Minimum Unit Pricing for Alcohol in the Court of Justice

*Aidan Robertson**

I. Introduction

Legislation passed by the Scottish Parliament in June 2012 to impose minimum unit pricing for alcohol sold in Scotland as part of a strategy to tackle alcohol-related harm has yet to be implemented pending the outcome of a challenge to its legality under EU law before the Scottish Courts brought by three associations of producers of wines and spirits, namely the Scotch Whisky Association, the Confédération Européenne des Producteurs de Spiritueux[1] and the Comité de la Communauté économique européenne des Industries et du Commerce des Vins, Vins aromatisés, Vins mousseux, Vins de Liqueur et autres Produits de la Vigne.[2] The first instance court in Scotland rejected the challenge in May 2013, but Scotland's appeal court decided in April 2014 that before ruling on the producers' appeal, it should refer a number of questions to the Court of Justice of the European Union ("CJEU"). The CJEU is not expected to rule until late 2015 at the earliest and so the ultimate outcome before the Scottish courts is not likely to be known until 2016.

This article seeks to set out how the questions referred are likely to be answered by the CJEU. In short summary, it is argued that the questions referred do not raise any ground on which the Scottish legislation may be declared incompatible with EU law and that the producers' appeal should be dismissed.

II. The legislation

The Scottish legislation in question is the Alcohol (Minimum Pricing)(Scotland) Act 2012[3], which provides for amendment of the Licensing (Scotland) Act 2005 by the introduction of a requirement that alcohol is not to be sold from licensed premises at below a minimum price per unit.[4] The legislation provides a formula for the calculation of a minimum price of MUP x S x V x 100 where MUP is the minimum price per unit, S is the strength of the alcohol and V is the volume of the alcohol in litres.[5] The minimum price per unit is to be specified by order by the Scottish Ministers[6] and had the legislation come into force when intended, would have been fixed at 50p per unit.[7] Therefore, the minimum price of a bottle of wine with 13% alcoholic strength would be £4.88[8], a litre bottle of 8% cider £4[9] and a 70cl bottle of 40% whisky £14.[10]

The legislation includes a sunset clause, so that it expires six years after entry into force, unless the Scottish Ministers specify by order during the sixth year that it is to continue.[11] The Scottish Ministers are required to lay before the Scottish Parliament as soon as possible after the end of the fifth year of the Act being in force a report on the operation and effect of the minimum pricing provisions.[12]

The Act was adopted in June 2012[13], but its substantive provisions do not enter into force until a day

* QC, Brick Court Chambers, London.

1 CEPS, also known as the European Spirits Organisation.

2 Abbreviated to CEEV, Comité Européen des Entreprises Vins, and also known as the European Wine Companies Committee.

3 asp 4, 2012.

4 The new requirement is to be inserted pursuant to section 1(2) of the 2012 Act as paragraph 6A in schedule 3 (premises licences: mandatory conditions) of the Licensing (Scotland) Act 2005, asp 16.

5 Paragraph 6A(3).

6 Paragraph 6A(4). The Scottish Ministers are the devolved government in Scotland.

7 Under the draft Alcohol (Minimum Price per Unit) (Scotland) Order 2013. There has been no proposal to amend that price should the judicial review ultimately fail and that appears most likely to be the price applied. However, the Scottish Ministers do, of course, retain a discretion to fix the price at a different level when an Order is finally made.

8 0.50 x 0.13 x 0.75 x 100 = 4.875.

9 0.50 x 0.08 x 1 x 100 = 4.

10 0.50 x 0.40 x 0.7 x 100 = 14.

11 Section 2 of the 2012 Act.

12 Section 3 of the 2012 Act. This also sets out provisions as to the content of such report and the categories of persons to be consulted in the preparation of the report, which includes appropriate persons with functions in relation to health, prevention of crime, education, social work and children and young people.

13 The Bill was introduced into the Scottish Parliament in October 2011 and passed by the Scottish Parliament in May 2012 with only one vote against. Royal Assent was given in June 2012: [2013] CSOH 70, [12].

to be specified by order of the Scottish Ministers. No such day has yet been specified as the Scottish Ministers are awaiting the outcome of a judicial review challenge brought by a number of alcohol producers in the Scottish Courts.

III. The judicial review challenge in the Scottish Courts

The three associations of producers of wines and spirits referred to above immediately brought a petition for judicial review of the 2012 Act and related decisions of the Scottish Ministers as to the entry into force of the Act and fixing the minimum unit price.[14]

The petition advanced several grounds on which it was alleged that the legislation was unlawful. A domestic law ground alleging that the 2012 Act lay outside the legislative competence of the Scottish Parliament because the subject matter of the legislation was reserved to the UK Parliament was subsequently abandoned in light of a subsequent Supreme Court judgment[15], thus leaving grounds based on breach of the Act of Union 1707 by which the United Kingdom of Great Britain was created and on breach of the Treaty on the Functioning of the European Union ("TFEU") and EU legislation made thereunder.

The petition was heard by Lord Doherty sitting in the Outer House of the Court of Session who decided in May 2013 that it was neither necessary nor appropriate to refer any question to the CJEU, dismissed the challenge on all grounds and refused the petition.[16]

The petitioners appealed Lord Doherty's decision on the EU law grounds[17] by bringing a 'reclaiming motion'. This was heard by the Extra Division of the Inner House of the Court of Session, comprising Lord Eassie, Lord Menzies and Lord Brodie. The opinion of the court was delivered by Lord Eassie in April 2014. In contrast to the detailed 108 paragraph judgment delivered by Lord Doherty, the Opinion ran to only 8 paragraphs of which the substantive reasoning comprised the following single paragraph:

> "4. Putting matters very briefly, it appears to us, first, that in relation to the branch of the petitioners' argument concerned with the compatibility of minimum unit pricing with the common organisation of the market in wine, there is an evident area of uncertainty, since it is not clear whether the line of authority in the EC Court of Justice upon which the petitioners rely falls to be modified or qualified where the common organisation of the market in question deploys a regime of free formation of prices by market forces or is affected by the shared competence provisions introduced by the Treaty of Lisbon. Secondly, although it is now accepted by the Scottish Ministers that minimum unit pricing constitutes a quantitative restriction prohibited by article 34 TFEU unless they can discharge the burden on them of justifying it under article 36 TFEU, and although at first sight the tests to be applied under article 36 might appear to be relatively well established, we have come to the view that — as was heralded in the debate before us — the present proceedings raise aspects of those tests and of the role of the national court which are not clearly established. There are thus aspects relating to the Scottish Ministers' claim of justification under article 36 TFEU upon which we consider that it would be of help to have the guidance of the Court of Justice of the European Union."

There were therefore broadly two questions to be referred to the CJEU: is the minimum unit pricing legislation compatible with (a) the EU's common organisation of the market in wine and (b) the TFEU's provisions on free movement of goods? While Lord Doherty at first instance had considered these issues in detail in rejecting the petitioners' case, the court chose not address the issues in similar detail or in-

14 The court allowed an application to intervene against the petitioners brought by Alcohol Focus Scotland: [2012] CSOH 156, Lord Hodge. The intervention was by way of written submission only. The same group was later denied permission to intervene on appeal for the purpose of addressing submissions in support of the legislation after the decision to refer to the CJEU had been made: [2014] CSIH 64.

15 *Imperial Tobacco v Lord Advocate* [2012] UKSC 61; 2013 SLT 2.

16 *Scotch Whisky Association and others v Lord Advocate* [2013] CSOH 70; 2013 SLT 776; [2013] 3 CMLR 34. See Bartlett [2014] EJRR 73 *Distilling Prospects: Reflections on the Proportionality of Minimum Unit Pricing under EU Law*. See also MacCulloch *Scottish Minimum Alcohol Pricing and EU law*, Lancaster University law School Working Paper, January 2014, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2394018.

17 The grounds based on breach of the Act of Union 1707 were not pursued on appeal.

deed explain in anything other than the broadest terms why it was not persuaded by Lord Doherty's reasoning.[18] The court simply expressed the view at [5] that "not all the issues of EU law in this case are *acte clair*, which is of course the test if a court of final instance is not to apply the obligation to make a reference".[19] Here the Inner House was not suggesting that it was the court of final instance, but was expressing a view as to how the issues of EU law would be viewed by the United Kingdom Supreme Court (to which an appeal from this court lies).[20] The court also stated that in exercising its discretion to refer:

> "we have also come to the view that it is expedient and appropriate for this court now to request a preliminary ruling under article 267 TFEU . In reaching that view we also bear in mind that the EU Commission has expressed an adverse opinion on the minimum unit provisions and that of the eleven member states who have expressed a view to the Commission following notification in terms of the Technical Standards Directive 98/34/EC nine have expressed opposition to the proposals. The Court of Justice is of course a forum in which those parties may make submissions."[21]

The court did not formulate the questions to be referred in this opinion, but did so subsequently without any further hearing.[22] In so doing, the second of the two broad questions identified by the Court in the opinion, free movement of goods, was developed into five questions, thus making six questions in total for the CJEU. The reference and questions were received by the CJEU in September 2014.[23]

IV. The questions referred

1. Compatibility with the EU's common organisation of the market in wine (question 1)

The first question asks whether the common organisation of the market in wine precludes national legislation on minimum unit pricing:

> On a proper interpretation of EU law respecting the common organisation of the market in wine, in particular Regulation EU No 1308/2013[24], is it lawful for a member state to promulgate a national measure which prescribes a minimum retail selling price for wine related to the quantity of alcohol in the sale product and which thus departs from the basis of free formation of price by market forces which otherwise underlies the market in wine?

The basis for this ground of challenge appears to be twofold. First, it is argued that the EU rules on the common organisation of the market in wine precluded national rules affecting trade in that product. Second, it is argued that the legislation specifically precludes price fixing and that minimum unit pricing is caught by this prohibition. Lord Doherty had reject-

18 This seems odd when one considers a challenge on similar grounds to a ban on tobacco vending machines in Scottish legislation: *Sinclair Collis v Lord Advocate* [2012] CSIH 80, [2013] SC 221. In that case, the Extra Division of the Inner House upheld the decision of Lord Doherty in the Outer House to reject a petition for judicial review of the compatibility of the ban with EU law. Both judgments were fully reasoned.

19 The *acte clair* doctrine relieves a national court of final instance of the obligation to make a reference on a material question of EU law to the CJEU under Article 267 TFEU if the question of interpretation has already been addressed in an earlier case or if the correct application of EU law is so obvious as to leave no scope for any reasonable doubt by any national court: see Case 283/81 *CILFIT v Ministry of Health* [1982] ECR 3415.

20 It is open to question whether the court was correct as to the view to be taken by the Supreme Court as to whether to refer. The Supreme Court has in recent years displayed considerable willingness to decide matters of EU law without making a reference to the CJEU. The current approach was pithily expressed by Lord Mance JSC in *Bloomsbury International v DEFRA* [2011] UKSC 25; [2011] 1 WLR 1546 at [51]: "The Court of Justice's role is one of interpretation, the national court's one of application."

21 [2014] CSIH 38, [5]. As Bartlett explains, those Member States expressing opposition would appear to be doing so to protect their export trade in wines and spirits: [2014] EJRR 73, 77.

22 It is understood that, unlike the court's published opinion, the reference does set out the court's reasons for asking its questions at some length. The reference is not, however, in the public domain. In this author's view, it is to be regretted that the court's reasons for making the reference in a case of this importance have not been published, not least because it would have informed the electorate whose representatives in the Scottish Parliament voted overwhelmingly in support of the legislation.

23 Case C-333/14 *Scotch Whisky Association v Lord Advocate*, OJ 2014 C 339/4.

24 Regulation (EU) No 1308/2013 of the European Parliament and of 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 347/671.

ed both arguments at first instance.[25] While this ground only concerns wine, it is clear that defeat for the Scottish government on this ground would force a rethink of its entire strategy, as it is difficult to see how a minimum unit pricing regime for other alcoholic drinks could credibly operate if it did not include wine.

As to the first aspect of this ground, the extent of the rules on the common organisation of the market so far as it concerns wine, the starting point is to identify how legislative competence is exercised in this area. Article 4(2)(d) TFEU provides that agriculture is an area of shared competence between the EU and Member States. Therefore, to the extent that there are not harmonised rules for human health protection (which there are not), Member States retain competence to legislate to protect human health in this area, provided that such legislation does not contravene the rules in the TFEU (as to which see questions 2-5 discussed in section (b) below).[26] Nor are there rules on price regulation in Regulation 1308/2013, and so this too remains within Member States' competence.

It may be that reference at [4] of the opinion of the Inner House that Regulation 1308/2013 "deploys a regime of free formation of prices by market forces", reiterated in the wording of this question, suggests the court is considering an argument that the Regulation has in some sense 'occupied the field' when it comes to prices and has thus denuded Member States of their legislative competence. However, if that argument is being advanced, it is clearly contrary to the consistent case law of the CJEU, which as Lord Doherty emphasised[27] (referring to *Denkavit*[28], *Prantl*[29] and *Monsees*[30]) requires a careful examination of the subject matter and scope of the alleged harmonisation measure. It would require very clear words in Regulation 1308/2013 to set out a deliberate policy choice to exclude Member States' competence in these matters where competence is shared under the TFEU and, it is respectfully submitted, none are to be found.

Turning to the specific rule on price fixing, this is now to be found at Article 167 of Regulation 1308/2013[31] which provides:

> "1. In order to improve and stabilise the operation of the common market in wines, including the grapes, musts and wines from which they derive, producer Member States may lay down marketing rules to regulate supply ...
>
> Such rules shall be proportionate to the objective pursued and shall not:
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> ...
>
> (b) allow for price fixing, including where prices are set for guidance or recommendation;
>
> ..."

It can be seen from the face of the legislation that Lord Doherty was correct to conclude that:

> "The provision strikes at marketing rules at the production stage which permit anti-competitive price fixing agreements between competitors. It does not prohibit or restrict Member States' competence to make provision for minimum retail prices for sales from licensed premises to consumers ... on grounds of the protection of public health."[32]

It is submitted that the first question must be answered in the affirmative. Otherwise it would be open to argument across the common organisation of all markets that market forces are to be applied, to the exclusion of any regulation by Member States, denying any role for the shared competence guaranteed by Article 4(2)(d) TFEU.

2. Compatibility with the TFEU's rules on free movement of goods (questions 2-6)

The remaining five questions ask whether the rules on free movement of goods in Articles 34 and 36 TFEU preclude national legislation on minimum unit pricing.

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25 [2013] CSOH 70, [85]-[96]. The legislation referred to by Lord Doherty was Regulation 1234/2007, the Single Common Market Organisation ("CMO") Regulation, OJ 2007 L 299/1. The CMO Regulation was replaced by Regulation 1308/2013 with effect from 1st January 2014, see Article 232 of the latter Regulation.

26 E.g. Joined Cases C-90 and C-176/90 *Aragonesa de Publicidad Exterior SA and Publivía SAE v Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña* [1991] ECR I-4151, [16].

27 [2013] CSOH, [91].

28 Case 16/83 *Prantl* [1984] ECR 1299, [16].

29 Case 73/84 *Denkavit* [1985] ECR 1015, [12]-[13].

30 Case C-350/97 *Monsees* [1999] ECR I-2921, [24]-[27].

31 Lord Doherty referred to the predecessor provision at Article 113c.1(b) of the CMO Regulation.

32 [2013] CSOH 70, [94].

It is common ground in the proceedings before the Scottish courts that a restriction on minimum pricing is caught by Article 34 TFEU as a measure having equivalent effect to a restriction on imports.[33] The question for the court is therefore whether the measures were justified under Article 36 TFEU on the grounds of the protection of public health.

As noted above, the court observed that "the EU Commission has expressed an adverse opinion on the minimum unit provisions and that of the eleven member states who have expressed a view to the Commission following notification in terms of the Technical Standards Directive 98/34/EC nine have expressed opposition to the proposals" The adverse opinion[34] is summarised in the judgment of Lord Doherty as follows:

> "In that opinion the Commission noted that national legislation imposing minimum pricing falls within the ambit of art 34 TFEU; that the draft order was capable of having an adverse effect on the marketing of imported goods, and was a measure having an effect equivalent to a quantitative restriction in so far as it prevented their lower cost price from being reflected in the retail selling price. The Commission accepted the existence of an alcohol caused public health problem in Scotland, and that a policy of increasing prices was likely to reduce consumption (generally and by hazardous and harmful drinkers). However, it suggested that those ends could also be achieved by using excise duty to increase prices for all products; that that would better serve the aim of achieving a reduction in consumption; and that it would avoid hindering free movement. It did not see the potential problem of increases in excise duty being absorbed by producers or retailers (rather than being passed on to consumers in the form of increased prices) as a sticking point. It observed that it was "not definite" that that would be likely to occur. Nor did it accept that the constraints imposed by the excise duty directives would prevent excise duty being used effectively to achieve the aims of reducing consumption — both generally and by hazardous and harmful drinkers. As increasing excise duty was an available measure which was less restrictive of trade than minimum pricing the draft order appeared to be disproportionate. The Commission opined that the draft order would be in breach of art 34 TFEU were it to be adopted without giving due consideration to its remarks."[35]

It can therefore be seen that the Commission's objection was not to increasing the cost of alcohol in principle. The Commission's view was that the better option was to do this by way of increased excise duty rather than by imposing minimum unit pricing. The Commission, of course, had not undertaken the full review of the evidence that was before the Scottish Parliament when the legislation was adopted.

While authority is not cited, it seems clear that the basis for the Commission's opinion lies in the jurisprudence of the CJEU concerning the legislation of various Member States imposing minimum retail prices for manufactured tobacco products. In three cases decided together in 2010, the CJEU held that Member States were not entitled to impose minimum retail prices and were, instead, limited only to imposing higher levels of duty on manufactured tobacco products, combined with a prohibition on the sale of manufactured tobacco products below the sum of the cost price and all taxes.[36] While the EU regime for duty on manufactured tobacco products is different from that on alcohol, the CJEU's observations on minimum pricing were also based on Articles 34 and 36 TFEU and so are relevant to the present case.[37]

The tobacco cases turn on the Court's finding that "the objective of ensuring that a high price level is fixed for those products may adequately be attained by increased taxation of those products, the excise

33 [2013] CSOH 70, [28]. See Case 82/77 *Van Tiggele* [1978] ECR 25, [21]: "the establishment by a national authority of a minimum retail price fixed at a specific amount and applicable without distinction to domestic products and imported products constitutes ... a measure having an effect equivalent to a quantitative restriction on imports which is prohibited under" Article 34 TFEU.

34 Commission Communication SG(2012) D/52513.

35 [2013] CSOH, [29].

36 Case C-197/08 *Commission v France* [2010] ECR I-1599, [52]-[53]; Case C-198/08 *Commission v Austria* [2010] ECR I-1645, [42]-[43]; Case C-221/08 *Commission v Ireland* [2010] ECR I-1669, [54]-[55]. AG Kokott delivered a single opinion in these three cases. These cases qualify an earlier CJEU judgment by accepting that national law may prohibit sales at a price below cost plus duty: the CJEU had not addressed that question in Case C-216/98 *Commission v Greece* [2000] ECR I-8921, [31].

37 In this regard only, the author respectfully parts company with Lord Doherty who distinguished the tobacco cases at [2013] CSOH 70, [44] on that basis that the CJEU held that Article 36 TFEU could not be advanced as a defence to infraction of the excise duty directives. It is respectfully submitted that the CJEU was not limiting its reasoning in that way, and its reasoning on Article 36 TFEU was of general application.

duty increases sooner or later being reflected by increased taxation of those products".[38]

It is respectfully submitted that finding in relation to manufactured tobacco products cannot simply be transposed to alcohol without more analysis. The position requires more detailed analysis to determine whether simply using excise duty could achieve the desired public health objectives. There was considerable evidence before the Scottish Parliament as to the merits of different methods of addressing the abuse of alcohol and this was discussed at length by Lord Doherty. The evidence was set out and considered in a Final Business and Regulatory Impact Assessment ("the BRIA") published in November 2011 by the Scottish Government.[39]

The starting point is that the public health concern is directed to the excessive consumption of units of alcohol, in particular through the availability of cheap alcoholic drinks. It is not seriously in dispute that there is ample evidence that there are serious public health and related public order problems in Scotland caused by problematic alcohol consumption.[40] As to price levels, the Scottish Government has observed that "Alcohol is now 44 per cent more affordable in the UK than it was in 1980. It is possible in Scotland today to exceed the maximum weekly recommended intake of alcohol for men (21 units) for around £4."[41] Alcohol misuse imposes a considerable cost on Scottish society. The BRIA stated that "Alcohol misuse acts as a brake on Scotland's social and economic growth, costing an estimated £2.5 billion to £4.6 billion in 2007, with a midpoint estimate of £3.6 billion. For the midpoint estimate, this includes around £870m in lost productivity, a cost of around £270m to the [Scottish] NHS and around £730m in crime costs."[42]

A minimum unit price can provide for a precisely targeted increase in price to a particular level and therefore is obviously the most direct and effective remedy[43], on a conventional approach to the economic relationship between price and demand. The BRIA refers to a considerable body of research into and detailed modelling of the impact of price increases, as justification for setting a MUP of 50p.[44] The Scottish Government explained in the BRIA that other policy instruments aimed at increasing the price of alcoholic drinks would be less effective.[45] Excise duty necessarily can only operate as a less effective remedy because there is no direct relationship between the level of duty and prices to consumers. Increases in excise duty may not be passed on to ultimate consumers but absorbed by producers and retailers by way of a reduction in margin, doing nothing to affect demand from consumers. Indeed, there was evidence before the Scottish Government from the UK Competition Commission's investigation into grocery retailing that large grocery retailers priced some alcoholic drinks below cost as loss leaders.[46]

Moreover, excise duty directives do place limits on how excise duties may be targeted, and this is a considerable area of difference from tobacco, where a specific excise duty may be calculated per unit of the product.[47] Thus, wine of 8.5% strength must be taxed at the same rate as wine of 15% strength and cider of 1.2% strength the same as cider of 8.5% strength. This is a particular problem as the availability of cheap, strong cider is one of the particular areas of concern.[48]

The Scottish Government also took into account that the Westminster Government's policy is that "the [UK] Government does not see alcohol duty as a prime tool for tackling the problems associated with alcohol consumption".[49] The Scottish Government does not the power to vary alcohol duty as this is not a power which has been devolved to it.[50]

A further feature of alcohol market not found in the supply of tobacco products is that excise duty affects sales for consumption on licensed premises as much as sales consumption off licensed premises,

38 Case C-197/08 *Commission v France* [2010] ECR I-1599, [52]; Case C-198/08 *Commission v Austria* [2010] ECR I-1645, [42]; Case C-221/08 *Commission v Ireland* [2010] ECR I-1669, [54].

39 The BRIA is available at: http://www.scotland.gov.uk/Topics/Health/Services/Alcohol/minimum-pricing/regulatoryimpactassessment.

40 [2013] CSOH, [35].

41 See: http://www.scotland.gov.uk/Topics/Health/Services/Alcohol/minimum-pricing

42 BRIA, [2.9].

43 It also involves a much lighter touch than other means which have been deployed to address this issue which are compatible with EU law, such as a national alcohol retail monopoly, as to which see Alemanno and Garde *The emergence of an EU Lifestyle Policy: the Case of Alcohol, Tobacco and Unhealthy Diets* (2013) 50 CMLRev 1745, 1756.

44 BRIA, [2.33]-[2.41].

45 BRIA, Annex A, [72]-[78].

46 BRIA, Annex A, [74].

47 See, e.g. Case C-197/08 *Commission v France* [2010] ECR I-1599, [4].

48 BRIA, [2.31].

49 BRIA, Annex A, [73].

50 BRIA, Annex A, [78].

whereas it is the availability of cheap alcohol from the latter which is the real scourge[51] and which minimum unit pricing would tackle.[52] As Bartlett has pointed out, the tobacco pricing cases are to be distinguished because:

> "Any level of tobacco consumption is harmful, therefore increasing prices across the board to cut consumption would be appropriate. However, there are varying levels of alcohol consumption that cause varying levels of harm, thus addressing the most serious levels requires a tailored approach. The Commission states that increasing tax 'would impact all products equally'; however this is not the point of the intervention. The Scottish government have chosen to target alcohol drunk by the heaviest drinkers, protecting public health to that extent while balancing the interests of moderate drinkers, a choice that is within the discretion of national governments to make. Consequently, if minimum pricing is on available evidence the most effective way of achieving the specific aim sought by the Scottish government, it must be necessary to achieve the aim and proportionate."[53]

Therefore, it is submitted that the reasoning in the tobacco cases concerning the use of excise duties cannot be directly transposed to the questions referred by the Inner House, which must be considered from first principles.

Turning to the specific questions referred by the Inner House, question 2 seeks guidance on the question of the excise duty alternative in the following terms:

> In the context of a justification sought under article 36 TFEU, where –
> – a member state has concluded that it is expedient in the interest of the protection of human health to increase the cost of consumption of a commodity – in casu alcoholic drinks – to consumers, or a section of those consumers; and
> – that commodity is one in respect of which the member state is free to levy excise duties or other taxes (including taxes or duties based upon alcoholic content or volume or value or a mixture of such fiscal measures),
> is it permissible under EU law, and if so under what conditions, for a member state to reject such fiscal methods of increasing the price to the consumer in favour of legislative measures fixing minimum retail prices which distort intra EU trade and competition?

With respect to the referring court, this is phrased as something of a leading question as it states that minimum unit prices "distort intra EU trade and competition" but does not make the same assumption about "fiscal methods of increasing the price to the consumer" through excise duties. As excise duties are levied by reference to bands of alcoholic content, then those too have the capacity to distort intra EU trade and competition. Moreover, the question also assumes that permission is required under EU law to choose not to rely on fiscal methods and to impose minimum unit prices. The correct starting point is that a Member State is free to legislate to impose minimum prices unless otherwise constrained by EU law, in this case Articles 34 and 36 TFEU.[54] As it is accepted that the legislation in question is caught by Article 34 TFEU, the issue is whether the legislation is compatible with Article 36 TFEU.[55] If the legislation is compatible with Article 36 TFEU, then there is no further issue as to a choice between that legislation and use of fiscal methods. Unlike the position under the tobacco excise duty directives as held by the CJEU in the three 2010 cases, there is nothing in the EU excise duty directives[56] which precludes such legislation or requires the use of fiscal methods.

The extent of the constraints imposed under Article 36 TFEU are considered below in relation to questions 4-6 below. However, before raising those ques-

51 BRIA, [2.26]-[2.32].

52 [2013] CSOH 70, [38]. For more recent evidence on the superiority of the targeted effect of minimum unit pricing against cheaper alcoholic drinks when compared with excise duties, see Brenna et al *Potential benefits of minimum unit pricing for alcohol versus a ban on below cost selling in England for 2014: modelling study* BMJ 2014;349:g5452.

53 Bartlett [2014] EJRR 73, 76.

54 See, for example, Case C-231/83 *Cullet v Centre Leclerc* [1985] ECR 305, in which it was held at [34] that Treaty rules "do not prohibit national rules providing for a minimum price to be fixed by the national authorities for the retail sale of fuel".

55 There are no other issues raised in the case as to whether the legislation would offend other Treaty provisions or principles of protection of fundamental rights.

56 Council Directive 92/83/EEC on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages, OJ 1992 L 316/21; Council Directive 92/84/EEC on the approximation of the rates of excise duty on alcohol and alcoholic beverages, OJ 1992 L 316/29. For the background to these directives, see *R v HM Treasury ex p Shepherd Neame* [1999] 1 CMLR 1274 (CA), [3]-[9].

tions, the referring court sought guidance on question 3 as to the evidence to which it should have regard in carrying out its assessment, presumably because it is now being invited to consider material post-dating the adoption of the legislation in June 2012.

> Where a court in a member state is called upon to decide whether a legislative measure which constitutes a quantitative restriction on trade incompatible with article 34 TFEU may yet be justified under article 36 TFEU, on the grounds of the protection of human health, is that national court confined to examining only the information, evidence or other materials available to and considered by the legislator at the time at which the legislation was promulgated? And if not, what other restrictions might apply to the national court's ability to consider all materials or evidence available and offered by the parties at the time of the decision of the national court?

Thus the court wishes to know whether and to what extent it may go beyond the Parliamentary record in considering other evidence. While this had been raised before Lord Doherty below, it was not a matter of dispute as both parties accepted that on a judicial review a court could look to evidence beyond the Parliamentary record and such material was found by Lord Doherty not to make a material difference.[57] As to the correct approach, EU law does not impose constraints on rules of evidence before national courts unless a domestic rule would make it impossible or excessively difficult to obtain a remedy for a right conferred by EU law.[58] On normal judicial review principles, a court will principally be concerned only with evidence that was before the decision making body. There are only limited circumstances in which it may be relevant also to look at evidence that was not considered.[59] In this case it is difficult to see how evidence postdating the adoption of the legislation would be relevant.

Question 4 referred by the Inner House asks:

> Where a court in a member state is required, in its interpretation and application of EU law, to examine a contention by the national authorities that a measure otherwise constituting a quantitative restriction within the scope of article 34 TFEU is justified as a derogation, in the interests of the protection of human health, under article 36 TFEU, to what extent is the national court required, or entitled, to form – on the basis of the materials before it – an objective view of the effectiveness of the measure in achieving the aim which is claimed; the availability of at least equivalent alternative measures less disruptive of intra EU competition; and the general proportionality of the measure?

It would appear that by referring to "an objective view of the effectiveness of the measure in achieving the aim which is claimed", the court is asking to what extent it may substitute its judgement for that of the Scottish legislature. It is submitted that the answer to this question is that which was succinctly set out in the single opinion of Advocate General Kokott in the three tobacco cases in 2010, who stated that:

> "The decisive question is whether the measures at issue are necessary to achieve that aim [i.e. prevention of smoking and the control of tobacco consumption] or whether there are equally suitable, but less restrictive, alternatives. In this context it is necessary to bear in mind that, according to the settled case-law of the Court, when assessing compliance with the principle of proportionality in the field of public health, it must be recognised that the Member State can determine the level at which it would like to protect public health and how that level is to be achieved. In that respect Member States enjoy considerable discretion."[60]

Therefore, while a court must of course approach the matter objectively, the court must accord the legislature a considerable margin of discretion as to the level at which it would like to protect public health and

57 [2013] CSOH 70, [82]-[83].

58 Case 199/82 *San Giorgio* [1983] ECR 3595 and authorities cited therein. The effectiveness of EU law may require consideration of new material where there may have been a significant change in circumstances since the adoption of the original legislation: Case C-167/97 *Seymour Smith* [1999] ECR I-623, [47]-[48].

59 Fordham *Judicial Review Handbook* (6th ed, 2012), § 17.2 Fresh evidence in judicial review. (While this is a book on English public law, it is understood that the same approach would be applied under Scots public law.)

60 Case C-197/08 *Commission v France* [2010] ECR I-1599, 1617, [61]. The following authorities were cited at footnote 27 at the end of this passage for that proposition: Case C-41/02 *Commission* v *Netherlands* [2004] ECR I-11375, [46] and [51]; Case C-169/07 *Hartlauer* [2009] ECR I-1721, [30]; and Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and Others* [2009] ECR I-4171, [19]. See also the authorities to similar effect cited by Bartlett [2014] EJRR 73 at 76.

the measures to be adopted to achieve that level of protection.[61]

In the present case, it is respectfully submitted that Lord Doherty's judgment at first instance is a paradigm example of a court carrying out this exercise and there is no justification in EU law for the Inner House to take a different view. Therefore, in answer to the fourth question, the court should not substitute its judgment for that of the Scottish legislature.

In particular, it would not be justified for the Inner House to encroach upon the role of the legislature in the manner that appears to be adumbrated by question 5, which asks:

> In considering (in the context of a dispute as to whether a measure is justified on grounds of the protection of human health under article 36 TFEU) the existence of an alternative measure, not disruptive, or at least less disruptive, of intra EU trade and competition, is it a legitimate ground for discarding that alternative measure that the effects of that alternative measure may not be precisely equivalent to the measure impugned under article 34 TFEU but may bring further, additional benefits and respond to a wider, general aim?

This question assumes "the existence of an alternative measure", when in fact no such measure exists.[62] The Scottish legislature considered a number of possible measures before deciding upon the measure, minimum unit pricing, which was adopted in the 2012 Act. The role of the national court in the present case is to consider the proportionality of that measure, rather than to consider the legality of other potential measures which were not in the event adopted.

Thus, it would appear that the court is seeking guidance on what other less restrictive alternative measures may be taken into account under Article 36 TFEU. In particular, the court appears to be contemplating whether it can consider alternative measures which would have different aims and result in different benefits to the measure that was adopted. It is clear from Advocate General Kokott's tobacco opinion and the case law referred to that the court may not do so. The national court may only consider "equally suitable, but less restrictive, alternatives". The question of what is equally suitable must reflect the wide margin of discretion given to the legislature "to determine the level at which it would like to protect public health and how that level is to be achieved". In other words, it is not for the court to engage in policy making in the field of public health: that role is properly for the legislature. The court's role is limited to determining whether the legislature has gone too far in the measure it has adopted in restricting free movement of goods under EU law.

The court's sixth and final question is:

> In assessing whether a national measure conceded, or found, to be a quantitative restriction in the sense of article 34 TFEU for which justification is sought under article 36 TFEU and in particular in assessing the proportionality of the measure, to what extent may a court charged with that function take into account its assessment of the nature and extent to which the measure offends as a quantitative restriction offensive to article 34?

By this question, the court appears to be asking whether the proportionality of a restriction under Article 36 TFEU varies with the extent of the interference with free movement under Article 34 TFEU. While the view has been expressed that as a matter of principle that the answer is that it does[63], as is clear from what has been submitted ought to be the answer to the fourth question, it is submitted that even where a restriction on a fundamental principle such as free movement is in issue, the national court in applying the principle of proportionality must take into account that the legislature enjoys a considerable margin of discretion as to the level at which it would like to protect public health and the measures to be adopted to achieve that level of protection.[64] It

61 As was done in the tobacco vending machine ban cases in both England, *R (Sinclair Collis) v Secretary of State for Health* [2011] EWCA Civ 437, [2012] QC 394, [49], [135], [213]; and in Scotland, *Sinclair Collis v Lord Advocate* [2012] CSIH 80, [2013] SC 221, [59]. As Green J observed in *Gilbraltar Betting & Gaming Association v Secretary of State for Culture, Media & Sport* [2014] EWHC 3236 (Admin) at [120] "In areas relating to public health protection the precautionary principle is well established", citing Laws LJ at [42] and Arden LJ at [142]-[143] in the English *Sinclair Collis* case.

62 As noted above, the Scottish Parliament does not have the power to vary excise duties as this is not a devolved power: BRIA, Annex A, [78].

63 Tridimas *The General Principles of EU law* (2nd ed, 2006), p 215 "The more tenuous the restriction on free movement, the more lax the standard of proportionality", citing Joined Cases 60 & 61/84 *Cinéthèque* [1985] ECR 2605.

64 Case C-36/02 *Omega* [2004] ECR I-9609, [31]: "The fact remains, however, that the specific circumstances which may justify recourse to the concept of public policy may vary from one country to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty."

is therefore submitted that in the present case this is a matter for the discretion of the legislature.

V. Conclusion

Action to reduce health-related harm and other risks from alcohol use is a high priority for governments (as well as health bodies and other groups). This issue has been considered seriously and in depth by the Scottish legislature. It is a matter of considerable regret that implementation of the Scottish legislation has been held up by legal challenges from the drinks industry. The legal objections are now limited to those under EU law which were, it is respectfully submitted, correctly dismissed by Lord Doherty in 2013. It is unfortunate that the Inner House did not take a similar line. The questions referred to the CJEU do not, for the reasons set out above, disclose any ground under EU law on which the validity of the legislation may be impugned. Minimum unit pricing for alcohol ought to be permitted as an innovative attempt to tackle a serious health and social problem facing Scotland.