



The Scottish legislation introducing a minimum price per unit of alcohol is contrary to EU law if less restrictive tax measures can be introduced

A tax measure might provide additional benefits and a broader response to the objective of combating alcohol misuse

In 2012 the Scottish Parliament passed legislation relating to the minimum price of alcoholic drinks in Scotland.¹ That legislation provides for the imposition of a minimum price per unit of alcohol (MPU) which must be observed by any person holding a licence for the retail selling of alcoholic drinks in Scotland. The minimum price is calculated by the application of a formula that takes into account the strength and volume of alcohol in the product.

The objective of the Scottish legislation is to protect human life and health. A minimum price per unit of alcohol would lead to an increase in the currently modest price of some high-strength alcoholic drinks. Such drinks are often purchased by those whose consumption of alcohol is problematic. In the opinion of the Scottish legislature, that objective could not be achieved with the same degree of success by means of tax measures.

The Scotch Whisky Association and a number of other undertakings in the alcoholic drinks sector brought proceedings against that legislation. They claim that the Scottish legislation constitutes a quantitative restriction on trade that is incompatible with EU law, and that its effect is to distort competition among distributors of alcohol. Further, they maintain that tax measures could less restrictively achieve the objectives pursued by the legislation.

In that context, the Inner House of the Court of Session seeks to ascertain whether the introduction of a minimum price is compatible with EU law. In particular, that court asks whether the effect of the legislation at issue is to restrict the free movement of goods and, if it does, whether that restriction can be justified on the ground of the protection of health. The national court also wonders whether that measure can be justified where it is open to the Member State to adopt tax measures which are less distortive of the free movement of goods and competition, but which have objectives that are broader than those more specifically pursued.

In today's judgment, the Court of Justice considers that the effect of the Scottish legislation is significantly to restrict the market, and this might be avoided by the introduction of a tax measure designed to increase the price of alcohol instead of a measure imposing a minimum price per unit of alcohol.

Firstly, the Court states that the regulation relating to the common organisation of the market in wine² does not preclude the imposition of an MPU for the retail selling of wines. The Court holds that the establishment of a common organisation of the market does not prevent the Member States applying national rules that pursue an objective relating to the general interest such as the protection of health, provided that such rules are proportionate.

¹ Alcohol (Minimum Pricing) (Scotland) Act 2012

² Regulation (EU) No 1308/2013 of the European Parliament and the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (OJ 2013 L 347, p. 671).

Nonetheless, the Court states that the fact that that measure prevents the lower cost price of imported products being reflected in the selling price and that the legislation is thus liable to impede access to the UK market of alcoholic drinks produced in other Member States is sufficient reason to conclude that the measure constitutes an obstacle to the free movement of goods. According to the Court's case-law, such a measure may be justified on grounds of the protection of health only if it is proportionate to the objective pursued.³

The Court also notes that the Scottish legislation pursues a twofold objective, namely to reduce not only the hazardous consumption of alcohol, but also, more generally, the Scottish population's consumption of alcohol. Although the imposition of an MPU intended to increase the price of cheap alcohol is an appropriate means of reducing the consumption of alcohol, a practice such as that adopted in Scotland is not justified where it is possible for health to be protected equally effectively by less restrictive tax measures.

According to the Court, a fiscal measure that increases the taxation of alcoholic drinks is liable to be less restrictive than a measure imposing an MPU since, unlike where there is a minimum price; traders retain the freedom to determine their selling prices.

The Court states that it is ultimately for the national court to determine whether measures other than that provided for by the Scottish legislation, such as increased taxation on alcoholic drinks, are capable of protecting human life and health as effectively as the current legislation, while being less restrictive of trade in those products within the EU. The Court adds that the fact that the tax measures might more broadly secure the objective of health protection cannot justify the rejection of such measures. The Court notes that, in the light of the twofold objective pursued by the Scottish legislature, a taxation measure that entails a generalised increase in the price of drinks and that contributes to achieving the general objective of combating alcohol misuse (affecting not only hazardous or harmful drinkers, but also moderate drinkers) would justify that taxation measure being preferred to an MPU. Further, the Scottish court will have to examine objectively all the evidence provided by the Scottish Government, and must not to that end confine itself to examining the information that was available when the legislature passed the legislation at issue.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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³ See judgment of the Court of 26 April 2012, ANETT (C-456/10).