# Minimum Alcohol Pricing: Balancing the 'Essentially Incomparable' in *Scotch Whisky*

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This note contrasts the approaches taken by the Court of Justice of the European Union and the UK Supreme Court in the high-profile litigation which preceded the introduction of minimum alcohol pricing in Scotland. The case of *Scotch Whisky Association and others* v *The Lord Advocate and another* hinged, ultimately, on the necessity of minimum pricing to achieve important public health goals. The notably differing viewpoints adopted by the domestic and Union courts, however, both illustrate the elusiveness of the proportionality criterion, and expose tensions between domestic and supranational control in the context of internal market regulation.

## INTRODUCTION

Whisky may traditionally be the 'water of life,' yet it is recognised as having, together with other alcohol products, a notably malign impact within contemporary Scottish society. Curbing excessive consumption has long been a prominent policy concern of the devolved Scottish Parliament. Minimum pricing regulation, whereby retailers are prohibited from charging below a specified price-per-unit of alcohol sold, was identified as the lynchpin of a comprehensive public health strategy aimed at reducing alcohol-related harms. Yet minimum pricing rules potentially conflict with the 'open and undistorted competition' ostensibly guaranteed by the EU free movement provisions, thus exposing tensions between market and non-market objectives, and between domestic and supranational control.

This case note explores the contrasting approaches taken in the case of *Scotch Whisky Association and others* v *The Lord Advocate and another* by the Court of Justice of the European Union (CJEU)[1] and the UK Supreme Court,[2] respectively. Here, public health concerns were invoked to defend the Alcohol (Minimum Pricing) (Scotland) Act 2012 (2012 Act), in order to justify derogation from the free movement of goods guaranteed by Article 34 of the Treaty on the Functioning of the European Union (TFEU). In upholding unanimously the legality of this legislation, and thus paving the way for the introduction of minimum pricing from May 2018, a seven-judge panel of the Supreme Court sidestepped urgent, yet arguably rather ill-considered, concerns identified by the CJEU regarding the perceived necessity of the national measures. The case

*LSE Law. Many thanks to an anonymous reviewer for their helpful comments on an earlier draft.

1 Case C-333/14 *Scotch Whisky Association and others* v *The Lord Advocate and another* EU:C:2015:845.

2 *Scotch Whisky Association and others* v *The Lord Advocate and another* [2017] UKSC 76.




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thus raises important questions about, *inter alia*, the scope of the free movement of goods prohibition, the approach to proportionality under EU law, and the application, and implications, of EU law within devolved national government structures.

## FACTS AND EVOLUTION OF THE DISPUTE

The public health concerns that motivated passage of the 2012 Act are well-known within popular culture – representing, as the Inner House of the Court of Session put it, 'an unfortunate, if distorted, caricature of the Scottish character'[3]–and meticulously set out in the numerous policy documents that paved the way for its enactment. 'Scotland's alcohol-related statistics are stark'[4]: consumption is amongst the highest in Western Europe, and a quarter higher than in England and Wales; excessive consumption is associated with high levels of a range of social problems, including alcohol-related hospital discharges, deaths and criminal offences; and, even if problematic drinking is widespread across social groups, the ill-effects of alcohol abuse are experienced most acutely by those in poverty, meaning that excessive consumption exacerbates existing social inequalities.

The Scottish government's alcohol strategy involves 40 measures intended, together, to reduce consumption while providing greater community and individual support.[5] Amongst these, minimum alcohol pricing is premised on the notion, counterintuitive from a competition policy perspective, that lower prices are harmful to consumers: greater affordability leads to increased consumption, which leads to increased levels of alcohol-related harms.[6] The 2012 Act empowers the Scottish government to set a minimum price-per-unit (MPU) for retail sales, which takes effect as a licence condition for on-trade and off-trade sales.

At its enactment, the proposed MPU was £0.50, a figure intended to strike 'a reasonable balance between public health and social benefits and intervention in the market.'[7] The 2012 Act was nonetheless challenged before the Outer House of the Court of Session by three trade associations representing producers and importers of alcohol products. The grounds of challenge included arguments relating to the constraints of the Acts of Union and the limitations of the devolved competences of the Scottish Parliament. Most important for our purposes were several claims alleging breaches of EU law, in particular the free movement of goods under Article 34 TFEU.

In a concise yet convincing opinion, Lord Doherty rejected the petitioners' arguments, finding that any EU law objections were overridden by legitimate

3 *Scotch Whisky Association and others* v *The Lord Advocate and another* [2016] CSIH 77 at [178].
4 Scottish Government, *Final Business and Regulatory Impact Assessment for Minimum Price Per Unit of Alcohol as Contained in Alcohol (Minimum Pricing) (Scotland) Bill* (2012), 3.
5 Scottish Government, *Changing Scotland's Relationship with Alcohol: A Framework for Action* (2009).
6 n 4 above, 6.
7 *ibid*, 10. Modelling conducted as part of the impact assessment exercise considered the effects of an MPU ranging from £0.25 to £0.70, with, unsurprisingly, the greatest health benefits predicted in the higher range (*ibid*, 54-60).

and proportionate public health concerns.[8] More precisely, he held that the twofold aims of the legislation – to reduce alcohol consumption generally, and to reduce over-consumption by harmful and hazardous drinkers specifically[9] – were most effectively achieved through a policy which targeted alcohol that was cheap relative to strength, almost invariably sold by off-trade retailers.[10] Conversely, a more indiscriminate rise in alcohol prices through a blanket increase in excise duties would have a disproportionately negative impact on moderate drinkers and the on-trade.[11]

That, of course, was merely the start. The petitioners appealed to the Inner House of the Court of Session (a reclaiming motion, in Scottish parlance), retaining only their claims based on EU law. Proceedings became more drawn-out when the higher court referred the case for preliminary ruling under Article 267 TFEU. The CJEU, largely following the approach of Advocate General Bot,[12] confirmed unprompted that MPU regulation constitutes a 'measure having equivalent effect' (MEE) to a quantitative restriction on free movement of goods, which could in theory be exempted by public health concerns.[13] On the facts, however, and influenced perhaps by somewhat leading questions referred by the Inner House,[14] the CJEU was unconvinced that such regulation would survive scrutiny from a proportionality perspective, in particular because an apparently less restrictive alternative – increased taxation – was available.[15]

The subsequent judgment of the Inner House is detailed and dense. Like the CJEU,[16] Lord Carloway was persuaded of the suitability of MPU regulation to curb excessive drinking, even if, as the petitioners emphasised, harmful and hazardous drinkers exist across economic groups.[17] Where he diverged from Luxembourg was on the question of necessity. Contrary to the clear indications of the CJEU and its Advocate General, Lord Carloway was neither prepared to second-guess the policy choices of the Scottish Parliament, nor to fault the Lord Ordinary for similarly allowing a certain discretion.[18] Faced with the principal objection to MPU regulation – that changes to excise duty could achieve broadly the same result in a manner less harmful to inter-state trade – Lord Carloway observed, with finality, that '[t]he fundamental problem with an increase in tax is simply that it does not produce a minimum price.'[19]

Thus, a case concerning distinctive local policy concerns within Holyrood made its way to Westminster, where Lord Mance delivered the unanimous

8 *Scotch Whisky Association and others* v *The Lord Advocate and another* [2013] CSOH 70, particularly at [43]-[83].
9 *ibid* at [53].
10 *ibid* at [71].
11 *ibid* at [80].
12 Opinion of Advocate General Bot in Case C-333/14 *Scotch Whisky Association and others* v *The Lord Advocate and another* EU:C:2015:527.
13 n 1 above at [32]-[33].
14 On this point, see the observations of A. Alemanno, 'Balancing free movement and public health: The case of minimum unit pricing of alcohol in *Scotch Whisky*' (2016) 53 *Common Market Law Review* 1037, 1056.
15 n 1 above at [40]-[50].
16 *ibid* at [36]-[39].
17 n 8 above at [180]-[183] in particular.
18 *ibid* at [193]-[205] in particular.
19 *ibid* at [196].



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opinion of the Supreme Court. By this juncture, the appeal had collapsed into a single issue, namely whether the recognised public policy concern could be protected through less restrictive means.[20] Approving of the two-fold objectives of the 2012 Act identified by the Lord Ordinary, Lord Mance nonetheless refined these to identify a particular policy preoccupation with the negative impacts of excessive alcohol consumption specifically within deprived communities.[21] Although more receptive than the lower courts to arguments that EU law regulating excise duty might permit a differentiated approach to taxation of alcoholic products by strength, in a manner that could mirror MPU regulation, Lord Mance endorsed Lord Doherty's finding that higher taxes would create a disproportionate burden for moderate drinkers who pose no public health risk.[22] Finally, Lord Mance considered an issue examined only obliquely by the lower courts, that is, the (lack of any) measurement of the likely impact of MPU regulation on inter-state trade.[23] Treating this as an aspect of proportionality *stricto sensu*, he rejected the petitioners' arguments as being, variously, unfounded, incalculable, and involving incommensurable values.[24] Accordingly, he dismissed the appeal, paving the way for introduction of MPU regulation from May 2018.

## ARTICLES 34 AND 36 TFEU: SCOPE OF FREE MOVEMENT OF GOODS

Remarkably, perhaps the most interesting aspect of this case from an EU law perspective was an issue treated as wholly uncontentious within the domestic proceedings: namely, the initial characterisation of MPU regulation as a MEE contrary to Article 34 TFEU. Before the Lord Ordinary, it was 'common ground' that such regulation contravened the free movement of goods unless justified by a proportionate derogation, the burden of establishing which lay with the Scottish government.[25] This, almost inevitably, was unchallenged before the higher courts.[26] This unexpected starting-point, MacCulloch has suggested, may stem from a detailed Opinion issued by the European Commission beforehand, which had taken the firm view that the proposed regulation would constitute an impermissible MEE.[27] Yet the point was not indisputable under EU law prior to this case. Accordingly, the decision has added to our understanding of the evolving nature of Article 34 TFEU, albeit in a manner not immune to criticism as a matter of substantive EU law.

The breadth of the *Dassonville* formula, establishing the parameters of the concept of a MEE, is well-known: Article 34 TFEU prohibits 'all trading

20 n 2 above at [29].
21 *ibid* at [19]-[28].
22 *ibid* at [37] and [46].
23 *ibid* at [47]-[62].
24 *ibid* at [47]-[62].
25 n 8 above at [28].
26 n 3 above at [166]; n 2 above at [3].
27 A. MacCulloch, 'Scottish Minimum Alcohol Pricing and EU Law,' Lancaster University Law School Working Paper, January 2014.

rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-[Union] trade' in goods.[28] Given that the free movement provisions are not intended to result in a 'market without rules',[29] however, the CJEU subsequently, in *Criminal proceedings against Bernard Keck and Daniel Mithouard* (*Keck*), distinguished between domestic rules which restrict inter-state trade, directly or obliquely, and those which merely limit the commercial freedom of traders within the domestic territory.[30] Categorising the latter under the ambiguous label of 'certain selling arrangements,' the Court excluded such rules from the ambit of Article 34 TFEU, provided that they respect the principles of universality and non-discrimination.[31]

More recently, the Court has moved away from a pure discrimination-focused approach,[32] bringing goods in line with other areas of free movement where the so-called market access approach is well-established.[33] Yet, in its pivotal decision in *Commission* v *Italy (Trailers)*, the Court nonetheless reaffirmed the *Keck* case-law, meaning that discrimination and market access-based approaches to free movement of goods ostensibly co-exist, alongside the 'selling arrangements' lacuna.[34]

This was of direct relevance in *Scotch Whisky*, where the domestic provision arguably most closely resembled a selling arrangement along the lines of the *Keck* jurisprudence. *Keck* itself involved a French rule regulating unfair competition through a prohibition on below-cost sales by retailers.[35] Although MPU regulation restricts the commercial freedom of retailers by reference to a different, arguably more objective, metric – they cannot price below the market-wide minimum price-per-unit, as opposed to their own unit costs – it is difficult to argue that this distinction suffices to remove the Scottish legislation from the presumptive safety of the selling arrangement category.[36]

Because the issue was uncontested domestically, the questions referred by the Inner House assumed that MPU regulation constituted a MEE. Yet, quite properly, both the Advocate General and the CJEU considered this point as a necessary precursor to the question of whether any such restriction could be justified.[37]

28 Case C-8/74 *Procureur du Roi* v *Benoît and Gustave Dassonville* EU:C:1974:82 at [5].

29 Opinion of Advocate General Tizzano in Case C-442/02 *CaixaBank France* v *Ministère de l'Économie, des Finances et de l'Industrie* EU:C:2004:187 at [63].

30 Case C-267/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* EU:C:1993:905 at [14].

31 *ibid* at [16].

32 Case C-110/05 *Commission* v *Italy (Trailers)* EU:C:2009:66.

33 See, for example, E. Spaventa, 'Leaving Keck behind? The free movement of goods after the rulings in *Commission* v *Italy* and *Mickelsson and Roos*' (2009) 35 *European Law Review* 914, and J. Snell, 'The Notion of Market Access: A Concept or a Slogan?' (2010) 47 *Common Market Law Review* 437.

34 *Trailers* n 32 above at [33]-[37].

35 n 30 above at [2].

36 Indeed, Advocate General Bot observed such formal similarity between the (permissible) restriction in *Keck* and the measure under examination in *Scotch Whisky*: see n 12 above at [63]. See also the earlier discussion of Advocate General Bot on the distinction between selling arrangements and product requirements in his Opinion in Case C-110/05 *Commission* v *Italy (Trailers)* EU:C:2006:646 at [65]-[75].

37 n 12 above at [47].

Advocate General Bot was most obviously alive to on-going debate regarding the scope of Article 34 TFEU, and thus approached the question of whether MPU regulation might constitute a MEE from two distinct perspectives. Reflecting a long-term and influential concern with coherence across the fundamental freedoms,[38] he argued primarily that the measure should be judged by a market access standard: that is, it should be held to constitute an obstacle to free movement 'when, *irrespective of its nature*, it impedes access to the market of the Member State concerned.'[39] The fact that such regulation might cancel out the competitive advantage of lower cost imports was therefore sufficient to constitute an obstacle to market access.[40]

Aware, however, that *Keck* remains good law in principle, the Advocate General went through the motions of such an analysis in the alternative. Relying principally on the judgment in *van Tiggele*,[41] he concluded that, even if MPU regulation ostensibly falls within the selling arrangement concept, it results in discrimination in fact against imports for essentially the same reason as under the market access analysis, that is, by cancelling out any comparative advantage.[42] What the Advocate General neglected to consider, however, was that *van Tiggele* pre-dated *Keck*, and thus conceivably comes within the somewhat amorphous body of case-law apparently overruled in the later case.[43] At the very least, having explicitly acknowledged the outward similarity between the national rule in *Keck* and the proposed MPU regulation,[44] it would seem proper to have considered whether either the latter evinced substantially greater discriminatory impact than the permissible prohibition on below-cost pricing in the former, or more contentiously, whether perhaps *Keck* was wrongly decided on its facts.

The Court, conversely, continuing its enthusiastic and occasionally ill-considered embracing of the market access standard,[45] dealt with the issue in two brief paragraphs. Having restated the *Dassonville* formula,[46] it fast-forwarded through four decades of jurisprudence to consider the measure solely in market access terms. Citing *Trailers* and drawing explicitly on the analysis of its Advocate General, the Court stated simply that

> *the fact that the legislation ... prevents the lower cost price of imported products being reflected in the selling price to the consumer means, by itself, that that legislation is capable of*

38 See, for example, Advocate General Bot's Opinion in *Trailers* n 36 above at [82]-[83].

39 n 12 above at [58], emphasis added. In this regard, his approach followed relatively recent cases like *Trailers* (n 32 above), Case C-142/05 *Åklagaren* v *Percy Mickelsson and Joakim Roos* EU:C:2009:336 and Case C-456/10 *Asociación Nacional de Expendedores de Tabaco y Timbre (ANETT)* v *Administración del Estado* EU:C:2012:241 (*ANETT*) in applying the market access standard within the goods context. The pre-eminence of the market access approach is more firmly established in other areas of free movement, including services (see, for example, Case C-384/93 *Alpine Investments* EU:C:1995:126) and establishment (see, for example, Case C-55/94 *Gebhard* EU:C:1995:411).

40 n 12 above at [59].

41 Case C-82/77 *Van Tiggele* EU:C:1978:10.

42 n 12 above at [61]-[67].

43 In *Keck* n 30 above at [16], the CJEU noted, cryptically, that its ruling was 'contrary to what has previously been decided ...'

44 n 12 above at [63].

45 See, for example, *ANETT* n 39 above.

46 n 1 above at [31].

> *hindering the access to the United Kingdom market . . . and constitutes therefore a measure having an effect equivalent to a quantitative restriction.*[47]

It made no effort to characterise the nature of the alleged restriction as a selling arrangement or otherwise, nor to distinguish its approach from *Keck*, despite the fact that, in *Trailers*, the earlier case was expressly reaffirmed.

The approach in *Scotch Whisky* to this all-important threshold criterion for application of Article 34 TFEU has been subject to considerable debate. MacCulloch, for instance, argued that the judgment elevates retail price competition to an extraordinary, yet unexplained, special status within the context of the free movement rules.[48] Andreangeli criticised the CJEU's approach as, effectively, a jurisdictional 'land grab,' whereby the scope of Article 34 TFEU begins to usurp other powers (like public health protection) conferred on Member States.[49] Both criticisms thus hint at the dangers of an over-expansive interpretation of the MEE concept, which gives ever greater weight to the 'market' and the supranational, in contradistinction to the non-market and domestic, in the context of the EU's social market economy.

Most fundamentally, the judgment cannot but call into question the CJEU's ostensible continuing commitment to the *Keck* exception.[50] Alemanno, endeavouring to find nuance in the ruling, suggested three potential explanations: that the CJEU relied upon (unspecified) pre-*Keck* case-law which treated certain forms of price regulation as discriminatory, and thus as a violation of the *Keck* exception itself; that it applied a 'pure' market access test, an interpretation supported by adoption of the reasoning of its Advocate General; and/or that the approach was an artefact of the domestic procedural posture, specifically the absence of disagreement regarding the treatment of MPU regulation.[51] At the very least, the judgment tells us that price regulation no longer benefits from the presumptive safety of the selling arrangements category, a point confirmed obliquely in the *Deutsche Parkinson* ruling.[52] Thus, even if the exception articulated in *Keck* remains good law, it is difficult to say with certainty whether the outcome in that earlier case would be the same today.

This returns us in a roundabout manner to an issue which occupied Lord Mance, albeit framed in somewhat different terms: namely, the extent to which evidence of actual negative impact on inter-state trade is required under any Article 34 and/or 36 TFEU assessment. Before the Supreme Court, the petitioners had argued that, by failing to quantify the likely effect on EU-level trade of MPU regulation, and to compare that with the supposedly less restrictive alternative of taxation, the Scottish government failed to discharge its

47 *ibid* at [32].

48 A. MacCulloch, 'State intervention in pricing: an intersection of EU free movement and competition law' (2017) 42 *European Law Review* 190, 204.

49 A. Andreangeli, 'Marking Markets Work in the Public Interest: Combatting Hazardous Alcohol Consumption through Minimum Pricing Rules in Scotland' (2017) 36 *Yearbook of European Law* 522, 534.

50 n 48 above, 202.

51 n 14 above, 1048-1050.

52 Case C-148/15 *Deutsche Parkinson Vereinigung eV* v *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV* EU:C:2016:776 (*Deutsche Parkinson*).




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evidential burden. Lord Mance approached, and rejected, these claims, from several distinct perspectives.

Based on the limited evidence available, he was prepared to leave unchallenged the Inner House's finding that the effect on EU-level trade would be limited in practice, compared both with the level of alcohol sales in Scotland overall and volumes of EU trade generally.[53] This was because, perhaps surprisingly given the tenor of arguments against MPU regulation, the great bulk of the very cheapest alcohol sold in Scotland is manufactured domestically. In reality, therefore, it is domestic producers rather than importers which are likely to be disadvantaged by minimum pricing rules.

Second, contrary to the criticism that more ought to have been done *ex ante* to quantify the likely negative impact of the legislation, Lord Mance suggested that this question might involve, 'incalculables, which cannot presently be further or more precisely assessed in any way which would be relevant.'[54] He thus dismissed arguments that the Scottish government had failed to satisfy its evidential burden as, in effect, 'an unrealistic counsel of perfection.'[55] The provisional nature of the 2012 Act, incorporating a sunset clause pursuant to which regulation lapses after six years unless proactively renewed, was also relevant, reflecting the dynamic nature of the evidence-gathering process.[56]

Third, and perhaps most profoundly, Lord Mance noted that the balancing exercise required was 'between two essentially incomparable values': health and the desire to reduce socioeconomic inequalities on the one hand, development of the internal market on the other.[57] In this regard, he was understandably squeamish about a direct comparison between human life and market access,[58] a reticence notably lacking from the judgment of the CJEU.

Yet it is possible to go further, and attack such an approach as, in effect, begging the question. Establishing a *prima facie* breach of Article 34 TFEU, following the approach of the CJEU with its heavy reliance on *Dassonville*, would appear to require little more than the formulation of a hypothetical claim by which access to the domestic market may in theory be rendered less attractive, even 'indirectly' and 'potentially'. Whereas other areas of free movement case-law appear to be developing a *de minimis* threshold to eliminate spurious claims,[59] in the realm of goods the CJEU has been disconcertingly receptive to speculative, and it might be argued, patently meritless claims.[60]

53 n 2 above at [49].
54 *ibid* at [50].
55 *ibid* at [55].
56 *ibid* at [62].
57 *ibid* at [48].
58 *ibid* at [48].
59 See, for example in the area of services, Cases C-518/06 *Commission* v *Italy (motor insurance)* EU:C:2009:270 at [66], and C-602/10 *SC Volksbank România SA* v *Autoritatea Națională pentru Protecția Consumatorilor* EU:C:2012:443 at [80]-[81].
60 The restrictions on use condemned in *Trailers* n 32 above, and *Mickelsson and Roos* n 39 above, are pre-eminent examples. Conversely, Advocate General Jacobs had argued, presciently, that if the market access standard was adopted in the realm of goods – a development he strongly supported – a *de minimis* criterion was necessary 'to prevent excessive interference in the regulatory powers of the Member States': Opinion in Case C-412/93 *Société d'Importation Edouard Leclerc-Siplec* v *TF1 Publicité SA and M6 Publicité SA* EU:C:1995:26 at [42].

Already, this approach creates a troubling asymmetry: a default assumption that domestic regulation is incompatible with the free marketeer's paradise that is the internal market, coupled with a burden on Member States to justify any and all intervention by reference to the narrow and demanding criteria established under EU law.[61] Justifying claimed derogations has, of course, always been the responsibility of Member States. Yet, the broader the ambit of the prohibition contained in Article 34 TFEU, the more difficult and demanding this exercise becomes, with an arguable shift in focus from integration to deregulation.

To furthermore require, in the course of such an exercise, that Member States must quantify the extent of any alleged restriction before establishing a proportionate derogation – where no equivalent obligation exists for parties seeking to establish a *prima facie* breach – would effectively involve a reversal of the burden of proof. Although this objection may come into conflict with the CJEU's increasing embrace of a more evidence-focused assessment of public interest justifications, itself a not-uncommendable development,[62] the ultimate root of the problem is a notable absence of rigour in applying Article 34 TFEU. Inevitably, it is difficult to balance meaningfully an empirically-grounded derogation against a purely hypothetical restriction, as considered below. The proper solution is not, however, continually to raise the bar for Member States seeking derogation, but rather to reconsider the approach to the notion of a restriction under Article 34 TFEU.

## THE PRINCIPLE OF PROPORTIONALITY IN THEORY AND PRACTICE

The most acute effect of the Court's increasingly lax approach to Article 34 TFEU is a shift in emphasis, from assessment of whether an obstacle exists to the question of whether the restriction can be justified. As noted, it is at this juncture that the burden of proof shifts to the Member State – or part thereof, as in *Scotch Whisky* – seeking to save its domestic measure. Accordingly, once the parties in *Scotch Whisky* had agreed that MPU regulation constituted a MEE, the burden lay with the Scottish government to establish a valid objective justification.[63]

In principle, this inquiry involves consideration of two distinct though interlinked elements: identification of a legitimate public interest, and assessment of the proportionality of the restriction in light of that justification. Given that the

61 An asymmetry similarly emphasised by D. Schiek, 'Towards More Resilience for a Social EU – The Constitutionally Conditioned Internal Market' (2017) 13 *European Constitutional Law Review* 611, 616.

62 Discussed by A. Alemanno, 'A Meeting of Minds on Impact Assessment: When *Ex Ante* Evaluation Meets *Ex Post* Judicial Control' (2011) 17 *European Public Law* 485, and N. Nic Shuibhne and M. Maci, 'Proving Public Interest: The Growing Impact of Evidence in Free Movement Case Law' (2013) 50 *Common Market Law Review* 965. Judgments in this vein include Cases C-405/98 *Konsumentombudsmannen (KO)* v *Gourmet International Products* AB EU:C:2001:135, C-147/03 *Commission* v *Austria* EU:C:2005:427 and C-542/09 *Commission* v *Netherlands* EU:C:2012:346.

63 See, for example, n 3 above at [113], and n 2 at [18].

CJEU has been receptive to a range of nominally valid public interest claims[64] however, most intellectual heavy lifting is now done under the proportionality assessment. Unsurprisingly, this was the principal focus of each of the five opinions from *Scotch Whisky*. This aspect of the case is thus of particular significance: both for what it tells us about the approach to proportionality under EU law generally, and because it raises important questions about the extent to which Union courts should pre-empt domestic decision-making in this context.

In *Scotch Whisky*, the key point of contention boiled down to the question of whether a recognised legitimate aim – protection of public health – provided a proportionate exemption to the presumed restriction on free movement. At first instance, the Lord Ordinary relied upon the approach to proportionality articulated by the Court of Session in *Sinclair Collis* v *Lord Advocate*, which in turn drew heavily from EU case-law.[65] He thus applied a two-part test: considering both the suitability and the necessity of the national measure to achieve the identified aim.[66] This same straightforward approach was similarly applied by the CJEU,[67] and approved by the Inner House.[68]

Advocate General Bot, however, in a thoughtful though perhaps not entirely helpful mediation on the nature of proportionality generally, divided the 'intellectual exercise' into three successive stages. These comprised a suitability or appropriateness test; a necessity test, restyled as a 'minimum interference test' requiring consideration of alternative solutions potentially less restrictive of trade; and a 'test of proportionality in the strict sense,' requiring a balancing of the extent of restriction against its contribution towards attainment of the legitimate aim.[69] The addition of a third proportionality *stricto sensu* limb arguably implies an intrinsic superiority of the fundamental freedoms, insofar as even national measures which represent the appropriate and least restrictive means to achieve legitimate public policy goals must yield if they represent an undue incursion into free movement. Advocate General Bot nonetheless argued, somewhat disingenuously as shall be seen, that judicial review of proportionality should be 'marked by a certain degree of restraint': both because of the complexity of the underlying assessment, and because Member States should be permitted a margin of discretion in areas of particular public policy salience.[70]

This Opinion clearly had a significant impact on Lord Mance, who treated the CJEU's failure to follow the three-pronged approach of its Advocate General as manifesting an 'evidently deliberate suppression' of the supposed third

64 Beyond the express derogations provided by Article 36 TFEU, the CJEU has recognised a wide range of so-called 'mandatory requirements' justifying derogation, starting from Case C-120/78 *Rewe-Zentral AG* v *Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon')* EU:C:1979:42 at [8]. A comprehensive list is provided in C. Barnard, *The Substantive Law of the EU* (Oxford: OUP, 5th ed, 2016) ch 6; well-established examples include consumer protection, the effectiveness of fiscal supervision, environmental protection, and fairness in commercial transactions.

65 n 8 above at [50]-[52].

66 *ibid* at [57]-[84].

67 n 1 above at [33].

68 n 3 above at [167]-[170].

69 n 12 above at [73]-[76].

70 *ibid* at [82]-[84].

limb of the proportionality assessment.[71] Lord Mance read into this a willingness on the part of the CJEU to afford greater discretion to domestic policy choices,[72] and he later drew direct links between the Court's omission of a proportionality test *stricto sensu* and the inherent incommensurability of human life and free trade.[73] Yet the real explanation may be more banal: the inconsistency of the CJEU's approach to proportionality is well-documented,[74] while a straightforward 'suitable and necessary' test has similarly been applied in other recent cases on goods.[75]

Lord Mance accordingly summarised the two limbs of the proportionality assessment as comprising 'the legitimacy of the aim which the legislature had in mind, and the necessity for the measures adopted if such aim is to be achieved,' describing the latter as simply a less restrictive measures test.[76] Although this formulation effectively identified the pinch points in analysing the validity of the purported derogation from free movement in this instance, as a statement of the more general legal rule, unfortunately it is somewhat off-focus. First, it elides the threshold question of whether a potential justification exists with the substantive proportionality analysis: quite separate considerations, as the CJEU made clear in *Scotch Whisky*.[77] Moreover, it essentially collapses the proportionality assessment into a simple question of whether a less restrictive alternative exists: an approach that coincides with the definition of proportionality within Article 5(4) of the Treaty on European Union, but not, as noted above, one which reflects its current jurisprudential interpretation in the area of free movement. In particular, it omits discrete analysis of the appropriateness of the measure chosen to achieve that aim.

The error was of little consequence before the Supreme Court, where only the question of necessity remained in dispute. Yet, should this truncated legal test be followed in later cases, it could conceivably lead to erroneous results from an EU law perspective, as *Deutsche Parkinson* illustrates. Following less than a year after the CJEU's ruling in *Scotch Whisky* and arguably to be viewed as a companion piece, this case dealt with fixed price regulation in the pharmacy sector in Germany. Here, despite a nominally binding holding of the national court that such regulation was *necessary* to achieve legitimate public health objectives, the CJEU concluded that the impugned measure was *unsuitable* to do so, relying on curiously speculative reasoning regarding the potential impact

71 n 2 above at [16].
72 *ibid* at [15].
73 *ibid* at [48].
74 Compare, for example, the comparatively deferential approach adopted in Case C-36/02 *Omega Spielhallen* EU:C:2004:614 with the interventionist approach in Case C-341/05 *Laval un Partneri* EU:C:2007:809. For further discussion, see T. Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16 *European Law Journal* 158, and F. de Witte, 'Sex, Drugs and EU Law: The Recognition of Moral and Ethical Diversity in EU Law' (2013) 50 *Common Market Law Review* 1545.
75 See, for example, *Trailers* n 32 above at [59]; *Roos* n 39 above at [29]; *ANETT* n 39 above at [50]; and *Deutsche Parkinson* n 52 above at [34].
76 n 2 above at [15].
77 n 1 above at [33]-[36]. See also, generally, Case C-55/94 *Reinhard Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* EU:C:1995:411 at [37].



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of alternative mechanisms to foster brick-and-mortar pharmacy provision.[78] One may legitimately dispute the manner in which the suitability criterion was interpreted in *Deutsche Parkinson*. Yet, the case at least demonstrates that, as a matter of EU law, this requirement has standalone substantive bite, which should be given due attention by national courts.

Moreover, contrary to the magnanimous reading of Lord Mance, even if the CJEU or its Advocate General had intended to afford a margin of discretion in articulating the relevant legal test to be applied in *Scotch Whisky*, their respective approaches to the assessment of proportionality in substance granted little leeway to domestic policymakers. Both expressed deep scepticism about whether MPU regulation could truly be considered necessary, based – once again – on notably speculative arguments regarding the perceived adequacy of taxation increases to achieve broadly the same results.[79]

Two significant criticisms may be advanced against the interventionist approach to proportionality adopted at EU-level here. First, such an approach neglects the inexorable reality that the Scottish Parliament lacks competence in the area of excise duty, a point considered further below, so that taxation and price regulation can hardly be viewed as 'either/or' policy options in reality. Second, it remained highly disputed within the national proceedings as to whether the sorts of differentiated tax increases, coupled perhaps with alternative price regulation to prevent absorption by retailers, could in fact be lawfully implemented, as a matter of EU law, by Member States. In such circumstances, the decision of the CJEU to call into question the democratically-mandated policy choices of a devolved government, where the underlying public interest justification was compelling, the regional polity lacked the necessary legislative competence to adopt the preferred alternative measure, and the latter was itself questionably legal under existing EU law, seems ill-advised when viewed even in the most generous light.

Perhaps unsurprisingly, neither the Inner House nor the Supreme Court treated the markedly prescriptive indications of the CJEU as determinative, both instead placing reliance on the Luxembourg court's recognition that the assessment of proportionality lies, ultimately, with national courts.[80] More remarkably, however, neither of the domestic judgments that followed the preliminary ruling acknowledged the vehemence or specificity of the CJEU's approach, although the question of whether taxation increases could and should have been preferred was a key consideration on the facts before each.

Ultimately, it is difficult to avoid the conclusion that the CJEU overstepped its remit here, and the absence of deference by the national courts is understandable. Yet it is also somewhat disconcerting, insofar as the views of the Union courts, formally, take precedence in the realm of EU law.[81] The imprudence of an overly-intrusive approach to scrutiny of domestic regulation

78 n 52 above at [37]-[45] in particular.
79 n 12 above at [151] in particular.
80 n 1 above at [49] and [56].
81 Formally, a ruling under Article 267 TFEU is binding only upon the national court to which it is directed. As Garben has argued, however, in practice a judgment that condemns an individual national social rule tends to prohibit *all* Member States from adopting or maintaining such rules: S.

pursuing non-economic values under the free movement provisions is well-documented.[82] It would be implausible to argue, moreover, that the national measure at issue was the sort of outdated or unduly protectionist regulation that merits eradication on the 'bonfire of red tape' underpinning Article 34 TFEU.[83] The dogmatic yet unsubstantiated second-guessing of the CJEU is thus all the more problematic, and judgments of this nature risk bringing a respected institution into disrepute.

At its most basic, perhaps this is simply a case of 'be careful what you wish for', where use of the Article 267 TFEU procedure was unnecessary, or at least unhelpful, as reflected by the fact that the need for a reference had been contemplated but ultimately rejected by the Lord Ordinary.[84] National courts are not obliged to refer where the relevant point of EU law is already clear,[85] while lower courts have no duty at all to do so provided that options for appeal exist domestically.[86] Here, the central relevant question of EU law – the test for proportionality – was a straightforward one that had been correctly identified from first instance. Moreover, the purported guidance of the CJEU on its application was consistently disregarded as unworkable in light of the full facts, determination of which lies with national courts. The further delay of a year and half introduced into the proceedings by virtue of the reference to Luxembourg takes on a particular poignancy, given that MPU regulation at a rate of £0.50 per unit is projected to cut alcohol-related deaths by more than 300 annually after a ten-year period.[87] The case, accordingly, presents a good example of the occasionally suboptimal division of labour between Union and domestic courts under the preliminary reference procedure.

## EU LAW IN DEVOLVED GOVERNMENT STRUCTURES

Finally, the intricacies of this case illustrate the complexity of applying – and respecting – EU law within devolved government structures. Throughout the litigation process, the core issue of contention was the question of whether MPU regulation could be viewed as proportionate, and thus compatible with EU law as a legitimate derogation from Article 34 TFEU, given the argument that increased taxation might provide a less restrictive alternative. As the Inner Court noted, however, 'the elephant in the room is the fact that the Scottish

Garben, 'The Constitutional (Im)balance between 'the Market' and 'the Social' in the European Union' (2017) 13 *European Constitutional Law Review* 23, 42.

82 Discussed by de Witte, n 74 above. Prominent examples of much-criticised cases in this vein include the so-called 'Sunday trading' cases, including Cases C-145/88 *Torfaen Borough Council* v *B & Q plc* EU:C:1989:593, and C-169/91 *City of Stoke-on-Trent and Norwich City Council* v *B & Q plc* EU:C:1992:519 which may, or may not, have been overruled in the subsequent case of *Keck* n 30 above.

83 S. Weatherill, 'Pre-emption, Harmonisation and the Distribution of Competence to Regulate the Internal Market' in C. Barnard and J. Scott (eds), *The Law of the Single European Market. Unpacking the Premises* (Oxford: Hart Publishing, 2002) 49.

84 n 8 above at [107].

85 See Case C-77/83 *CILFIT* EU:C:1984:91, and more recently, Case C-72/14 *X* EU:C:2015:564.

86 Article 267(2) TFEU.

87 n 4 above at 54.




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Government has no power to raise taxation on alcohol.'[88] Yet, with the agreement of the respondents, the case proceeded *as if* the full range of policymaking options available to both devolved *and* central government could be employed to cure any identified infringement of free movement, the rationale being that responsibility under Article 34 TFEU lies with the Member State as a whole.[89]

As a matter of litigation strategy, this concession by the Scottish Government may be queried. It is well-established that a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with its obligations under rules of EU law.[90] At the same time, a complete divergence between theoretical legal viability and political reality, as acknowledged by the Inner House,[91] seems unsustainable.

On the one hand, the logic of this decision is defensible to the extent that different Member States have different internal governance structures, and the ambit of the fundamental freedoms should not differ depending upon any national-level decision about internal division of competences. In *Commission* v *Belgium*, for example, the fact that delays in transposing a directive were attributable to the complexity of Belgium's federal structure, and in particular a conflict between national and regional mechanisms of transposition, provided no defence to the determination that it had failed to fulfil its obligations under EU law.[92] The responsibility of the whole of a Member State for breach committed by one of its constituent parts is, moreover, well-illustrated by *Omega Spielhallen*, in which a decision of the Bonn police authority constituting a *prima facie* restriction of free movement of services was ultimately attributable to Germany.[93] Accordingly, it is undisputed that a *prima facie* breach of Article 34 TFEU by the devolved Scottish government would appear to implicate the UK as a whole.

On the other hand, it is impossible to conduct any meaningful proportionality assessment on the premise of a legal fiction. As the facts of *Scotch Whisky* illustrate, it is strongly arguable that the practical possibility of enacting alternative measures, viewed objectively from the perspective of the policymaker tasked with protecting the legitimate public interest, should constitute a relevant consideration when examining the necessity of *prima facie* restrictive domestic legislation. The argument is not that devolution should grant the UK greater latitude as a matter of EU law than Member States in which legislative power is more centrally organised. Yet, at the point at which the proportionality assessment kicks in, where both a restriction of free movement and a legitimate countervailing public policy goal have been identified, the relevant considerations are inherently fact-specific. The adjudicator is required to identify, and where possible to quantify, the considerations that lean for and against the proposition that a restrictive measure is objectively required to further an identified policy objective. Privileging a purely hypothetical less restrictive

88 n 3 above at [192].
89 n 8 above at [62]; n 3 above at [192].
90 Case C-421/12 *Commission* v *Belgium* EU:C:2014:2064 at [43].
91 n 3 above at [192].
92 Case C-326/97 *Commission* v *Belgium* EU:C:1998:487.
93 *Omega Spielhallen* n 74 above.

alternative indeed risks making a mockery of the CJEU's feted empirical turn.[94] On occasion, moreover, the CJEU has been receptive to arguments premised on a disjuncture between formal legal rules and their application in practice.[95]

Accordingly, although the preceding section was critical of the CJEU's prescriptive approach to proportionality, perhaps part of the explanation is that it was operating with imperfect information. The questions referred by the Inner House were premised explicitly on the competence of Member States to set excise duties, thus prompting, not unreasonably, a response from the CJEU in equivalent terms. The Scottish Government's choice to prefer price regulation over taxation naturally appears less rational if one is unaware that price regulation is the *only* legislative option within its immediate control. Its failure to pursue this line of argument in its defence thus lent an air of unreality to both domestic and EU-level proceedings, insofar as arguments then concentrated on the relative desirability of the Scottish government exercising a power it does not actually possess. Unlike its unprompted meditations in *Scotch Whisky* on the scope of the Article 34 TFEU prohibition, furthermore, the scope and limits of the devolved Scottish parliament's powers are not an issue within the immediate knowledge of the CJEU, although it ought perhaps to have sought clarification from the referring court or parties concerned on this point.

The *Scotch Whisky* case might thus be seen as something of a missed opportunity to obtain vital further guidance from the CJEU on application of the free movement rules to the activities of devolved government structures. This question, moreover, raises an important more general issue, namely the extent to which the unfeasibility in practice of proposed alternative solutions might affect the determination of necessity under the proportionality assessment. Given the significant divergence of opinion between the Union and domestic courts in this case, it seems unlikely that the latter were entirely unmindful of the practical limitations contradicting the abstract alternative approach advocated by the CJEU. The rather curious procedural posture adopted here means, however, that we remain in the dark as to whether and to what extent the considerations arising from the division of competences with respect to devolved government structures are cognisable within the EU legal framework.

## CONCLUDING REMARKS

*Scotch Whisky* continues the extraordinary contribution of alcohol-related disputes towards the development of EU internal market law. The diverging considerations at issue might indeed be viewed as a microcosm of the diverse concerns that alcohol raises: from its almost unique role as a 'social lubricant';[96] to its highly lucrative economic dimension; to its challenging associations with

94 n 63 above.

95 See, for example, Case C-565/08 *Commission* v *Italy* EU:C:2011:188 at [53], where the CJEU confirmed the compatibility of national legislation setting maximum fees for lawyers' services, on the basis that the system incorporated sufficient flexibility to permit tariffs significantly exceeding the purported maximum in a variety of circumstances.

96 n 3 above at [185].




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public health and other social problems. It is therefore easy to sympathise with Lord Mance's doubts regarding the possibility of reconciling such essentially incomparable values. This contribution has argued that the intervention of the CJEU in this instance was excessively doctrinaire and ultimately ill-advised, although fault also lies with the Scottish Government for pursuing a line of defence premised upon an unnecessary legal fiction.

The case furthermore highlights what might be described variously as the flexibility or the ambiguity of the principle of proportionality: despite the best efforts of the CJEU to articulate the parameters of the exercise in constrained and technical terms,[97] in truth assessing proportionality involves an inherent judgment call, as the domestic courts recognised.[98] Given the strong policy dimension to the proportionality assessment, it is unsurprising that the Union and domestic courts favoured quite different values in their consideration of the balance of interests here. This however raises difficult questions about the level at which such decision-making should occur within the internal market. The thrust of the questions referred by the Inner House suggests discomfort with the apparent breadth of the discretion afforded to adjudicators, yet the subsequent *de facto* rejection of the CJEU's unsubtle steering reveals a reluctance to cede jurisdiction. Moreover, considering the extent to which proportionality is now the cornerstone of most free movement cases following adoption of the market access approach, it can legitimately be questioned whether extensive reliance on such an elusive criterion is appropriate for the clear and coherent development of the internal market.

97 n 1 above at [53]-[59] in particular.
98 n 3 above at [195].