

Response to the Home Office Consultation on the Government Alcohol Strategy

Affiliation and declaration of interest: I am the Lecturer in Competition Law at Edinburgh Law School, University of Edinburgh. I hold no interest in business entities in the alcoholic beverages', catering or hospitality industries; I am not linked to any third sector bodies active in lobbying or advocacy on these issues or to any public bodies concerned with the application of existing or proposed licensing rules or with the exercise of oversight powers.

Introductory remarks

The present submission concerns only the proposal for the introduction of a minimum price per unit for alcoholic beverages and covers the issues summarised in questions 1 and 4.

A similar measure was recently introduced by the Scottish Parliament in July 2012: the Alcohol (Minimum Pricing) (Scotland) Act (hereinafter referred to as "the 2012 Act"), which has been recently followed by an implementing 2013 Order, provides for a range of minimum prices per unit that are determined in relation to the alcohol content of each beverage. It also establishes a minimum floor price of 50p per unit, applicable across the board. The main objective of the 2012 Act is to reduce the impact of the harm caused by alcohol misuse on public health and, as a result, on society and the economy in Scotland, where alcohol related deaths and illnesses are still very significant: according to a recent NHS Scotland report, alcohol related mortality remains twice as high in Scotland than in England Wales and, together with related morbidity, tends to affect the most deprived areas of the region. The same report also recognised that since the 1980s alcohol had become more affordable, thus leading to higher levels of consumption—with about 66% of alcohol sold in 2011 being priced below the 50p threshold identified in the 2012 legislation (see: <http://www.healthscotland.com/uploads/documents/20101-MESASCombinedReportNov2012.pdf>, pp. III-IV). It was also shown that there are significant links between alcohol misuse and crime and disorder: as the NHS report shows, in 2011 alcohol consumption was associated with more than 70% of homicides (where information on levels of alcohol in the accused's bloodstream was known).

The Act is currently being challenged before the Court of Session, on account of allegations that it infringes principles of free movement of goods and the rules on competition, contained in the Treaty on the Functioning of the European Union. The other challenge, i.e. that the Scottish Parliament, in enacting the measure, had overstepped the limits of its derived legislative powers, was dropped by the applicants (the Scotch Whiskey Association). The same applicants, together with a number of other European lobbying bodies, also made a complaint to the EU Commission, alleging an infringement of the above rules by way of the Scottish legislation and asking the Commission to initiate an action for infringement against the United Kingdom. Following the Commission's letter before action of December 2012, the Scottish Government is pondering its response. This submission seeks to contribute to the consultation by drawing from the debate concerning the compatibility of the Scottish legislation introducing minimum prices per unit of alcoholic beverages for public health reasons with the rules contained in the Treaty on the Functioning of the European Union. The provisions concerned are Article 34, which establishes the principle of free movement of goods, subject only to the limited exceptions of Article 36, and Article 101 TFEU, which prohibits, inter alia, arrangements designed to distort price competition, even when they are concluded as a result of state compulsion.

Minimum pricing on alcohol and the EU rules—compliance or conflict?

The question asks whether the setting of a minimum price per unit and in particular one of 45p would achieve the goals of harm reduction identified in the consultation. Research conducted both

in the UK and in other jurisdictions, such as Canada, shows that an increase in price for alcoholic drinks has a direct effect on the demand for these products: the study published in 2009 by the University of Sheffield's Alcohol Research Group showed that there was a direct relation between, respectively, an increase in prices and a diminution in the consumption of alcoholic beverages.¹

Giving evidence before the Scottish Parliament's Health and Sport Committee, one of the authors of the report expressed the view that due to the causal link existing between alcohol consumption and premature death or certain types of illnesses, a reduction in demand owed to a growth in prices was likely to lead to a correspondingly lesser incidence of these types of health harm.² However, how can this increase be achieved? Two options were identified: it may be envisaged that prices may rise as a result of an increase in indirect taxation, e.g. in the form of a higher excise duty. Alternatively, a minimum price could be imposed by legislation, as in the 2012 Alcohol (minimum pricing) (Scotland) Act. However, the scientific evidence shows that the outcomes in terms of demand reduction and resulting lesser public health harm are not the same. The Sheffield report illustrated how, since excise duty increases are likely to affect all drinks in a uniform way, regardless of their alcohol percentage, demand for them remained inelastic due to the ability of buyers to "trade down", i.e. to buy less expensive alternatives. Prof. Jonathan Chick, giving evidence before the same Scottish Parliament's Committee, emphasised how this outcome was particularly likely to occur for "hardened drinkers" whose tendency was, in response to a growth in price, to choose a cheaper option.³

Imposing a minimum price both in the form of a "floor price", applicable to all drinks and in the form of differentiated price levels determined in light of the percentage of alcohol contained in each type of drink was instead regarded by the authors of the Sheffield study as being far more effective in reducing demand and, consequently, alcohol related harm.⁴ Prof Chick stated before the Parliamentary Committee that demand for alcoholic beverages was far more sensitive to differentiated price increases, coupled with a floor price, than to the uniform increase effected through higher taxation on the ground that in these circumstances drinkers could not "trade down" to less expensive drinks: as a result, especially the most "hazardous" drinkers were likely to be affected by the measure and their demand being consequently eroded by the price increase.⁵

Similar findings were also reached by a more recent study concerning the impact of minimum price legislation introduced in the Canadian province of British Columbia.⁶ The study found that mandating a minimum price for alcohol beverages resulted in a fall in consumption and, in particular, if the increase was more significant in for cheaper options, it was more likely to lead to a slowdown in demand.⁷ Especially among hazardous drinkers, such an increase prevented them from "trading down" to cheaper options and therefore led to a longer term and more visible loss of demand:⁸ according to the Canadian study, "hazardous drinkers [tend to] spend less per unit of alcohol than do light to moderate drinkers" and consequently are more frequently led to switch to cheaper options.⁹ In light of this finding, it was strongly suggested that incremental increases as opposed to uniform ones, taken together with a minimum price across the board, was more likely to lead to a significant loss of demand than uniform growth in prices, as would have been the case with higher excise duties.¹⁰

¹ http://www.shef.ac.uk/mediacentre/2012/minimum_alcohol_pricing_update.html.

² See evidence given by Prof. Joseph Brennan, available at:
<http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=6852&i=62104&c=1284513>.

³ Ibid.

⁴ Ibid.

⁵ See <http://www.shef.ac.uk/scharr/sections/ph/research/alpol/research/sapm>.

⁶ Stockwell et al., "Does minimum pricing reduce alcohol consumption? The experience of a Canadian province", (2011) 107 *Addiction* 912.

⁷ Id., p. 913; see also pp. 916-17.

⁸ Id., p. 917.

⁹ Id., p. 918.

¹⁰ Id., pp. 918-919.

Against this background, it is submitted that a minimum price per unit of alcohol, resulting in a differentiated “pricing scale”, calculated on the basis of the alcohol percentage in each drink, is capable of achieving a reduction in alcohol related harm to public health and more generally to the well-being of society (e.g. in the form of reduced alcohol-fuelled crime) and to the economy (e.g. in terms of lesser incidence of sick leave owed to the consequences of alcohol related illnesses). As to the actual measure of the “floor price”, i.e. the absolute minimum of the scale, the Canadian study seemed to suggest with approval a price of 50p per unit, as is the case in Scotland.¹¹ On this point, it should be emphasised that, according to the NHS Scotland report cited above, about 2/3 of the off licence alcohol sales in 2011 was priced at or below the minimum of 50p per unit, thus suggesting that adopting that price as the absolute minimum would have a significant incidence on the level of consumption.¹² On this basis, it may be argued that the 45p price proposed in England and Wales would certainly reduce demand: it is in fact illustrated in the same report that the incidence of alcohol related mortality and morbidity is less significant South of the Border, thus suggesting that a lower floor price may be effective in reducing demand.¹³

However, important questions as to the legality of minimum price legislation remain open, especially in light of Article 34 of the Treaty on the Functioning of the European Union, protecting freedom of movement of goods, and Article 101 of the same Treaty, which prohibits agreements restricting competition on grounds of, among other factors, price—even when, albeit with certain caveats, the infringement is owed to state compulsion. On this point, it is important to draw a clear distinction between the legislation enacted by the Holyrood Parliament and the proposals on which the Home Office is consulting. The Scottish minimum pricing legislation was enacted with the clear purpose of tackling alcohol misuse and reducing its harmful consequences and consequently in order to tackle a public health emergency. By contrast, the measures proposed by the Home Secretary are part of a wider package of proposals, including new, more restrictive rules on licensing and strict obligations on impact assessment of licensing applications, which appear clearly designed to tackle public order objectives, with public health being a relatively secondary concern. It is suggested that this difference is not without consequences, since, especially in scrutinising the lawfulness of the measures in question pursuing public health as opposed to preventing public disorder could have an impact on the identification and application of the legal standards provided in the TFEU.

It emerges from the consultation document that the Westminster Government, similarly to its Scottish counterpart, will impose a staggered schedule of minimum prices for unit, varying in relation to the alcoholic content of each beverage and in addition a minimum floor price of 45p per unit, under which no beverage should be sold, so as to discourage cut price sales and sales at below-cost prices. In order to illustrate the legal implications of the proposed measure, it is useful to consider the debate surrounding the Scottish minimum pricing legislation; it is reminded that a challenge to the 2012 Act is now pending before the Court of Session, via an application for judicial review. In addition, a number of trade bodies have filed a complaint with the EU Commission, alleging that the UK, via the Scottish Parliament, infringed the TFEU through enacting the 2012 Act. In particular, the authors of the complaint alleged that the perspective of not being able to price drinks below the 50p/unit floor price would prevent non-Scottish vintners from exporting their wares into Scotland, on the ground that they would be unable to transfer any efficiencies on to customers via lower prices. The 2012 Act and the 2013 implementing Order would therefore infringe Article 34, which bans domestic measures having “equivalent effect” to quantitative restrictions of the free movement of goods within the EU. It is also a long standing principle of competition law that the fixing of prices, in whatever form, can in circumstances constitute a serious infringement of Article 101(1) TFEU; although the setting of floor prices has been recently brought

¹¹ Ibid.

¹² <http://www.healthscotland.com/uploads/documents/20101-MESASCombinedReportNov2012.pdf>, p. IV.

¹³ Ibid.

back in discussion in other jurisdictions¹⁴ the case law of the Court of Justice of the EU is consistent with the view that, even when the minimum price is enforced via state compulsion it makes any arrangement incorporating that price null and void.

In respect to the "free movement of goods" arguments, it is clear that, according to Article 34 TFEU, any measure which can have an effect, whether direct or indirect, actual or potential, on the flow of trade among Member States, especially by seeing to make imports or exports more difficult or less "attractive", is liable to infringe EU Law.¹⁵ This may also occur when a measure is subject to general application if it can be shown that it results in the same outcome of discouraging trade with other Member States.¹⁶ However, the Treaty provides, in its Article 36, for a number of restrictive grounds according to which the freedom of movement of goods principle can be limited. According to the case law of the Court of Justice of the EU, Article 36 will allow the Member States to restrain free movement of goods if they aim to attain one of the goals it identifies, e.g. public order and the protection of life of humans and animals; in addition, when seeking to do so, Member States must comply with the requirement of "proportionality", that is, their measures must be strictly necessary to the goal they look to achieve.¹⁷ Proponents of the Act and the same Scottish Health Minister argued that the restraints on trade imposed by the Act fulfilled both these requirements. It was suggested that the Act was clearly aimed at securing improvements in public health, thus falling squarely within one of the grounds dictated by Article 36.

As to the compliance with the principle of proportionality, it was emphasised that, according to the Sheffield Study, minimum price legislation could lead to up to a total of £64million in harm reduction after one year and up to £942m after 10 years. By contrast, an increase of alcohol excise in the same measure across the board would not be capable of tackling demand from "hardened" drinkers in the same effective way: as was shown by the University of British Columbia study concerning Canada, unless they were prevented from "trading down" to less expensive products, those belonging to this consumer group would not have been significantly deterred from their usual purchasing pattern. Against this background it was argued that imposing minimum prices was comparatively more effective than, and should have therefore been preferred to increases in custom duties, since it was a more efficient measure to attain gains in public health. It was also emphasised that its structure, the fact that it was limited in time by the "sunset clause" assisting legislation and was only applicable to off-premises sales ensured that the 2012 Act would not wholly eliminate the possibility of "more efficient" traders to compete despite being constrained in their pricing freedom.

It was suggested that the minimum pricing legislation was capable of accommodating the interests of "more efficient" traders from other Member States, who could come up with a greater variety of goods, each with a different concentration of alcohol, and thereby seek to compete not just on price and vis-a-vis the producers of the same beverage, but rather on the quality of beverages that belonged to different categories. Pro-minimum price stakeholders also relied on consistent EU case law, indicating that minimum pricing obligations may in some cases remain consistent with the Treaty: as was held in *Inno*, imposing a fixed retail price might be justified if it is indispensable for the Member State concerned in order to protect its fiscal revenue or indeed to maintain in place a retail structure designed to avoid concentrations of market power.¹⁸ However, it was not at all clear what the outcome could have been if the lowest price possible was not the "absolute minimum" envisaged in *Inno*: opponents of the Scottish legislation pointed to a number of judgments concerning the attempts made by some Member States to set floor prices in respect to the sale of tobacco and related products. In those decisions the Court of Justice had made clear that

¹⁴ See e.g. *PSKS Inc v Leegin*, judgment of the Supreme Court of the United States of 22 February 2011, 113 S. Ct. 1476.

¹⁵ See e.g. case 6/74, *Dassonville*, [1974] ECR 837, para. 5-10; case 120/78, *Rewe Zentral AG, re: Cassis de Dijon*, [1979] ECR 649, [para. 8, para. 13-14.

¹⁶ See e.g., case 120/78, *Rewe Zentrale AG*, cit. above, para. 15.

¹⁷ See e.g. case C-17/93, *Van der Veldt*, [1994] ECR I3537, para. 15.

¹⁸ See Case 13/77, *INNO GB v ATAB*, [1977] ECR 2115, para. 14-18.

since in this area a number of EU harmonising measures had been adopted and implemented, whatever concerns for public health could be raised had to be presumed to have been already "accommodated" by the EU legislature in drafting, discussing and enacting these measures.¹⁹ Consequently, Member States could not seek to impose autonomously a floor price for these sales since this measure would have been regarded as "disproportionate". This is not, however, the case for alcohol beverages' sales: except for very limited areas, this field has not been the subject of as wide ranging harmonisation as the one occurred for tobacco product, hence it could be argued that the "balancing out" of anti-trade and pro-health interests had not been conducted.

As to the separate issue of the extent to which the measure in question could also be justified vis-à-vis the EU competition rules, the case law of the Court of Justice of the EU indicates that engaging in anti-competitive conduct as a result of state compulsion does not exclude liability for the firms concerned as to any ensuing competition infringements,²⁰ save for very limited circumstances. It is also clear from the case law that undertakings will not be subject to penalties in respect to unlawful behaviour compelled by domestic legislation that took place before a finding that the legislation in question had contravened the EU competition rules.

Against this background, it was queried whether undertaking engaging in "cut-price" alcohol sales that should always and at all costs be allowed to "pass on" their alleged efficiencies in this way or whether, instead, the legal exception of Article 101(3) TFEU could be stretched as to provide a justification for the Act. It was argued that the first requirement that a restraint on competition lead to gains in terms of "economic efficiency" could be read as to include attaining a reduction of harm to health and to the economy resulting from alcohol misuse, which would therefore benefit consumers. Importantly, a similarly "generous" reading of Article 101(3)(a) was adopted by the EU Commission and the EU Courts in respect to the agreement setting up a "European Council of electric appliances' manufacturers": in the decision the Commission expressed the view that a limitation of competition designed to allow the parties to produce more energy efficient and environmentally friendly machines would have overtime let to the supply of efficient products, and consequently to the gradual reduction in pollution as well as to an improvement in public health.²¹ On this basis it is suggested that if the goal of legislation on minimum alcohol pricing is to boost public health, then its enactment and implementation may well be regarded as a tool for the achievement of this goal, whose wider implication are very strongly likely to be an improvement of the health of society and of the economy at large (especially in terms of lesser incidence of mortality and morbidity that are alcohol related, e.g. via less sick days).

As to the "negative" conditions enshrined in the legal exception, the reading of both the Sheffield report and the more recent Canadian study show that if the goal of the proposed measures is to improve public health and, as a consequence, the state of society and of the overall economy, minimum alcohol prices may well be the most effective options that cannot find in any alternative, e.g. a growth in excise duties, an equally efficient measure. The fact that MPUs are differentiated per each drink is also liable to leave suppliers with a margin to compete on grounds of quality of their product: although the Court of Justice has consistently stated that price competition is so important that can never be eliminated, it has also emphasised that it is not the only means with which suppliers can compete; other forms of rivalry based on quality and on, e.g. more innovative ways of reaching out to and supporting buyers would be protected by Articles 101 and 102 TFEU.²²

Against this background, it is suggested that the "differentiated" nature of the minimum prices imposed by the 2012 Act may actually secure an appreciable degree of rivalry since it would boost competition not between producers of the same type of drink, but between suppliers of beverages having different strengths and thus subjected to different pricing regimes. In other words, a situation may well be envisaged in which suppliers would have to improve efficiency and

¹⁹ Ibid.; see also case C-221/08, *Commission v Ireland*, [2010] ECR I-1699.

²⁰ See e.g. Case C-198/01, *Consorzio Italiano Fiammiferi*, [2003] ECR I-8055, para. 47 and 51-54.

²¹ See e.g. case 96/82, *NV IAZ*, [1983] ECR 3369.

²² See e.g. case 243/83, *SA Binon*, [1985] ECR 2015; also T-88/92, *Leclerc Siplec*, [1996] ECR II-1961.

appeal of their products by offering "better" and more appealing products in order to "capture" new customers whose demand (usually attracted to different beverages) has been eroded by higher prices now applicable to their drink of choice. Accordingly, it was submitted that the Act and its implementing Order, by imposing a differentiated list of prices, would not eliminate completely rivalry from the alcohol off-licence market and would remain within the boundaries of "necessity", vis-à-vis the goals they pursued.²³

In light of the above, a number of preliminary conclusions may be drawn which are relevant to the subject matter of the consultation: imposing minimum prices for alcohol, or for any product, is inherently problematic in light of the principles governing the EU single market. However, it is not a foregone conclusion that the measures proposed by the Home Office will necessarily fall foul of the application of Union Law.

The Scottish experience may be regarded as a useful example in this respect: it is true that until such time as the Court of Session (or indeed the Court of Justice of the EU) hands its judgment no firm conclusion can be drawn. Nonetheless, it should be emphasised that, first of all, the Luxembourg court has accepted the imposition of minimum prices, at least in principle, to protect certain interests, such as the interest of the Member States to protect the integrity of their own revenue. It is added that the TFEU provides in, respectively, Article 36 and Article 101(3) two tests against which domestic restraints on free movement and on genuine competition within the Single Market can be assessed. It was argued above that, providing that the minimum pricing scale is differentiated in light of the alcohol content of each drink and determined, as a result, on the basis of objective criteria, the requirement of 'proportionality' which underscores both Article 36 and the two 'negative' conditions of Article 101(3) TFEU, may be regarded as satisfied. It may also be useful to highlight the fact that the 2012 Act is subject to a "sunset" clause and was enacted after consideration of solid scientific evidence and with a view to disciplining the functioning of markets that had not hitherto been subject to harmonisation on the part of the Union legislature.

Against this background it may be queried whether similar arguments can be made in respect of the proposals made for England and Wales. It is acknowledged that the Home Office proposals envisage a lower minimum price, which is therefore less restrictive than the one at the heart of the Scottish legislation, and just as with the 2012 Act, they rely on a "differentiated scale" for the determination of minimum prices. However, unlike the 2012 Act, the core objective of the Westminster proposals seems to be the protection of public order, a factor which, it is submitted, bears significant consequences when it comes to the assessment of the proposed measures in light of both Article 36 and 101(3) TFEU. In respect to the competition rules, it is apparent from the EU Treaty that 'public order' is not among the objectives for which the legal exception can be sought: thus, unless the Home Office could "subsume" the envisaged gains in terms of reduced public disorder, for instance, into an "economics-based" argument,²⁴ it may be difficult for it to rely on Article 101(3) as a justification for the proposed legislation under competition law.

The Westminster proposals may also run into difficulties in respect to the application of the test provided in Article 36 TFEU: it is in fact clear from the EU Courts' case law that to rely on the 'public order justification' to limit freedom of movement domestic authorities have had to satisfy the Courts that there was a decidedly "serious" and tangible threat to public safety arising from, e.g. the entry of specific individuals.²⁵ As regards the freedom of movement of goods, the Court of Justice stated in a number of judgments that this, as well as the other fundamental freedoms protected by the Treaty, can only be restrained for the purpose of attaining goals of public order if their exercise entails a "genuine and serious threat" to society. It was held, for instance, in *Eglise de Scientologie* that although it is up to each Member State to establish legal requirements necessary for the protection of such public interests, these requirements must be interpreted strictly: in particular,

²³ See e.g. Case 209/78, *Van Landewyck and others v Commission*, [1980] ECR 3125, para. 174-185.

²⁴ See e.g., mutatis mutandis, case T-17/93, *Matra Hachette SA v Commission*, [1994] ECR II-595, para. 138-140.

²⁵ Inter alia, case 41/74, *Van Duyn v Home Office*, [1974] ECR 1337, para. 13, 21-24.

when they pertain to the protection of public order, they should be clearly determined, amenable only to strict interpretation and confer upon the individuals affected by a derogation from their freedom of movement a right of redress.²⁶

Against this background, it is submitted that in proposing legislation imposing minimum prices for alcohol beverages the Home Office should provide convincing evidence that the measure in question is both appropriate to the aim pursued and “proportionate” to achieving it. The former criteria, it is suggested, may be satisfied having regard to the scientific evidence that links price increases to consumption and consequently harm reduction, provided by the Sheffield Study. Nevertheless, it is undeniable that meeting the “proportionality” threshold is going to prove more taxing. It is submitted that compliance with this criterion would require the UK to demonstrate, first of all, that alcohol misuse is likely to have a direct impact on public order, in the sense, *inter alia*, of increasing the likelihood of crime or public disorder and that, consequently, its reduction via imposing minimum purchase prices is going to bring the latter down.

On this point, the scientific evidence discussed above is going to prove decisive and could indeed strengthen the case as to the necessity of this measure: it may be argued that minimum pricing, in as much as it is liable to “erode” demand among “hazardous drinkers”, could lead to the reduction of “alcohol fuelled” crime. In this specific respect, it should be emphasised that, according to the 2012 NHS Scotland report, offenders reported to have been acting under the influence of alcohol in more than 50% of reported street crime in 2011.²⁷ It is submitted that this evidence raises a legitimate question as to the extent to which, had these not been intoxicated, or had been intoxicated to a lesser degree crime rates may have been lower. Nonetheless, and even if the answer were negative, another question would have to be answered, namely whether imposing a floor price to the tune suggested by the Home Office would be the “least restrictive” option.

As was argued in the context of the Scottish debate, imposing a higher rate of excise duty may result in price levels for alcohol beverages that are just as high, albeit also uniform across the various categories of drinks, without raising many of the EU law questions illustrated above. However, as was forcefully argued by Stockwell and others in their study concerning the experience of similar measures in one of the Canadian provinces, higher excise duties are unlikely to be as effective as a staggered minimum pricing scale, coupled with a floor price generally applicable. It was in fact shown in the study that tax-induced increases in price would not, in themselves, prejudice the ability of the most “hardened drinkers” to “trade down” to cheaper versions. On that basis, it is argued that if the objective of the measure is to secure public order via a reduction in alcohol-related crime, a *prima facie* strong and very plausible argument can be made in favour of minimum pricing as the “most effective” option (in terms of harm reduction) available to the legislature. In addition, the circumstance that just as with the Scottish legislation, the Home Office is looking at creating a differentiated pricing schedule based on the alcohol potency of each beverage could be regarded as a means through which “non-price based” competition can be maintained may reinforce the case in favour of the “proportionality” of the proposed measure.

Furthermore, it should be reminded that according to the EU Court of Justice Member States may outlaw “below cost” sales, on the ground that they would threaten their ability to reap tax revenues: against this background, it may be suggested that, were the “floor price” to be set along similar levels to the sum of all production costs minus taxes, its imposition would be less likely to be inconsistent with the EU principles. Finally, it is emphasised in the case law of the EU Court of Justice that some form of “redress” should be allowed to those affected by restraints imposed on the exercise of the four freedoms. It is suggested that, in respect to generally applicable measures such as the one in issue, this “redress” could take the form of periodic reviews on the part of Parliament as to the “effectiveness” of the legislation, of transparent procedures through which

²⁶ Case C-54/99, [2000] ECR I-1335, para. 21-23

²⁷ See: <http://www.healthscotland.com/uploads/documents/20101-MESASCombinedReportNov2012.pdf>, p. iv.

compliance with minimum prices can be assured and, ultimately, on the imposition of a “sunset clause” on the “life” of the envisaged Act.

Conclusions and suggestions

The imposition of minimum prices for any good or service is inevitably problematic in light of the principles laid down by the TFEU. However, it is submitted that, as was illustrated above, the Treaty itself provides for appropriate framework within which these different objectives of, on the one hand, free markets and, on the other hand, public health can be balanced. The above discussion, drawn mainly from the discussions taking place in Scotland, has attempted to show what the possible arguments for and against the proposed legislation are likely to be. On that basis, it is suggested that:

- The minimum pricing legislation should provide for a differentiated pricing structure in which prices per unit of alcohol are determined on the basis of the alcohol percentage for each beverage, so as to allow for “inter-product” competition, i.e. rivalry between different types of drinks;
- The “floor price” should be calculated, as far as possible, by taking into account the cost of production of specific drinks minus tax, so as to target below cost sales and thus by justified also by the demand of protecting the state’s tax revenue; at the same time, however, this price should be sufficiently high as to prevent trading down on the part of “hazardous drinkers”—in this specific respect, the Home Office may consider coordinating the determination of the floor price with a prohibition of “multi-product” discounts, that have been shown to be greatly encouraging below-cost sales.
- The Home Office should consider providing for a mechanism of periodic review of the extent to which the proposed legislation, once enacted, fulfils its goals: this may be done through periodic reports, relying on data supplied, inter alia, by Trading Standard officials in local authorities; a sunset clause may also be required to secure compliance with EU principles of “proportionality”.