Subordinate Legislation Committee

3rd Report, 2012 (Session 4)

Alcohol (Minimum Pricing) (Scotland) Bill

Published by the Scottish Parliament on 25 January 2012
Subordinate Legislation Committee

Remit and membership

Remit:

The remit of the Subordinate Legislation Committee is to consider and report on—

(a) any—

(i) subordinate legislation laid before the Parliament;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1;

and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.

(Standing Orders of the Scottish Parliament, Rule 6.11)

Membership:

Chic Brodie
Nigel Don (Convener)
James Dornan (Deputy Convener)
Mike MacKenzie
Michael McMahon
John Pentland
John Scott

**Committee Clerking Team:**

Clerk to the Committee
Irene Fleming

Assistant Clerk
Euan Donald
The Committee reports to the Parliament as follows—

INTRODUCTION

1. At its meetings on 22 November, 20 December 2011 and 24 January 2012, the Subordinate Legislation Committee considered the delegated power provisions in the Alcohol (Minimum Pricing) (Scotland) Bill (“the Bill”) at Stage 1. The Committee submits this report to the Health and Sport Committee as lead committee for the Bill under Rule 9.6.2 of Standing Orders.

2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”).

3. The Cabinet Secretary for Health, Wellbeing and Cities Strategy also provided oral evidence to the Committee at its meeting on 20 December 2011.

OVERVIEW OF THE BILL

4. The Alcohol (Minimum Pricing) (Scotland) Bill was introduced in the Parliament on 31 October 2011. It is a Government Bill which seeks to introduce minimum pricing of alcohol products. The power to set the minimum price per unit is substantially the same as that which was proposed in section 1 of the Alcohol etc. (Scotland) Bill introduced in November 2009 but which was subsequently rejected by the Parliament.

5. In the Policy Memorandum which accompanies the Bill, the Scottish Government sets out the intended impact the Bill will have on alcohol consumption in Scotland and the reasons for bringing forward the legislation—

1 Alcohol (Minimum Pricing) (Scotland) Bill. Delegated Powers Memorandum. Available at: http://www.scottish.parliament.uk/S4_Bills/Alcohol%20(Minimum%20Pricing)%20(Scotland)%20Bill /DPM.pdf
“The Scottish Government considers the minimum pricing measure in the Bill will help reduce alcohol consumption in Scotland, in particular reducing the consumption of alcohol by harmful drinkers, and reduce the impact that alcohol misuse and overconsumption has on public health, crime, public services, productivity, and the economy as a whole.”

COMMITTEE’S REMIT

6. The Committee’s role in scrutinising the delegated powers provisions in Bills is distinct from the lead committee’s interest in policy matters. The Committee considers whether the grant of a delegated power is acceptable in the circumstances and whether the appropriate level of parliamentary procedure is applied to scrutinising the exercise of these powers. As part of this process the Committee considers the nature of the power in the context of the scheme of the Bill and the balance between the respective legislative powers of the Parliament and the Scottish Ministers.

7. Looking ahead to the scrutiny of instruments made under the powers once the Bill is passed, the Committee has regard to its function of reporting on the instrument to the lead committee and the Parliament as required by Standing Orders. This function requires the Committee to consider whether any instrument is within competence, including the requirement that any instrument made by the Scottish Ministers is compatible with EU law. In looking ahead the Committee must ensure that there is a sufficiently robust scrutiny process in place throughout the lifetime of the power to enable the Committee to fulfil this function effectively.

DELEGATED POWERS PROVISIONS

8. The Committee considered each of the delegated powers provisions in the Bill.

Section 1 – Minimum price of alcohol

Section 1(2) and (3) – power to specify the minimum price per unit of alcohol (inserted paragraph 6A(4) of schedule 3 and paragraph 5A(4) of schedule 4 of the Licensing (Scotland) Act 2005)

9. Section 1 makes provision in relation to the prohibition on the sale of alcohol below the minimum price. This is achieved through the imposition of a new mandatory licence condition – whether in relation to a premises licence (new paragraph 6A of schedule 3 to the 2005 Act) or an occasional licence (new paragraph 5A of schedule 4 to the 2005 Act). Where a licence holder fails to comply with this new mandatory condition, he or she will have committed a criminal offence under section 1 of the Licensing (Scotland) Act 2005 and on conviction could be fined up to £20,000 and/or imprisoned for up to 6 months.

10. The minimum price is calculated by multiplying together the following—

- the minimum price per unit (MPU)

---

2 Alcohol (Minimum Pricing) (Scotland) Bill. Policy Memorandum, paragraph 3. Available at: http://www.scottish.parliament.uk/S4_Bills/Alcohol%20(Minimum%20Pricing)%20(Scotland)%20Bill/Policy_Memo.pdf
• the strength of the alcohol
• the volume of the alcohol in litres
• 100

11. The MPU is the price specified by the Scottish Ministers by affirmative order.

12. The DPM sets out the Scottish Government’s reasons for taking this power to set the MPU. Firstly, the Scottish Government is of the view that the principle of minimum pricing can be considered without the price being specified. Secondly, further evidence and research into minimum pricing and its effects needs to be considered before the Scottish Ministers exercise their judgement and specify a price per unit. Finally, it considers that flexibility is required to amend the MPU in order to ensure that inflation does not erode the benefits of the measure.

13. The Committee acknowledges that, if the principle of minimum pricing is accepted, in order to ensure its continued effectiveness, the power to modify the MPU from time to time would be necessary and considers that delegated powers are in principle an appropriate mechanism for keeping the MPU up to date.

14. However, the reason for not setting out the initial MPU on the face of the Bill at this point and requiring delegated powers to do so was not as clear. The Committee therefore sought further evidence from the Cabinet Secretary for Health, Wellbeing and Cities Strategy in an oral evidence session.

15. In response to whether the initial MPU should be set out on the face of the Bill, the Cabinet Secretary emphasised the need for the evidence used to determine the MPU to be as up-to-date as possible and indicated that the Scottish Government was not in a position to set the price at this stage as further work needed to be carried out on the modelling process. When questioned further on this matter, the Cabinet Secretary explained—

“The sale and consumption of alcohol do not stay steady over time—they change. Since the Parliament considered the bill in the previous session, more updated data has been published on consumption, hospital admissions and mortality rates.”

16. She indicated that the model developed by Sheffield University (“the Sheffield model”) was currently being updated and was due to be completed by January. She confirmed that this would enable the Scottish Government to take a view on the MPU as the Bill progresses through the Parliament and that, by the time Stage 3 was reached, the Scottish Government’s intentions in this regard would be known.

17. However, this would not mean that the Scottish Government would then seek to set the initial MPU on the face of the Bill. She indicated that she did not believe that to be the right approach given that any variation of the MPU would be made

---

under delegated powers. She also emphasised that the use of delegated powers would still allow for robust parliamentary scrutiny—

“In seeking to set the price through delegated powers, the Government is not seeking the ability to set a price without reference to anyone; the order will have to go through the very robust affirmative procedure. This committee, other relevant committees and the Parliament as a whole will have to satisfy themselves about the various tests that will be required. I know from previous experience that the delegated powers provision is no walkover—there is still a fairly robust procedure that we must go through.”

18. The Committee accepts that it is vital that the model used is as robust and as up-to-date as possible. It also notes that work is ongoing on updating the Sheffield model to that end and welcomes the Cabinet Secretary’s commitment to provide up-to-date information on this exercise and to make available to the Parliament details of what the proposed initial MPU will be before the conclusion of parliamentary consideration of the Bill. The Committee would also welcome further information on other evidence which may be used in determining the minimum price.

19. The Committee accepts the Cabinet Secretary’s view that what is important is that this Committee, the lead committee and the Parliament as a whole are satisfied that the appropriate legal tests have been applied and are met and that the policy objective will be achieved. It recognises that these requirements can be met through the use of delegated powers provided the process applied to the scrutiny of those powers is sufficiently robust.

20. However, the Committee considers that, in order to carry out its important scrutiny function in advising the Parliament appropriately on the compatibility of any instrument proposing an MPU with EU law, there are still a number of issues outstanding in relation to the process of using delegated powers that remain to be addressed. It accepts the Scottish Government’s position that the principle of minimum pricing set out in the Bill could be applied within legislative competence but notes that it is incumbent upon the Committee to ensure that sufficient scrutiny safeguards are put in place to ensure that the Parliament is satisfied that in its view any particular MPU set would in fact be within competence. This was acknowledged by the Cabinet Secretary—

“… any price that is set by subordinate legislation would be required to comply with the law as well.”

---

Legislative competence

21. With regard to legislative competence and the compatibility of minimum pricing with EU law, the Committee notes that there is the potential for minimum pricing to interfere with intra-EU trade. It is important to scrutinise carefully the level at which the MPU is set. In giving evidence to the Committee’s predecessor on the matter in Session 3 the Scottish Government’s legal adviser explained—

“European law does not ban minimum pricing as such. Whether a particular measure is contrary to European law will depend on whether it interferes with trade between or discriminates against products from member states. If such interference or discrimination can be justified in certain cases, there is no breach of European law. The grounds on which that can be done include protection of public health and reduction of crime, but it also has to be shown that any interference is proportionate, so that there is a balance between the interference to trade and the protection of health.”

22. At the meeting on 20 December 2011, the Cabinet Secretary acknowledged that this was the case—

“… in setting the price, we must ensure that it is compatible with other provisions of Community law, including those on the free movement of goods.”

23. She also stated—

“… we need to ensure that the measure meets the public health objectives that we have set for it and that it complies with European law. […] In short, we need to ensure that we are not setting the price too low, so that it would be ineffective, or too high, so that it would be an unwarranted interference in the freedom of movement of goods.”

24. The Committee considers that there will need to be careful evaluation of the evidence as to the potential health benefits anticipated by the adoption of any particular MPU, which will need to be weighed against the potential impact on competitiveness of imports and trade within the EU to establish that this is a proportionate approach. In addition to scrutiny of the effectiveness of the policy by the lead committee, the Subordinate Legislation Committee must be able to discharge its function to report to the Parliament on whether in its view the instrument is compatible with EU law. This will be the case in relation to any instrument made under section 1 for so long as minimum pricing remains in force and not just in relation to the initial MPU.

25. The evidence given by the Cabinet Secretary makes it clear that Ministers’ decision will involve a careful and considered balancing exercise to be conducted on the basis of up-to-date and reliable data. The parliamentary scrutiny process

---

will require a similar approach. The Committee therefore considers that it is vital that sufficient time and full details of the relevant supporting information are available to the Parliament in order to carry out this important scrutiny role when any order setting or varying the MPU is brought forward.

Super-affirmative procedure
26. The Committee queried whether consideration had been given to applying super-affirmative procedure to allow for additional scrutiny of the evidence underpinning the setting of and any proposed change to the MPU to ensure that the measure was compatible with EU law (as well as ensuring that it will deliver the intended practical effect). The Cabinet Secretary indicated that she did not think that this was necessary—

“… I do not think that it will be challenging. The Government has to specify the unit price by order. That order will be very short—it is likely to be one line long—but it will come with the necessary, normal and required supporting evidence and policy justification.”

27. The Committee accepts that an order setting or varying an MPU will be short and concise; however the matter under consideration is much more complex. In particular, the issue of EU law and the consequent impact this has on legislative competence would need to be considered in agreeing to set the MPU.

28. While it accepts the Cabinet Secretary’s view that, on balance, affirmative procedure still allows for robust parliamentary scrutiny and is therefore sufficient in order to carry out adequate scrutiny of the MPU, the Committee seeks assurances that the necessary evidence and background information used to determine the MPU will be available to the Parliament to support the scrutiny process. The Committee is not convinced that the standard documentation which accompanies affirmative instruments will be adequate for the Parliament to be able to form a view on legislative competence. It therefore calls on the Scottish Government to commit to providing additional accompanying documentation at the time an order is laid which provides further detail of the evidence used to determine the MPU. The Committee notes that it is not unprecedented for additional accompanying documentation to be required to be produced by the Scottish Government when bringing forward certain Scottish statutory instruments. Therefore, in order to be reassured that this information will always be made available to the Parliament, the Committee considers that such a requirement should be made on the face of the Bill.

Variation of MPU
29. The Committee also explored with the Cabinet Secretary the basis on which a variation to the MPU would be made and how often it was anticipated that such a revision would be required. She indicated that the Scottish Government had not reached a final view on either of these points. With regard to the basis on which a variation to the MPU would be brought forward, while noting that this was not

11 For example, under Part 2 of the Public Services Reform (Scotland) Act (asp 8). Available at: http://www.legislation.gov.uk/asp/2010/8/part/2
setting out the Scottish Government’s intent on its policy, she set out examples of possible approaches to setting variations in the price—

“An inflation-based approach to changing the price could be taken—the price could rise in line with the retail prices index or the RPI plus 2 per cent. Alternatively, the price could be reviewed every two years or five years—if that approach was taken, I strongly suspect that any future Government would look to update the evidence before it changed the price. There are various options for ensuring that the price stays up to date with current prices; we have not taken a final decision on what the best approach would be.”

30. With regard to how often it is anticipated variations to the MPU would be made, while emphasising that the Scottish Government had not reached final view on the matter, she indicated that there may be circumstances where frequent changes may be required—

“For example, at certain times, the inflation rate might be changing because of economic circumstances, so more frequent price changes might be needed then than in periods when inflation and other associated forms of behaviour are much more stable. We have to give that serious thought.”

31. She did, however, indicate that the Scottish Government would listen to views expressed and that she would be happy to update the Committee on the Scottish Government’s position as it developed. The Committee welcomes this commitment.

Conclusion

32. As stated earlier, the Committee accepts in principle that any variation to the MPU should be done by delegated powers. It also accepts the Cabinet Secretary’s arguments for the initial price also being set through delegated powers. However, this acceptance is predicated on the imposition of robust scrutiny procedures and it therefore seeks reassurances from the Scottish Government in a number of respects.

33. In order to ensure the robustness of the evidence used to determine the MPU, the Committee calls on the Scottish Government to keep the Parliament informed of any developments with regard to the review of the Sheffield model used to set the MPU during the passage of the Bill. In particular, it welcomes the Scottish Government’s commitment to provide the Parliament with an indication of what the initial MPU is expected to be before the Bill completes its passage through the Parliament. It also welcomes the Scottish Government’s commitment to provide details of the basis on which variations to the MPU will be made and how regularly it is anticipated these variations will be made.

---

34. With that in mind, it encourages the lead committee to give careful consideration to the modelling process during its scrutiny of the Bill and calls on the Scottish Government to provide further information on the evidence which may be used in determining the minimum price as part of this scrutiny process.

35. Finally, in line with its observation in paragraph 28 that it is not unprecedented for additional accompanying documentation to be required when certain Scottish statutory instruments are brought forward, the Committee recommends that the Scottish Government bring forward an amendment at Stage 2 which places an obligation on the Scottish Government to provide detailed accompanying documentation providing detail of the modelling carried out and the evidence used to determine the minimum price when bringing forward an instrument to set or vary the MPU.

36. With the caveats set out above, the Committee considers that the delegation of the powers under section 1(2) and (3) to specify the minimum price per unit of alcohol to be acceptable and that affirmative procedure is a suitable level of scrutiny.

Section 1(2) and (3) – power to specify relevant labelling provisions (inserted paragraph 6A(6) of schedule 3 and paragraph 5A(6) of schedule 4 to the Licensing (Scotland) Act 2005)

37. The Committee notes that the calculation of the minimum price is based in part on the strength of the alcohol in question. Inserted paragraph 6A(6) of schedule 3 and paragraph 5A(6) of schedule 4 to the Licensing (Scotland) Act 2005 provide that the strength marked or labelled on the alcohol “in accordance with relevant labelling requirements”\(^\text{14}\) can be used for the purpose of the formula. The Committee understands that it is intended that this will make operation of minimum pricing easier in practice.

38. Sub-paragraph (6) of each condition allow the Scottish Ministers to list the enactments which are “relevant labelling provisions” and so which can be relied upon for the purposes of the calculation of the formula.

39. The Committee accepts the reasons given for taking this power. It notes that it may be complicated to set out the relevant labelling requirements as they may differ depending on the type of alcohol product and therefore to do so in primary legislation might inhibit the clarity of the mandatory conditions. The Committee therefore considers that the specification of relevant enactments is a minor technical exercise which is well suited to subordinate legislation.

40. The Committee considers that the delegation of the power under section 1(2) and (3) to specify labelling provisions is acceptable and that negative procedure is a suitable level of scrutiny.

\(^\text{14}\) Alcohol (Minimum Pricing) (Scotland) Bill. Delegated Powers Memorandum, paragraph 8. Available at: http://www.scottish.parliament.uk/S4_Bills/Alcohol%20(Minimum%20Pricing)%20(Scotland)%20Bill/DPM.pdf
Section 3 – Commencement

Section 3 – commencement and ancillary provision on commencement

41. Section 3 provides a power to commence sections 1 and 2. Sections 3 and 4 come into force on Royal Assent. The power to commence includes the power to make transitional, transitory or saving provision.

42. The Committee notes that, as a Government Bill, it is normal practice for the Scottish Ministers to determine on what date or dates they wish one or more of the Bill’s provisions to come into force. It further notes that, in accordance with normal practice, it is proposed that the commencement order is subject to laid only procedure. However, it also notes that these orders may also make transitional, transitory or saving provision considered appropriate in connection with commencement. As the Bill stands, these additional provisions would not be subject to parliamentary scrutiny.

43. The Committee asked the Cabinet Secretary to confirm what additional provision it is envisaged may be required and whether these were likely to be complex or cause practical problems in implementation.

44. The Cabinet Secretary indicated that she did not expect there to be many transitional measures required as the commencement powers were relatively straightforward. However, she did confirm that some incidental issues may need to be dealt with—

“… contracts might have been started but not completed. If somebody had started the process of buying something by mail order when the minimum price came in, we would have to allow the contract to be completed at the price at which it started. However, such cases are pretty incidental.”

45. The Committee accepts that these commencement powers are likely to be relatively straightforward and is therefore content with the order-making power under section 3 relating to commencement, which may include transitional, transitory or saving provision, and furthermore, is content that an order under this power is not to be subject to Parliamentary procedure beyond the laying requirement.

---

Members who would like a printed copy of this *Numbered Report* to be forwarded to them should give notice at the Document Supply Centre.