



15 November 2017

PRESS SUMMARY

Scotch Whisky Association and others (Appellants) v The Lord Advocate and another (Respondents)(Scotland) [2017] UKSC 76
On appeal from [2016] CSIH 77

JUSTICES: Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Sumption, Lord Reed, Lord Hodge

BACKGROUND TO THE APPEAL

The Scottish Parliament decided to address the health and social consequences arising from the consumption of cheap alcohol by a minimum pricing regime ('the Regime'). The Alcohol (Minimum Pricing) (Scotland) Act 2012 ('the 2012 Act') amends schedule 3 to the Licensing (Scotland) Act 2005 by inserting in the licence which any retail seller of alcohol in Scotland must hold, an additional condition that an alcohol product must not be sold at a price below a statutorily determined minimum price per unit of alcohol. The minimum price is to be set by secondary legislation. The current proposal is 50 pence per unit of alcohol. The Scottish Ministers have undertaken not to bring the 2012 Act into force or to make any order setting a minimum price until determination of these proceedings. The 2012 Act contains a requirement for Scottish Ministers to evaluate and report to the Scottish Parliament on its operation after five years, and a provision terminating its operation automatically after six years, unless the Scottish Ministers by order affirmed by the Scottish Parliament determine that it should continue ('the Sunset Clause'). The appellants presented a petition for judicial review challenging the lawfulness of the 2012 Act. The remaining ground of challenge is that minimum unit pricing is disproportionate under EU law, namely: article 34 of the Treaty on the Functioning of the European Union ('TFEU') and Regulation (EU) No 1308/2013 establishing a Common Organisation of the Markets in agricultural products (including wine) ('the Single CMO' Regulation') and the Common Agricultural Policy set out in article 39 TFEU ('CAP'). The claim was rejected at first instance. The Extra Division of the Inner House hearing the appellants' reclaiming motion made a preliminary reference to the Court of Justice of the EU ('CJEU'). Following a ruling from the CJEU, the First Division of the Inner House refused the reclaiming motion.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lord Mance gives the judgment with whom the remaining six Justices agree. The 2012 Act does not breach EU law. Minimum pricing is a proportionate means of achieving a legitimate aim.

REASONS FOR THE JUDGMENT

The CJEU's Judgment

The issues have to be examined in light of the guidance given by the CJEU: [5]. Advocate General Bot ('the AG') and the CJEU both assimilated the analysis of proportionality under articles 34 and 36 TFEU and under the Single CMO Regulation. The AG conducted a three-stage proportionality analysis: (i) appropriateness, (ii) necessity and (iii) a balancing of interests. The CJEU, in contrast, conducted a two-stage analysis: (i) appropriateness and (ii) necessity, but appears to have subsumed an element involving a balancing of interests into the second stage of analysis: [9] and [15]. The CJEU

concluded that where a national court examines national legislation in the light of the justification relating to the protection of health under article 36 TFEU it is bound to examine objectively whether it may reasonably be concluded from the evidence submitted by the Member State concerned that the means chosen are appropriate for the attainment of the objectives pursued and whether it is possible to attain those objectives by measures that are less restrictive of the free movement of goods and of the CMO: [13]-[14].

The issues

The respondents accept that minimum pricing will affect the market and EU trade in alcohol. The issue is therefore whether the respondents can justify the EU market interference under article 36 TFEU and the parallel principles governing wine under the CAP and Single CMO Regulation: [3]-[4] and [18]. The appellants accept the legitimacy and appropriateness of the objective pursued by the respondents. The parties were not however agreed as to the precise implications or qualifications of the objective: [18].

The objectives pursued by minimum pricing

The objective as it was put before the CJEU was two-fold: ‘reducing, in a targeted way, both the consumption of alcohol by consumers whose consumption is hazardous or harmful, and also, generally, the population’s consumption of alcohol’: [19]. However, the objective is more refined than might appear [20]. The aim is not that alcohol consumption be eradicated or that its costs should be made prohibitive for drinkers. The aim is to strike at alcohol misuse and overconsumption manifesting themselves in particular in the health and social problems suffered by those in poverty in deprived communities: [20]-[28].

Less restrictive measures to achieve the same aim

The appellants’ submission that an excise or tax would be a less restrictive and equally effective way of achieving the government’s objectives is rejected. The Supreme Court is ready to accept, contrary to the view on which the courts below proceeded, that the relevant EU directives (Council Directive 92/83/EEC, Council Directive 92/84/EEC and Council Directive 2008/118/EC) would permit additional excise duties or VAT levied at different rates by references to narrowly defined bands of alcoholic strength: [38]-[45]. Nevertheless and in agreement with the Lord Ordinary, minimum pricing targets the health hazards of cheap alcohol and the groups most affected in a way that an increase in excise or VAT does not. The latter would be felt across the board in relation to the whole category of goods to which it applied and unnecessarily affect groups which are not the focus of the legislation: [34]-[37]. Second, in agreement with the Lord Ordinary, minimum pricing is easier to understand and simpler to enforce. It would not be open to absorption (e.g. by selling alcohol below cost in order to attract other business onto their premises): [46].

The lack of market impact analysis and balancing under proportionality

It is unclear how far an objective, which is reasonable and can only be achieved in one way, can or should be measured against an assessment of any damage which giving it effect might cause to the ordinary operation of the EU market. [47]. But the CJEU’s refusal to endorse the AG’s third stage enquiry is an indication that the matter should be treated very lightly [48]. The comparison to be undertaken is between two incomparable values: (i) health and (ii) the market and economic impact on producers, wholesalers and retailers of alcoholic drinks across the EU. The courts should not second-guess the value which a domestic legislator puts on health. As such, there is limited scope for the criticism made by the appellants about the lack of EU market impact evidence [48]. An analysis of the market and competition impact material that is available demonstrates that the impact will be minor: [50]-[62]. The Sunset Clause indicating the provisional nature of the Regime is a significant factor in favour of upholding it: [63]. The submission that the Scottish Government should have gone further than it did to assess market impact is not realistic: [63].

References in square brackets are to paragraphs in the judgment

NOTE: This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>