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The EU Single Market

14 September 2020

Introduction

On 16 July the UK Government published its White Paper on proposals for a UK Internal Market. The UK Internal Market Bill was subsequently published on 9 September.

Part of the UK Government's rationale for the Bill is that it is needed to replace the EU rules that governed the operation of the UK market whilst it was a Member of the EU and that still currently apply by virtue of the requirements of the transition period.

To aid Members in their consideration of the Bill, a piece of work was commissioned from Dr Kathryn Wright at York University using the Senedd's Brexit Academic Framework, to set out they key rules and principles that govern the operation of the EU's Single Market, on what grounds Member States are able to diverge from them e.g. to introduce laws that prevent the free movement of goods for public health grounds and how the rules of the EU's Single Market currently apply at sub-state level. It include a case study of the minimum alcohol price legislation introduce firstly by the Scottish

Government and subsequently by the Welsh Government to illustrate some of the papers main points. The paper is included below.

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Senedd

Framework Agreement for Research and Briefing Services in relation to Brexit

EU INTERNAL MARKET BRIEFING

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1. Historical context of the EU internal market

The internal market is an area without internal barriers based on the '**four freedoms**': free movement of goods, persons, services and capital. As the ultimate interpreter of EU law, the Court of Justice of the European Union (CJEU) has played a central role in market integration, defining concepts laid down in the Treaties and developing key principles such as mutual recognition.

There are two elements to removing internal barriers:

- removing tariffs, which is the function of a customs union, and
- dealing with regulatory barriers. These non-tariff barriers are more significant, both in terms of number and complexity.

The EU has developed from a customs union to a common market to a single - or internal - market. The **customs union** means that there are no tariffs for trade within the EU and there is one single customs tariff for trade with non-EU Member States: the Common External Tariff (CET). External trade is an exclusive competence of the EU, which is why Member States are not free to set their own individual trade policies.

A **common market** is a free trade area with no tariffs for goods and relatively free movement of capital and of services, but not so advanced in reduction of non-tariff trade barriers. The Common Market – the European Economic Community (EEC) - was mostly associated with the idea of 'negative integration' – that is, the removal of existing barriers to trade.

The **Single, or Internal, Market**, goes further regarding non-tariff barriers with more focus on 'positive integration' – that is, harmonising regulations and recognising remaining national measures as equivalent. The internal market is made up of various policy areas subject to the shared competence of the EU and the Member States.

The Single Market ambition was a response to the oil crisis of the 1980s which led to inflation and unemployment. The European Commission's 1985 White Paper, under its then President Jacques Delors, identified physical and technical obstacles that still needed to be removed to complete the Single Market. It set out around 300 specific measures to be achieved in stages by 1993.

After the fall of the Berlin Wall, the European integration project became more ambitious in terms of political as well as economic integration. Among other features, the Maastricht Treaty introduced the concept of EU citizenship, set a timetable for monetary union, and introduced a three-pillar system: the Economic Community (EC), Justice & Home Affairs (JHA), and the Common Foreign and Security Policy (CFSP). The latter two pillars were characterised by more intergovernmental decision-making. To accommodate the interests of some Member States, the Treaty allowed for opt-outs for the first time, such as for Euro membership. Subsequently the Treaty of Amsterdam allowed for 'enhanced cooperation' among Member States wanting to integrate at a faster pace in particular areas.

The internal market has developed through successive treaties and the enlargement of the EU from the original 6 to 28 (now 27) Member States. It is an ongoing project. The goods market is more integrated than services, and a Digital Single Market strategy was announced in May 2015 to take account of progress in technology.

Key dates

1957 Treaty of Rome, creating the European Economic Community (EEC). Common market established – free movement of goods, services, capital and people

1968 Customs union created: all import tariffs between the 6 EEC Member States removed

1986 Single European Act, creating the European Community (EC) (in force 1987) – 12 Member States by now - set timetable for the completion of the Single Market by 1 January 1993

1992 Maastricht Treaty: Treaty on European Union (in force 1993) – greater political and economic integration, three pillars, foundation for Economic & Monetary Union (EMU), opt-outs

1993 completion of Single Market – physical borders removed

2002 euro notes and coins in circulation and national currencies phased out

2007 Treaty of Lisbon (in force 2009): updating and consolidating the previous Treaties into two: the Treaty on European Union (TEU), and the Treaty on the Functioning of the European Union (TFEU), the latter containing the rules on the internal market – 27 Member States at this point

2. Key principles and features of the EU internal market

The legal basis for the internal market is Art 26 TFEU, which refers to the **free movement of goods, services, capital and persons**. Firms and people from one EU Member State should be able to operate in another Member State market under the same laws and conditions as those applying to the host Member State's own nationals. Member States cannot create unjustified barriers to trade. In EU law there is a general **principle of non-discrimination** on grounds of nationality. In the context of free movement of goods and services it is bound up with the principle of mutual recognition, discussed in this section. Whereas in its early case law the Court focused on discrimination, it increasingly applies a market access approach i.e. does a national rule prevent or hinder a claimant's access to that market?

This briefing discusses free movement of goods and services, with a focus on physical goods.

Barriers to trade in services

The core provisions governing the single market for **services** are the **freedom to establish** a company in another EU country (Art 49 TFEU), and the **freedom to provide or receive services** in an EU country other than the one where the company or consumer is established (Art 56 TFEU).

In terms of exceptions, activities directly connected with the exercise of official authority are excluded from freedom of establishment and provision of services (Art 51 TFEU). Member States may exclude the production of or trade in war material (Art 346(1)(b) TFEU) and retain rules for non-nationals in respect of public policy, public security or public health (Art 52(1) TFEU).

Freedom of establishment and free movement of services have been further developed through the Court of Justice of the EU's case law. Some case law has been codified into the Services Directive (Directive 2006/123/EC) which includes sectors such as retail, tourism, construction and business services. The directive covers services provided within countries as well as between Member States. There are also separate directives on particular sectors, such as financial services, transport, telecommunications, postal services, broadcasting and patient rights, supported by other rules such as recognition of professional qualifications.

Implementation of the Services Directive, initially due in 2009, has been delayed in some Member States, so the internal market in services is not as integrated as in goods.

Barriers to trade in goods

Free movement of **goods** is governed by Article 34 TFEU, which provides that **quantitative restrictions** on imports and **all measures having equivalent effect** [abbreviated as '**MEQR**s' or 'MEEs'] shall be prohibited between Member States. Art 35 TFEU is the similar provision applying to exports.

A **quantitative restriction** is a measure which amounts to a total or partial restraint of imports, exports or goods in transit (case 2/73 Geddo). An example would be a quota, prohibiting or limiting importation by amount or by volume. Most national measures are not direct quantitative restrictions but may have a similar effect, hence the prohibition against equivalent measures too.

'Measures having equivalent effect' to quantitative restrictions encompass "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially", trade within the EU (case 8/74 Dassonville, concerning a Belgian rule preventing the sale of products such as Scotch whisky without a certificate of authenticity). It should be noted that this definition has a broad scope. For example, these measures may relate to a product's content, its labelling or sale conditions, or its use.

In the Keck case (C-267/91), the Court of Justice of the European Union (CJEU) decided that rules on 'selling arrangements' (as opposed to 'product characteristics') that are non-discriminatory and impose an equal burden on imported and domestic products in law and in fact, fall outside Art 34 TFEU altogether. However, more recent case law focuses on the impact on market access regardless of the type of measure.

In a case concerning a Swedish law prohibiting the advertisement of alcohol on radio, television and in magazines (case C-405/98 Gourmet International), the CJEU focused on factual (in)equality: did the national measure impede access to the national market more for imported products than for domestic products? Although they could still advertise in the trade press to retailers and restaurants owners, the ban affected potential importers more heavily as they could not access potential consumers directly.

In C-110/05 Commission v Italy (Trailers), which concerned an Italian ban on the use of certain road vehicle trailers, the CJEU ruled:

"measures adopted by a Member State the object or effect of which is to treat products coming from other Member States less favourably are to be regarded as measures having equivalent effect to quantitative restrictions on imports… Any other measure which hinders access of products originating in other Member States to the market of a Member State is also covered by that concept." The Court also noted that a ban on the use of a product in the territory of a Member State has a considerable influence on the behaviour of consumers, which also affects the access of that product to the national market.

A similar approach is found in the cases on free movement of services. Under Art 56 TFEU, restrictions on freedom to provide services are prohibited in respect of Member State nationals who are established in a Member State other than that of the person for whom the services are intended. This covers all measures "liable to hinder or make less attractive the exercise of fundamental freedoms" (C-55/94 Gebhard) or that "prohibit, impede, or render less advantageous the activities of a service provider established in another Member State where they lawfully provide similar services" (cases C-369 & C-376/96 Arblade).

Showing again the focus on market access, in case C-384/93 Alpine Investments a ban on cold-calling potential customers deprived the firm of a "rapid and direct technique for marketing and for contacting potential clients in another Member State." (However, the ban could be justified on grounds of consumer protection – justifications are discussed below.)

Mutual recognition

Where there are harmonised rules, all EU and non-EU operators must comply with them within the internal market. In harmonised sectors EU countries do not have the option of introducing divergent national rules.

For non-harmonised products, a central feature of free movement of goods is the **principle of mutual recognition**. This covers approximately 25% of products on the EU market (European Commission, Evaluation of the Application of the mutual recognition principle in the field of goods, June 2015, p.31).

The principle of mutual recognition provides that if a product or service has been lawfully placed on the market in one Member State, there is no valid reason why it cannot be marketed in another Member State. This creates a presumption in favour of free movement. The principle was established by the Court of Justice in the important Cassis de Dijon case (case 120/78).

That case concerned the sale of cassis de Dijon, a type of crème de cassis (blackcurrant liqueur), in Germany by an importer and retailer, Rewe. A German law stipulated that products sold as fruit liqueur must contain at least 32% alcohol by volume, whereas crème de cassis produced in France only contains 15-20%. The relevant section of the German Federal Ministry of Finance told Rewe that the cassis de Dijon could be imported. On the other hand, it advised that it could not be marketed as a liqueur in Germany. This represented an MEQR.

The Cassis de Dijon case also categorised national rules into 'distinctly' and 'indistinctly' applicable measures according to their effect on imported and domestic products:

A **distinctly applicable measure** is one that is overtly discriminatory as it only applies to imported products and not to national products. For example, minimum or maximum prices for imported products; payment conditions for imported products which differ from those for domestic products; conditions in respect of packaging, composition, identification, size, weight, etc, which apply only to imported goods; a government campaign encouraging consumers to favour domestic products.

An **indistinctly applicable measure** on the face of it applies to all products – both domestic and imported – but in practice imposes a greater restriction on imported products. For example, an advertising ban which may make it more difficult for potential importers to reach a new market.

This categorisation is important as the type of measure influences the range of justifications open to Member States for diverging. In practice most measures are indistinctly applicable.

The possibility for Member States to diverge

As noted above, there is no lawful basis for Member States to diverge where harmonised rules apply.

There are possibilities to diverge in non-harmonised sectors where the principle of mutual recognition applies. These are known as Member State **derogations.** The Member State's justification for divergence must be based on grounds laid down in EU law, necessary, proportionate and genuine. In the traditional analysis, measures applying exclusively to non-national goods can only be justified by a narrow, closed category laid down in the Treaty. When the measures affect both national and non-national goods there is a wider scope for justification through the case law discussed below. The burden of proof shifts to the Member State to show that the restriction on trade is justified.

Traditionally, **distinctly applicable measures** can only be justified under the exhaustive list of derogations in Art 36 TFEU, which are:

- public morality,
- public policy or public security,
- protection of health and life of humans, animals or plants,
- protection of national treasures possessing artistic, historic or archaeological value, and
- protection of industrial and commercial property

Art 36 also states that Member States' measures "shall not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States." Economic protectionism is not allowed, as confirmed by case law such as case 40/82 Commission v UK on Christmas turkeys, and case C-1/00 Commission v France after the end of the BSE crisis in British beef, where the UK and France respectively unsuccessfully tried to invoke public health grounds.

Regarding **indistinctly applicable measures**, the Cassis de Dijon case also allows for the possibility of other derogations through a '**rule of reason**'. It mentions 'mandatory requirements' relating in particular to:

- effectiveness of fiscal supervision,
- protection of public health,
- fairness of commercial transactions, and
- defence of the consumer

This list of '**mandatory requirements**' is not exhaustive, so it is open to a Member State to justify an indistinctly applicable measure on another ground. For example, the Italian ban on the use of trailers breached Art 34 TFEU but could be justified on grounds of road safety (C-110/05 Commission v Italy (Trailers)). Similarly, a Swedish ban on the use of jet skis on all public waterways could be justified on the grounds of public and environmental nuisance (case C-145/02 Mickelsson v Roos).

On occasion the Court has taken a less strict approach to the derogations for distinctly applicable measures, blurring the distinction between the categories of justifications. It has done this by not explicitly labelling a measure as distinctly applicable – simply deciding it is an MEQR, or by allowing mandatory requirements to be considered as justifications (e.g. in C–54/05 Commission v Finland, allowing import licences to be justified by road safety).

In the Walloon Waste case (C-2/90 Commission v Belgium), the Walloon Regional Council prohibited waste originating in another Member State or in another region of Belgium to be stored or dumped in Wallonia. This could be considered a distinctly applicable measure because it did not apply to waste originating in Wallonia itself. The Court assessed environmental protection as a justification, although that is not one of the options in Art 36 TFEU. (This case can also be seen in line with other judgments on measures imposed by sub-State administrations, outlined in section 5.)

In free movement of services, the Säger case concerning patent attorney services (case C-76/90) established that only rules applying to all service providers pursuing an activity in the State of destination (i.e. indistinctly applicable measures) are potentially permissible. They must be justified by "imperative reasons relating to the public interest" Distinctly applicable measures are not justifiable at all.

Any justifications are also subject to a proportionality test. The national measure must be appropriate for securing its intended objective and must not go beyond what is necessary in order to achieve it. This includes considering whether alternative, less trade-restrictive, measures are available to achieve the aim. This operation of the proportionality test is discussed in more detail in the case study on Scotch Whisky in the final section of this briefing.

Potential justification of national measures on goods

distinctly applicable national measure	indistinctly applicable national measure
(only applies to imports)	(applies to imports and domestic products, but restrictive of trade between States)
Object	effect
↓	↓
justifiable under Art 36 TFEU (exhaustive list)	justifiable according to 'rule of reason' test in the Cassis de Dijon case ('mandatory requirements' - non-exhaustive) or Art 36 TFEU

+

proportionality

National derogations give an opportunity to diverge from the free movement rules, in non-harmonised areas. However, they must be justified on a case-by-case basis according to the facts, and they are only allowed in the context of the institutional governance structures of the EU. Governance is discussed in more detail in section 4 below.

The Single Market Transparency Directive 2015/1535 also aims to prevent barriers before they materialise for products which are not, or only partially, harmonised. Member States are required to notify any draft regulations concerning these products to the European Commission at least three months before their proposed adoption (the 'standstill' period). These measures are recorded in the Technical Regulation Information System ('TRIS') database. The Commission then analyses them in light of EU legislation, and other Member States can also give their opinion on the notified draft regulations.

Practical operation of mutual recognition

Mutual recognition within the internal market is also governed by legislation. The new Mutual Recognition Regulation (Regulation 2019/515 - applied from 19 April 2020) outlines rules and procedures on the application of the mutual recognition principle in individual cases. It includes:

- an assessment procedure to be followed by national authorities when assessing goods
- compulsory elements to be included in an administrative decision that restricts or denies market access
- a voluntary mutual recognition declaration, which businesses can use to demonstrate that their products are lawfully marketed in another EU country
- a problem-solving procedure, based on the existing SOLVIT service, that includes the possibility of an assessment from the European Commission on the compatibility of a national decision restricting or denying market access with EU law. SOLVIT is a practical problem-solving network to assist EU citizens or businesses when they encounter a problem in another Member State because a public authority is not respecting their obligations under EU law.
- stronger administrative cooperation to improve the application of the mutual recognition principle
- more information to businesses through reinforced product contact points and a single digital gateway

(see European Commission, Mutual recognition of goods: https://ec.europa.eu/growth/single-market/goods/free-movement-sectors/mutual-recognition_en)

3. An overview of harmonised and non-harmonised sectors

Harmonised sectors account for 70-75% of products on the EU market. These sectors include toys, electronic and electric equipment, such as electric motors, laptops, domestic refrigerators/freezers, gardening equipment, petrol pumps, air conditioners and integrated circuits, machinery, measuring instruments, lifts,

medical devices, recreational craft, fireworks, personal protective equipment, fireworks, automotive, chemicals.

In most harmonised sectors, EU legislation is limited to essential health and safety and environmental standards. Manufacturers then adhere to technical specifications or voluntary standards to show compliance. These standards are separately drafted through European Standards Organisations involving industry actors. In other sectors (automotive, chemicals), technical specifications for particular products are detailed in specific legislation itself.

Different aspects of a product can be harmonised: for toys, EU legislation covers all characteristics; for other products, it lays down only the technical characteristics (such as level of noise, chemical substances) or the rules concerning labelling (e.g. for composition of clothes and shoes, energy efficiency labelling for household electric appliances).

Concerning harmonised product rules, Regulation (EU) 2019/1020 on market surveillance and compliance of products aims to strengthen market surveillance rules for non-food products. It increases coordination of market surveillance, clarifies procedures for a mutual assistance mechanism, and requires non-EU manufacturers to designate a responsible authority for compliance information.

Non-harmonised sectors include certain foodstuffs, medicines, food additives and food supplements, furniture, textiles, bicycles, automotive spare parts, construction products, fertilisers, cooking implements, precious metals.

Conformity assessment by an accredited body is needed before a product (such as medicines) can be placed on the EU market, showing that it meets all the applicable requirements. CE marking denotes conformity with high safety, health, and environmental protection requirements.

The European Commission's 'Blue Guide' (July 2016) is a handbook on the implementation of EU product rules on non-food and non-agricultural products. It aims to help businesses, trade and consumer associations, standardisation bodies and conformity assessment bodies and national inspectors apply the rules consistently across different sectors and throughout the single market.

4. The governance of the internal market and the role of different institutions

The European Commission, the CJEU, European standardisation bodies and national courts and authorities are involved in internal market governance.

The European Commission is the guardian of the Treaties. It promotes the general interest of the EU, implements policies, and proposes and oversees the implementation of EU legislation. It is the approximate equivalent of the civil service for the EU. EU legislation is passed by the Council of the EU, comprising Member State ministers, and the European Parliament, made up of directly elected representatives.

Regulations are directly applicable from their adoption, whereas Directives need to be transposed into national law by Member States within two years, or by the date specified in the legislation. The measures taken to implement the Directive must be notified to the European Commission. If a country fails to implement a Directive properly, notify the Commission, or otherwise violates the Treaties, the Commission may start infringement proceedings under Art 258 TFEU.

The first step is a letter of formal notice requesting further information from the Member State, which must send a detailed reply within a specified period. If the Commission considers the response unsatisfactory, it sends a 'reasoned opinion', formally requesting that the country complies with EU law. It explains why the Commission considers there is a breach, and again asks the Member State to

inform the Commission of the measures taken by a specified deadline, usually 2 months. If the Member State still does not comply, the Commission may decide to refer the case to the Court of Justice. Most cases are settled before this point. If the Court of Justice finds that the Member State has breached EU law, the national authorities must take action to comply with its judgment. If this still does not happen the Commission can propose that the Court apply financial penalties.

The Court of Justice of the EU (CJEU) interprets EU law to ensure it is applied consistently, and adjudicates cases between national governments and EU institutions. CJEU rulings are binding on the Member States. It is important to note that it is not an appeal court from the Member States.

In free movement cases the CJEU would have jurisdiction in two ways: European Commission infringement proceedings brought against a Member State e.g. for non-implementation of legislation as explained above; or through the preliminary reference procedure after a case is brought in a national court to enforce an individual's or a firm's free movement rights.

Under the preliminary reference procedure (Art 267 TFEU), if a national court is unsure of the interpretation of EU law applicable to a case, it can (and must, in the case of the highest court) make a reference to the CJEU. Once the CJEU has given its binding interpretation - 'the **preliminary ruling**' - on the point of EU law raised, the national judge applies that ruling to the dispute between the parties.

Member States' courts and authorities play an important role in enforcing EU law. Flowing from the foundation principle of supremacy of EU law, they are required and empowered to:

- give effect to EU law: the principle of **direct effect** (case 26/62 Van Gend en Loos)
- interpret national law in line with EU law: the principle of **indirect effect** (case C-106/89 Marleasing)
- set aside national provisions which conflict with EU law (case 70/77 Simmenthal)

The principle of direct effect means that individuals and firms can enforce their free movement rights in national courts by challenging State measures on the basis of the Treaty. They do not need to go to the CJEU, and in fact the CJEU does not have jurisdiction to hear their cases, except indirectly through the preliminary reference procedure.

As noted above, European Standards Organisations are responsible for drawing up technical specifications, which meet the essential requirements laid down in Regulations and Directives. If producers comply with these standards there is a presumption of conformity with the essential requirements. These standards may define requirements for products, production processes, services or test methods. They are developed by industry actors following principles of consensus, openness, transparency and non-discrimination. Standards are aimed at ensuring interoperability and safety, reducing costs and facilitating integration. The European Standardisation Organisations are the European Committee for Standardisation (CEN – known by its French acronym), the European Committee for Electrotechnical Standardisation (CENELEC), and the European Telecommunications Standards Institute (ETSI).

5. The 'wholly internal' situation and the sub-State context

If there is no movement between Member States in a particular case, free movement rights in EU law are not engaged.

In the context of free movement of goods, Article 34 TFEU applies to obstacles to trade "between Member States". An inter-State element is therefore a prerequisite and it does not apply to 'wholly internal' situations i.e. the measure should be "capable of hindering, directly or indirectly, actually or potentially" trade between Member States (the Dassonville case). It does not apply to measures only affecting domestic goods. The need for an inter-State element means that EU law does not prevent Member States from treating their domestic products less favourably than imports i.e. **reverse discrimination** (although they would be unlikely to want to do that deliberately).

However, Art 34 TFEU does apply where a domestic product leaves the Member State but is imported back again (case 78/70 Deutsche Grammophon) - unless the sole purpose is to circumvent the domestic rules (case 229/83 Leclerc). It also applies to goods in transit (C-320/03 Commission v Austria). Irrespective of the place where they are originally produced inside or outside the internal market, once they are in free circulation all goods benefit from the principle of free movement (Cassis de Dijon).

Potential effects on inter-State movement have allowed national producers to successfully challenge national rules applying to all producers, on the grounds that the rule could also create a disadvantage for non-national producers in accessing the market (e.g. C–184/96 Commission v France - foie gras; C–321–324/94 Pistre). Similarly an obstacle or delay posed to national producers may have a knock-on effect further along the chain, indirectly affecting later cross-border trade (C-293/02 Jersey Potatoes).

The Lancry case (C-363/93, C-409/93 & C-411/93) concerned different parts of the same State. Dock dues imposed by Réunion (as a French overseas territory) on all goods, including those from mainland France, to boost local production were held to infringe Art 34. The Court found it would be "inconsistent to hold that a charge applied to all goods crossing a regional frontier, whatever their origin, should be classified as a charge having equivalent effect when it applies to goods from other Member States but not when it applies to goods from another part of the same State."

The Walloon Waste case, discussed above in section 2, demonstrates that a measure adopted by a sub-State administration which affects producers in other sub-State territories as well as other States is open to justification.

6. Case study: the Scotch Whisky case on minimum pricing of alcohol

Summary: The key issue in the Scotch Whisky case was the proportionality of the Scottish legislation introducing a minimum price unit for alcohol, and whether there were less trade-restrictive measures, such as taxation, which would be equally effective at achieving the intended aim of protecting human life and health. Scotland ultimately implemented a minimum price of 50p per unit of alcohol in 2018.

Facts

In 2012, the Scottish Parliament approved a minimum unit price for alcoholic drinks through s.6A(1) of the Licensing (Scotland) Act 2005, amended by the Alcohol (Minimum Pricing) (Scotland) Act. Its aim was to increase the price of alcohol to discourage excessive drinking, so protecting human life and health.

The legislation was not implemented initially as the Scotch Whisky Association and other alcohol lobby groups challenged it through a judicial review. Some of its arguments were based on EU law, namely that imposing a minimum unit price would breach the free movement of goods rules and EU Regulation 1308/2013 on the common organisation of agricultural markets. The Scotch Whisky Association was able to invoke EU law as it could argue that importers from other EU Member States were also affected by the legislation. When the case reached the Court of Session in Edinburgh on appeal, it made a preliminary reference to the EU Court of Justice (case C-333/14 Scotch Whisky v Lord Advocate).

Applying the free movement of goods framework to the case:

- The proposed minimum unit price was a 'measure having equivalent effect to a quantitative restriction' (MEQR) according to Art 34 TFEU and the Dassonville definition
-
- It was an 'indistinctly applicable' measure: it applied to Scottish and other UK producers of alcoholic drinks as well as those from other EU Member States
-
- It was justified: 'protection of health and life of humans' is explicitly one of the grounds in Art 36 TFEU, and consumer protection is also considered a 'mandatory requirement'
-
- Therefore, the key issue was the proportionality of the proposed minimum price unit for alcohol

The Court of Justice of the EU's ruling

The CJEU applied the market access test i.e. would the minimum unit price present an obstacle to importers' access to the market and affect fair competition? A manufacturer who could lawfully produce an alcoholic drink in other Member States more cheaply due to lower production or labour costs would not be able to compete by offering their products below the set minimum unit price in Scotland.

The CJEU accepted the objective of the legislation: "the protection of the health and life of humans... ranks foremost among the assets or interests protected by Article 36 TFEU. It is for the Member States, within the limits imposed by the Treaty, to decide what degree of protection they wish to assure" (para 35 of the judgment)

When it came to assessing whether the minimum unit price was proportionate to the aim of protecting human life and health, the Court examined whether there were less trade-restrictive alternatives which would be equally effective. In particular it considered that a fiscal measure which increases the taxation of alcoholic drinks is likely to be less restrictive of trade in those products within the EU than a measure imposing a minimum unit price. An MUP significantly restricts the freedom of economic operators to determine their retail selling prices in a way that taxation does not (para 46). The fact that increased taxation of alcoholic drinks entails a general increase in prices, affecting both moderate drinkers and

those whose consumption is harmful, does not necessarily mean that increased taxation is less effective (para 47).

As explained above, in the preliminary reference procedure it is ultimately for the national court to decide the case on the facts, applying the CJEU's binding ruling on the interpretation of the EU rule. In this case the CJEU gave a strong direction:

"Articles 34 TFEU and 36 TFEU must be interpreted as precluding a Member State choosing, in order to pursue the objective of the protection of human life and health by means of increasing the price of the consumption of alcohol, the option of legislation … which imposes an MUP for the retail selling of alcoholic drinks, and rejecting a measure, such as increased excise duties, that may be less restrictive of trade and competition within the European Union. It is for the referring court to determine whether that is indeed the case, having regard to a detailed analysis of all the relevant factors in the case before it. The fact that [taxation] may bring additional benefits and be a broader response to the objective of combating alcohol misuse cannot, in itself, justify the rejection of that measure." (para 50)

However, the burden of proof on the Member State "cannot extend to creating the requirement that, where the competent national authorities adopt national legislation imposing a measure such as the MPU, they must prove, positively, that no other conceivable measure could enable the legitimate objective pursued to be attained under the same conditions" (para 55)

In deciding the case, the national court should ensure that the relevant national authorities bring sufficient evidence to justify their measure (para 49, 54). The national court could take into account scientific uncertainty, and the fact that the minimum unit price had a time limit of 6 years unless the Scottish Parliament decided to extend it (para 57).

Outcome

The case returned to the domestic courts to apply the CJEU's ruling, first in the Court of Session and then in the UK Supreme Court on appeal. The UK Supreme Court ultimately found the minimum unit price to be lawful (*Scotch Whisky Association & Ors v The Lord Advocate & Anor (Scotland) [2017] UKSC 76* (15 November 2017)). Following the principles in the CJEU's judgment, the court emphasised the evidence behind the policy, the consideration of alternatives and the suitability of the measure for its intended objective. A minimum price of 50p per unit of alcohol was implemented in Scotland on 1 May 2018.

Similarly, Wales adopted a 50p minimum unit price on 2 March 2020 under the Public Health (Minimum Price for Alcohol) (Wales) Act 2018. The regulations specifying and explaining the minimum price unit had to be notified to the European Commission under the Single Market Transparency Directive before the measure came into force.

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