

Drinking up time: Minimum Unit Pricing of alcohol set to be introduced in Scotland following landmark decision



Following the recent, unanimous decision in the Supreme Court case of *Scotch Whisky Association v The Lord Advocate* [2017] UKSC 76, Minimum Unit Pricing (MUP) of alcohol is set to come into force in Scotland from 1 May 2018, setting it apart once again from the rest of the UK when it comes to the sale of alcohol.

As well as being of interest in terms of the Supreme Court's analysis of the proportionality test when considering domestic legislation's compatibility with EU law, the decision also reaffirms the position the courts will adopt when assessing the legality of devolved legislation the Scottish Parliament is proposing to implement, pursuant to the Scotland Act 1998.

Background to the introduction of MUP

The controversial subject of MUP first arose in Scotland in 2010, when the SNP administration failed to push through plans to set the MUP at 45 pence per unit. MSP's rejected this keystone proposal of the administration's Alcohol Bill, but unanimously approved the remainder of the Bill, which went on to become law.

When the Alcohol etc. (Scotland) Act 2010 came into force in October the following year, it brought with it mandatory conditions for premises and occasional licences, including various conditions on minimum pricing of multi-packs, age verification policies and the banning of multi-buy drinks promotions such as happy hours, 2-for-1 and multiple-measure discounts on spirits. This marked the beginning of significant changes to the way in which alcohol is sold in Scotland and distinguished it from the rest of the UK where such promotions remain legal and widely offered.

The SNP then quickly tabled the Alcohol (Minimum Pricing) (Scotland) Act 2012 (the Act), which amends schedule 3 of the Licensing (Scotland) Act 2005 to provide that as part of their licence conditions, any retail seller of alcohol in the UK must not sell an alcohol product at a price below a statutorily determined MUP. The MUP is to be set by secondary legislation, but the proposed MUP is 50 pence per unit.

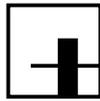
The Act was passed, receiving Royal Assent on 29 June 2012. However, it has not yet come into force as a consequence of five years of legal challenge by the Scotch Whisky Association (a trade association representing distillers and others involved in the Scotch Whisky industry); the European Spirits Association (a representative body in the European Union for producers of spirit drinks in which the SWA is a member); and the Comité Européen des Entreprises Vins (a representative body for the EU wine industry and trade), collectively referred to as 'the SWA' here.

Challenge in Scotland – The Court of Session

After the Act was passed, the SWA brought judicial review proceedings to challenge the legality of the Act at the Court of Session in Edinburgh.

The SWA challenged on a number of grounds, including that the Act:

- (1) breached the Acts of Union in relation to freedom of trade;
- (2) fell outside the legislative competence of the Scottish Parliament; and
- (3) was incompatible with EU law and so was not valid law in Scotland pursuant to section s. 29(2)(d) and 57(2) of the Scotland Act 1998.



The Scotland Act 1998 established the devolved Scottish Parliament. The sections cited in the SWA challenge outlined that an Act of the Scottish Parliament is not law if it is outside the legislative competence of the Scottish Parliament by virtue of being incompatible with EU law.

Lord Doherty, sitting in the Outer House of the Court of Session, refused the SWA's petition, ruling that the Acts of Union were not an impediment to MUP, the measures were not incompatible with EU law and that it was unnecessary and inappropriate to refer any question of EU law to the Court of Justice of the European Union (the CJEU) for a preliminary ruling.

However, following an appeal by the SWA to the Inner House of the Court of Session, the three judges sitting in the Extra Division exercised their discretion and referred the case to the CJEU to request a preliminary ruling on six questions of EU law before they would hear the merits of the appeal themselves.

By this point, the SWA had narrowed their case to argue that the Act breached Article 34 of the Treaty on the Functioning of the European Union (TFEU) which states that "quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States" as well as alleging that, in relation to wine only, it contravened Article 39 TFEU (which establishes the EU's common agricultural policy) and Regulation (EU) No 1308/2013, known as the "Single CMO Regulation" (which provides for a common market for agricultural products, including wine).

Challenge in Brussels - The Court of Justice of the European Union

A preliminary reference to the CJEU involves the court providing guidance on the interpretation of EU law, rather than it making a decision as to the legality of proposed measures based on the facts and circumstances of the particular case. As such, the CJEU did not rule that the Act breached EU law, but opined that it may do so given that it would appear to have the equivalent effect to a quantitative restriction on imports.

However, the CJEU recognised that, pursuant to Article 36 TFEU (which effectively outlines that Article 34 shall not preclude quantitative restrictions which are justified on the grounds of the protection of health and life of humans), Member State laws which breach EU Regulations on free trade (as MUP appears to) are not automatically prohibited. They may still be allowed if it can be proven the measures imposed are justified on the grounds of the protection of health and life of humans and satisfy the proportionality test.

The measures sought to be adopted therefore must be shown to be both appropriate, (in this case, capable of achieving the public health objective of "reducing,

in a targeted way, both the consumption of alcohol by consumers whose consumption is hazardous and harmful, and also, generally the population's consumption of alcohol") and necessary, (that the objective could not be achieved by prohibitions or restrictions that are less extensive, or less disruptive to trade, such as increased alcohol taxation in this case). The CJEU confirmed that it was for the domestic courts of the Member State to determine whether or not this test had been satisfied.

Thereafter, in October 2016 following further consideration by the Inner House, the three judges upheld the earlier decision of Lord Doherty, ruling the Act did not breach EU law and MUP was a proportionate means of achieving a legitimate aim.

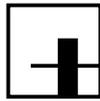
Challenge in London – The Supreme Court of the United Kingdom

Having reached the highest civil court in Scotland, the SWA then appealed to the UK Supreme Court, which issued a unanimous decision of seven judges, issued on 15 November 2017, refusing the SWA's appeal, The Supreme Court agreed with the decisions of the Lord Ordinary and the Inner House that MUP was indeed appropriate and necessary.

In assessing appropriateness, and given the arguments advanced by the SWA that there was not convincing enough evidence that MUP actually works or would work, the Supreme Court acknowledged that MUP is "experimental" in nature, but said that should not preclude it from being considered as appropriate in the circumstances. In support of that, significant weight was given to the so-called 'Sunset Clause' contained within the Act which acknowledges the unpredictability of MUP by providing that it must be reviewed by the Scottish Ministers after five years and that it will be automatically terminated after six years unless renewed by decision of the Scottish Parliament.

In assessing the necessity of MUP, the Supreme Court acknowledged that a critical issue was whether increased taxation of alcohol could achieve the same objective. However, they agreed with the original decision of Lord Doherty, with Lord Mance stating in the Supreme Court's written judgement that "taxation would impose an unintended and unacceptable burden on sectors of the drinking population, whose drinking habits and health do not represent a significant problem in societal terms in the same way as the drinking habits and health of, in particular the deprived, whose use and abuse of cheap alcohol the Scottish Parliament and Government wish to target."

MUP, it was said, would indeed target the problematic drinking to which the Government's objectives were directed.



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Furthermore, the Supreme Court considered that MUP was easier to understand and simpler to enforce than an excise duty or tax, which could also be “absorbed” by retailers in a way in which MUP could not.

The decision also reaffirms that, even though the Scottish Parliament’s law-making powers are conferred by statute, the Court appreciates that on those issues, decisions are for duly elected members of the Scottish Parliament to make. As such, when assessing the legality of devolved legislation sought to be implemented by the Scottish Parliament pursuant to the Scotland Act 1998, those decisions should not be subjected to intrusive review by the courts - particularly when it concerns public policy issues like the protection of health, to which the Scottish Parliament have given thorough consideration.

Practical Effect

With the SWA having exhausted all avenues of appeal and having confirmed it accepts the Supreme Court’s decision, MUP is set to be introduced from 1 May 2018. That said, Scotland will have to wait until the end of the five-year trial period to see if it is effective.

The Health Secretary has confirmed that MUP will be set at 50 pence from 1 May 2018, subject to final Scottish parliamentary approval following analysis of a public consultation on the proposed MUP. In the meantime, consumers in Scotland want to know how it will affect them and the price of their favourite tipple.

As MUP is targeted at cheap, high-strength alcohol, most alcoholic drinks will not be affected as they are already sold above the threshold. High-strength cider looks set to see the biggest price hike, doubling in price, with some beer and wine also affected.

Consumers can also expect a 70cl bottle of spirits like whisky, gin, rum and vodka which have around 26-28 units of alcohol to cost at least £13 to £14. This will mean a marked increase in the price of 70cl bottle of supermarket own-brand spirits, as well as a modest increase of £2 to £4 for popular mid-market spirits. Litre bottles will of course also be subject to further price increases. However, bars, restaurants and clubs are unlikely to be affected as they usually charge more than 50 pence per unit in any event.

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