Alcohol (Minimum Pricing) (Scotland) Bill

Law Society of Scotland

The Law Society of Scotland (‘the Society’) welcomes the opportunity to comment upon the general principles of the Alcohol (Minimum Pricing) (Scotland) Bill introduced into the Scottish Parliament on 31 October 2011 and has the following comments to make upon its terms.

General Comments

The Society’s Licensing Law Sub Committee responded to the Scottish Government’s Consultation Paper entitled Changing Scotland’s Relationship with Alcohol: A Discussion Paper on Our Strategic Approach in September 2008. The Licensing Law Sub Committee stated at that time that it welcomed any initiative brought forward in order to improve the nation’s health and to encourage both the sensible retailing and consumption of alcohol. The Society remains of this view. The Society also responded to the Scottish Parliament’s Health and Sport Committee’s call for written evidence in January 2010 upon the general principles of the Alcohol Etc. (Scotland) Bill in January 2010 and provided the Scottish Parliament’s Health and Sport Committee with oral evidence at a sitting of that Committee on 17 March 2010 at which John Loudon, the Society’s Licensing Law Sub Committee Convener, and Jim McLean, the Society’s Competition Law Committee Convener, provided the Committee with oral evidence.

The Society should like to respond to the terms of the Bill as follows.

Specific Comments

Section 1 – Minimum Price of Alcohol

The Society notes that this Section is in similar terms to the provisions at Section 1 of the Alcohol Etc. (Scotland) Bill which it did not receive sufficient support within the Scottish Parliament.

The Society set out its position in terms of its written evidence to the Health and Sport Committee in January 2010 and also at the oral evidence session of the Health and Sport Committee on 17 March 2010. With regard to statutory minimum pricing of alcohol, the Society in responding to this call for evidence as was the case with regard to its response to the Alcohol Etc. (Scotland) Bill, confines itself to legal issues which arise as a result of this proposed measure and accordingly will not address the advantages and disadvantages of establishing a minimum alcohol sales price based on a unit of alcohol, nor the level at which such a proposed minimum price should be set or the justification for that level as referred to in the Health and Sport Committee’s call for written evidence.

In terms of its previous response, the Society stated that the imposition of a minimum price of alcohol is a devolved matter within the legislative
competence of the Scottish Parliament but that there are issues raised by the imposition of minimum pricing at EU levels which brings into focus the compatibility or otherwise of the Scottish Government’s proposals with the obligation of the United Kingdom under the Alcohol Duty Directive (92/83/EEC) and, since the coming into force of the Treaty of Lisbon on 1 December 2009, Articles 34 and 36 of the Treaty on the Functioning of the European Union.

Compatibility with EC Duty Directives require to be taken into account in fixing a minimal price.

Legal issues concerning the free movement of goods in terms of the EU Treaty require to be taken into account. The Society has no settled view upon whether the Scottish Government’s proposal for minimum pricing of alcohol would comply with the United Kingdom’s obligations under EU law but remains, in all the circumstances, of the view that the matters arising out of Section 1 of this Bill will turn on the quality of the evidential and modelling basis for the proposed measures.

**Articles 34 and 36 of the Treaty on the Functioning of the European Union are as follows:**

**Article 34**

‘Quantitative restrictions on imports and all other measures having equivalent effect shall be prohibited between member states’

**Article 36**

The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protections of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between member states’

The Society notes the judgements of the Court of Justice of the European Union with regard to the cases of the European Commission v France, Austria and Ireland (C197-08, C198/08 and C221/08) where those Member States fixed minimum retail prices for cigarettes. The Court held that the legislation in France, Austria and Ireland fixing minimum retail prices for cigarettes infringed European Union Law. With regard to attaining public health objectives, the Court held that a high price level for tobacco products can be fixed for those products by increased taxation of those products, the excise duty increases sooner or later being reflected in an increase in the retail selling price without undermining the freedom to determine price.

The Society notes that this judgement of the Court of Justice of the European Union in these cases is with regard to the Tobacco Directive 95/59/EC and that the structure for duty for tobacco is different from that for alcohol which is
set out in terms of the Alcohol Duty Directive 92/83/EEC in that tobacco duty is a function of the maximum retail price of tobacco, a maximum which the Directive requires the manufacturers to be free to set while alcohol duty is based on the volume of alcohol as opposed to its price. Accordingly interference with the pricing of alcohol may not effect the duty regime in the same way as in the case of tobacco.

It should be noted however, that not only the compatibility with EC Duty Directives have to be taken into account in fixing a minimum price but also the legal issues concerning the free movement of alcohol.

Jim McLean, in his oral evidence to the Health & Sport Committee on 17 March 2010 stated that the Court of Justice of the European Union could decide that these "complicated arrangements" with regard to minimum pricing were too problematic in relation to interstate trade and that it would "just not allow them". However, he also suggested that the Court could alternatively conclude that the Scottish Government had managed to find a way of targeting a particular pattern of consumption that was a particular problem and that there was evidence that the policy of minimum pricing of alcohol might achieve the Government’s objectives. As EU law would have no difficulty with a ban on loss-leading (selling below cost) or an increase in duty on alcoholic drink, the Court would apply the principle of proportionality by asking what it is that minimum pricing can achieve that neither of those measures could achieve. The lack of devolved competence in Scotland to set duties or ban loss leading (a ban would be a competition-law measure) is an internal UK matter and would not answer the question.

The further question exists of whether the compatibility of Section 1 of this Bill will eventually be determined by the Court of Justice of the European Union or whether a national court might dispose of it, itself. The difficulty is not in identifying the European law principle - is the proposed measure one that can reasonably be considered to be a genuine and justifiable effort to address a public health problem in a way that causes no more interference with the European single market that is indispensable to achieve that legitimate purpose - but in applying it to the facts. When the European Commission brings a case, the Court of Justice has to deal with the issue of law and also its application to the facts. But if a case is brought in a national court, the application of the law to the facts is recognised to be primarily a task for the national court. If the national court thinks that the European law is very clear, then even a national court of last resort, such as the UK Supreme Court, can use the doctrine of "acte clair" to justify a refusal to refer an EU legal point to the European Court of Justice. Procedural issues may turn out to be highly significant.

The Society also notes, however, since providing the Scottish Parliament Health & Sport Committee with written and oral evidence last year, the judgement of the Court of Session in the case of the Judicial Review of Sections 1 and 9 of the Tobacco and Primary Medical Services (Scotland) Act 2010 in the petition of Imperial Tobacco Limited and the opinion of Lord Bracadale in that case. In particular Lord Bracadale stated in his opinion that
Section 1 and 9 of the Tobacco and Primary Medical Services (Scotland) 2010 are not outside the devolved competence of the Scottish Parliament. (Section 1 prohibits the display of tobacco products at point of sale and Section 9 prohibits the use of vending machines to sell tobacco products) on the basis that the purpose of Sections 1 and 9 of the 2010 Act was to reduce smoking of tobacco among children and young persons and thereby improving public health in the long term and accordingly this purpose would not relate to a reserved matter (Section C7(a) of Schedule 5 to the Scotland Act 1998 the sale and supply of goods and services to consumers) as this provision should be given a narrow construction as covering the terms on which goods and services are sold.

The Society notes that this decision is at present subject to an appeal before the Inner House of the Court of Session and awaits the judgment in that appeal.

The Society notes with interest that there was no comment by Lord Bracadale with regard to the circumstances in which Section C7(a) of Schedule 5 to the Scotland Act 1998 “Regulation of …the sale…of goods to consumers” applies. It has been suggested by some lawyers that the reservation might apply to minimum pricing of alcohol (because a minimum price is a ‘term’ of the contract of sale) and accordingly be a reserved matter outwith the legislative competence of the Scottish Parliament. Others have expressed the view that a key question may be whether or not that reservation applies to all terms of a consumer contract or is, like the law of unfair terms in consumer contracts (see OFT v. Abbey National [2009] UKSC 6), confined to terms other than the main subject matter of the contract or the adequacy of the price and remuneration.

Finally, the Society should like to reiterate its comments with regard to enforcement of the minimum price of alcohol as a mandatory condition of premises licence in that the Society remains of the view that licensing standards officers will have difficulty enforcing this condition in each and every premises subject to a premises licence. The Society also asks whether a licenceholder would be in breach of paragraph 8(2)(e) of Schedule 3 to the 2005 Act by encouraging or seeking to encourage a person to buy or consume a larger measure of alcohol that the person had otherwise intended to buy or consume by, for example, offering food or non-alcoholic products with alcohol. This requires clarification as does the use of the wording "sold" and "supplied" in paragraph 6A(1) and paragraph 6A(2) of Schedule 3 to the 2005 Act as inserted by Section 1(2) of the Bill.

**Section 2 - Repeal of Section 1 of Alcohol Etc (Scotland) Act 2010**

The Society welcomes the repeal of this redundant provision.

Alan McCreadie  
The Law Society of Scotland