

A Revised MUP Scheme: “Direct” and “Indirect” Discrimination

Briefing Note

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The aim of this note is to consider the implications of amendments to the UKIM Bill for any future revised MUP scheme for alcohol. Amendments to the Bill seek to clarify that price controls are not relevant requirements for the purposes of the application of the mutual recognition principle. The note considers instead the application of the non-discrimination principle, and in particular whether MUP schemes could be considered to be a form of impermissible indirect discrimination.

Direct and Indirect Discrimination

Taking price controls out of the ambit of the mutual recognition principle leaves price controls subject to the “non-discrimination” principle. That principle covers both “direct” and “indirect” discrimination.

Direct discrimination covers circumstances in which a rule in one part of the UK does not apply to goods originating in that part of the UK and puts incoming goods at a disadvantage.

By contrast a rule may be indirectly discriminatory even if it applies both to local and imported goods. The rule appears neutral but has a differential effect in practice.

For example:

A Scottish rule that doesn’t apply Minimum Unit Pricing to alcohol produced in Scotland but applies it to all other alcohol would be **direct** discrimination.

A Scottish rule that applies Minimum Unit Pricing to all alcohol whether domestic or imported could be **indirectly** discriminatory if it impacts more on imported alcohol than it does comparable Scottish-produced alcohol.

Indirect Discrimination and the 3-Part Test

The UKIM Bill sets out what will constitute prohibited indirect discrimination. There is a **3-step process** under which a rule is analysed. The test is whether the rule:

1. applies to an incoming good that puts it at a **disadvantage**,
2. has an **adverse market access effect**, and
3. cannot reasonably be considered to be a necessary means of achieving a **legitimate aim**.

Disadvantage

The first condition is whether MUP puts incoming goods at a disadvantage. The threshold for this is set quite low in the Bill. It asks whether the rule makes it:

More difficult, or less attractive, to sell or buy the goods or do anything in connection with their sale than if the requirements did not apply.

A rule which makes a product more expensive clearly makes it less attractive to sell in that market and this condition would be satisfied.

Adverse Market Access Effect

The second condition is whether MUP has an adverse market access effect. The threshold set for this in the Bill is higher. It asks whether – by putting the imported good at a disadvantage while domestic goods are not put at a disadvantage or not to the same extent – it causes:

a significant adverse effect on competition in the market for such goods in the UK.

This is a more complex test than that which the Court of Justice applied in the Scotch Whisky Association case. It could be said that MUP puts both domestic and imported goods at the same disadvantage. The onus would be on the claimant to show a differential disadvantage.

The claimant would then also have to show that the effect was significantly adverse in terms of its impact on competition.

This is a much more difficult condition to meet than was the case in the proceedings before the CJEU. If this condition was not met, then any new version of the MUP scheme would be unaffected by the Bill

Legitimate Aim

If both the disadvantage and adverse market effect conditions are met, a revised MUP would be of no effect in relation to goods coming into the Scottish market if:

it cannot reasonably be considered to be a necessary means of achieving a legitimate aim.

This means that to be saved, a revised MUP has to pursue a legitimate aim recognised in the Bill and is reasonably considered to be a necessary means of achieving that aim.

The protection of public health is a legitimate aim recognised in the Bill. The more complex issue is what will be “reasonably” considered to be “necessary” to achieve this aim. It is a different test from the proportionality test applied by EU and UK courts in the Scotch Whisky Association case.

Conclusion

In very broad terms, EU law sets a low bar for what sorts of requirements will be considered to be restrictions on market access. Instead it relies on the proportionality principle to do the heavy lifting in balancing market access and public regulation objectives.

The approach in the Bill is potentially to set a higher bar for when a requirement is considered to be problematic indirect discrimination. It is possible that this higher threshold means that even a revised MUP scheme would be compatible with the Bill.

However, given their novelty, the application and outcome of these new tests is unknown and likely to be tested in the courts.