 – 82/77, EU:C:1978:10.

37 – Paragraph 18.

38 – C−267/91 and C−268/91, EU:C:1993:905.

39 – 82/77, EU:C:1978:10.

40 – C−267/91 and C−268/91, EU:C:1993:905.

41 – 82/77, EU:C:1978:10.

42 – See judgment in *ANETT* (C−456/10, EU:C:2012:241, paragraph 33 and the case-law cited).

43 – C−267/91 and C−268/91, EU:C:1993:905.

44 – C−531/07, EU:C:2009:276.

45 – C−267/91 and C−268/91, EU:C:1993:905.

46 – Paragraph 20 of the judgment in *Fachverband der Buch- und Medienwirtschaft* (C−531/07, EU:C:2009:276).

47 – C−267/91 and C−268/91, EU:C:1993:905.

48 – C−63/94, EU:C:1995:270.

49 – C−531/07, EU:C:2009:276.

50 – C−267/91 and C−268/91, EU:C:1993:905.

51 – Paragraph 16.

52 – 82/77, EU:C:1978:10.

53 – See Picod, F., ‘La nouvelle approche de la Cour de justice en matière d’entraves aux échanges’, *Revue trimestrielle de droit européen*, 1998, p. 169, where the author considers that the case-law originating in the judgment in *van Tiggele* (82/77, EU:C:1978:10) ‘did not in any way require proof of a difference in treatment between national products and imported products, but applied because the competitive advantage obtained through an import transaction was cancelled out, even if only by comparison with another method of importation’. The author adds that ‘[i]t would be inappropriate for the Court to apply the conditions laid down in its judgment in *Keck and Mithouard* [(C−267/91 and C−268/91, EU:C:1993:905) to rules of that type, as otherwise it would render well-established case-law inoperative’. See, *a contrario*, Oliver, P., ‘Dossier *Keck* — Forces et faiblesses de l’arrêt *Keck*’, *Revue trimestrielle de droit européen*, 2014, p. 870, where the author considers that ‘well before the judgment in *Keck [and Mithouard* (C−267/91 and C−268/91, EU:C:1993:905)], only price controls that discriminated against imports were regarded as measures having equivalent effect’ (footnote 11). See, last, for a nuanced analysis, Candela Soriano, M., ‘Le traité CE et la fixation des prix dans le secteur du livre’, *Revue du droit de l’Union européenne*, No 2, 2000, p. 361, where the author states that, in order for a national measure prohibiting the retail sale of books at below the price imposed to be compatible with [European] Union law, ‘it would be necessary … that rules of that type were not discriminatory in law or in fact, in other words, that they were not of such a kind as to make access to the market more difficult for the economic operators concerned or for the products concerned’ (p. 382).

54 – 82/77, EU:C:1978:10.

55 – Paragraph 14, emphasis added. See, to that effect, judgments in *Cullet and Chambre syndicale des réparateurs automobiles et détaillants de produits pétroliers* (231/83, EU:C:1985:29, paragraph 25) and *Leclerc* (34/84, EU:C:1985:362, paragraphs 7 and 8).

56 – See judgment in *Berlington Hungary and Others* (C−98/14, EU:C:2015:386, paragraph 64).

57 – See, to that effect, judgments in *Blanco Pérez and Chao Gómez* (C−570/07 and C−571/07, EU:C:2010:300, paragraph 44 and the case-law cited); *Commission* v *France* (C−89/09, EU:C:2010:772, paragraph 42); *Susisalo and Others* (C−84/11, EU:C:2012:374, paragraph 28); *Ottica New Line di Accardi Vincenzo* (C−539/11, EU:C:2013:591, paragraph 44); *Venturini and Others* (C−159/12 to C−161/12, EU:C:2013:791, paragraph 59); and *Sokoll-Seebacher* (C−367/12, EU:C:2014:68, paragraph 26).

58 – See judgment in *Commission* v *Belgium* (C−227/06, EU:C:2008:160, paragraph 63 and the case-law cited).

59 – See, to that effect, inter alia, judgment in *Parliament* v *Council* (C−540/13, EU:C:2015:224, paragraph 35).

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60 – See, inter alia, judgment in *Billerud Karlsborg and Billerud Skärblacka* (C−203/12, EU:C:2013:664, paragraph 37).

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61 – Ibid.

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62 – C−167/97, EU:C:1999:60.

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63 – Paragraph 45.

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64 – See, to that effect, judgment in *Mirepoix* (54/85, EU:C:1986:123, point 16), where it was held that the authorities of the importing Member State are obliged to review a prohibition of the use of a pesticide or a prescribed maximum level if it appears to them that the reasons which led to the adoption of such measures have changed. See also, to that effect, judgment in *Heijn* (94/83, EU:C:1984:285, paragraph 18).

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65 – See judgment in *Agrarproduktion Staebelow* (C−504/04, EU:C:2006:30, paragraph 40).

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66 – Directive 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).

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67 – See, to that effect, judgments in *Petersen* (C−341/08, EU:C:2010:4, paragraph 42 and the case-law cited) and *Vital Pérez* (C−416/13, EU:C:2014:2371, paragraph 62 and the case-law cited), where the Court held that where the national legislation lacks precision as regards the aim pursued, it is necessary that other elements, derived from the general context of the measure concerned, should make it possible to identify the underlying aim of that measure for the purposes of review by the courts as to its legitimacy and as to whether the means put in place to achieve that aim are appropriate and necessary (paragraph 62 and the case-law cited).

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68 – See, by analogy, judgment in *Berlington Hungary and Others* (C−98/14, EU:C:2015:386, paragraph 64 and the case-law cited).

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69 – Ibid. (paragraph 65).

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70 – See paragraph 20 of the decision for reference.

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71 – 59% of hazardous drinkers and 63% of harmful drinkers consume alcoholic beverages bought at a price per unit of alcohol below GBP 0.50 when they live in poverty, while the relevant figures are 45% and 42% respectively for those not living in poverty.

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72 – Council Directive of 27 November 1995 on taxes other than turnover taxes which affect the

consumption of manufactured tobacco (OJ 1995 L 291, p. 40).

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73 – Council Directive of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages (OJ 1992 L 316, p. 21).

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74 – Council Directive of 19 October 1992 on the approximation of the rates of excise duty on alcohol and alcoholic beverages (OJ 1992 L 316, p. 29).

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75 – See, most recently, judgment in *Commission* v *France* (C−197/08, EU:C:2010:111, paragraph 52).

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76 – C−216/98, EU:C:2000:571.