

Message 315

Communication from the Commission - SG(2012) D/52513
 Directive 98/34/EC
 Notification: 2012/0394/UK

Detailed opinion from the Commission (article 9, paragraph 2, second indent of Directive 98/34/EC). This detailed opinion extends the standstill period until 27-12-2012.

Comunicado detallado - Podrobné vyjádření - Udførlig udtalelse - Ausführlichen Stellungnahme - Üksikasjalik arvamus - Εμπεριστατωμένη γνώμη - Detailed opinion - Avis circonstancié - Parere circostanziato - Detalizēts atzinums - Detali nuomonė - Részletes vélemény - Opinioni dettaljata - Uitvoerig gemotiveerde mening - Opinia szczegółowa - Parecer circunstanciado - Podrobný úsudok - Podrobno mnenje - Yksityiskohtainen lausunto - Detaljerat yttrande - Подробно становище - Aviz detaliat - Aviz detaliat.

Amplia el plazo del estatu quo hasta 27-12-2012. - Prodlužuje lhůtu pro stávající stav až do 27-12-2012. - Fristen for status quo forlänges til 27-12-2012. - Die Laufzeit des Status quo wird verlängert bis 27-12-2012. - Praeguse olukorra tähtaega pikendatakse kuni 27-12-2012. - Παρατείνει την προθεσμία του status quo μέχρι την 27-12-2012. - Extends the time limit of the status quo until 27-12-2012. - Prolonge le délai de statu quo jusqu'au 27-12-2012. - Proroga il termine dello status quo fino al 27-12-2012. - Pagarina "status quo" laika periodu līdz 27-12-2012. - Pratešia status quo laiko limitą iki 27-12-2012. - Meghosszabbítja a korábbi állapot határidejét 27-12-2012-ig. - Jestendi t-terminu ta' l-istatus quo sa 27-12-2012. - De status-quo-periode wordt verlengd tot 27-12-2012. - Przedłużenie status quo do 27-12-2012. - Prolonga o prazo do statu quo ate 27-12-2012. - Časový limit momentálneho stavu sa predĺži až do 27-12-2012. - Podaljša rok nespremenjenega stanja do 27-12-2012. - Jatkaa status quo määräaika 27-12-2012 asti - Förlänger tiden för status quo fram till: 27-12-2012 - Удължаване на крайния срок на статуквото до 27-12-2012 - Prelungește termenul status quo-ului până la 27-12-2012.

Die Kommission hat diese ausführliche Stellungnahme am 26-09-2012 empfangen.
 The Commission received this detailed opinion on the 26-09-2012.
 La Commission a reçu cet avis circonstancié le 26-09-2012.

ОГРАНИЧЕН - OMEZENÝ PŘÍSTUP - BEGRÆNSET - ZUGANGSBESCHRÄNKT - ΕΣΩΤΕΡΙΚΗ ΧΡΗΣΗ - LIMITED - LIMITADO - PIIRATUD - RAJOITETTU - LIMITÉ - KORLÁTOZOTT HOZZÁFÉRÉS - RISERVATO - RIBOTO NAUDOJIMO DOKUMENTAS - IEROBEŽOTAS PIEĒJAMĪBAS DOKUMENTS - RISTRETT - RESTRITO - LIMITAT - OBMEDZENÝ - OMEJENO - BEGRÄNSAT

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1. MSG 315 IND 2012 0394 UK EN 27-12-2012 26-09-2012 COM 9.2(2) 27-12-2012

2. Commission

3. DG ENTR/C/3 - BREY 08/94

4. 2012/0394/UK - C00A

5. article 9, paragraph 2, second indent of Directive 98/34/EC

6. In the framework of Directive 98/34/EC, on 25 June 2012 the UK authorities notified to the Commission the draft Alcohol (Minimum Price per Unit) (Scotland) Order 2013.

According to the notified draft order, an alcohol product must not be sold to consumers at a price below a minimum price. The legislation prescribes a formula to calculate the minimum price of each product, which is $MPU \times S \times V \times 100$; where MPU is the minimum price per unit (specified by order), S is the strength of the product (actual ABV or "declared" ABV) and V is the volume of the product in litres ($S \times V \times 100$ calculates how many 10 millilitre units of pure alcohol the product contains). The draft order sets up a minimum price per unit of 50 pence.

The notification message explains that the minimum pricing aims to reduce alcohol consumption across the Scottish population to improve public health and attain social benefits in the areas of crime, public services, productivity and the economy as a whole. In particular, it aims to target a reduction in consumption of cheaper alcohol products relative to their strength because the evidence shows that this type of product is more likely to be favoured by hazardous and harmful drinkers, and they are likely to benefit most from a reduction in alcohol-related harms. A summary of the policy and the evidence behind it can be found at the beginning of the accompanying Business and Regulatory Impact Assessment. It is further pointed out that minimum pricing is a key part of a wider strategy. The Scottish Government's alcohol strategy ("Changing Scotland's Relationship with Alcohol: A Framework for Action", published in 2009) sets out over 40 measures aimed at addressing alcohol-related harm and is closely aligned with the World Health Organisation's Global strategy to reduce harmful use of alcohol.

Pursuant to Article 9(2) of Directive 98/34/EC, examination of the draft has prompted the Commission to deliver the detailed opinion set out below.

Articles 34-36 of the Treaty on the Functioning of the European Union (TFEU)

1. A measure of equivalent effect to a quantitative restriction

As regards minimum pricing, the EU secondary legislation, especially Council Directive 92/83/EEC on the harmonization of the structures of excise duties on alcohol and alcoholic beverages, does not prohibit Member States from setting minimum retail prices for alcoholic beverages. However, any such national measure and its effects still need to be compatible with other provisions of EU law, including the Treaty's rules on the free movement of goods (Articles 34-36 TFEU).

The case-law of the Court of Justice of the European Union ("Court of Justice") is unequivocal to the effect that national legislation imposing minimum pricing in respect of particular products falls within the ambit of the Article 34 TFEU (prohibition on measures having the equivalent effect of impeding imports of products).

According to the 'Dassonville formula':

"All trading rules enacted by Member States, which are capable of hindering directly or indirectly, actually or potentially, intra-EU trade are to be considered as measures having an effect equivalent to quantitative restrictions."

The Court of Justice has ruled that national rules fixing retail prices for alcoholic beverages could constitute measures having an equivalent effect to quantitative restrictions on imports contrary to Article 34 TFEU. This would be the case if, for example, prices were set at such a level that imported products were placed at a disadvantage in relation to identical domestic products, either because they could not profitably be marketed in the conditions laid down or because the competitive advantage conferred by lower cost prices was cancelled out. In other words, a minimum price fixed at a specific amount may, according to the circumstances, have an adverse effect specific to the marketing of imported products and thus constitute an obstacle to the free movement of goods within the Internal Market.

In the case *Van Tiggele* (Case 82/77, ECR 1978, p. 25) the Court decided that "a fixed minimum price which, although applicable without distinction to domestic products and imported products, is capable of having an adverse effect on the marketing of the latter must be considered as a measure having an effect equivalent to a quantitative restriction in so far as it prevents their lower cost price from being reflected in the retail selling price."

In the case *Keck and Mithouard* ("Keck") (joined cases C-267/91 & C-268/91) the Court of Justice restricted the scope of Dassonville finding that that:

"... the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgement (Case 8/74[1974] ECR 837), so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States ".

Furthermore, the Court of Justice stated that:

"51. For that reason, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is such as to hinder directly or indirectly, actually or potentially, trade between Member States for the purposes of the case-law flowing from Dassonville, unless those provisions apply to all relevant traders operating within the national territory and affect in the same manner, in law and in fact, the selling of domestic products and of those from other Member States. The application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is by nature such as to prevent their access to the market or to impede such access more than it impedes the access of domestic products (see, to that effect, *Joined Cases C-267/91 and C-268/91 Keck and Mithouard* [1993] ECR I-6097, paragraphs 16 and 17, and *Commission v Italy*, paragraph 36) ".

Thus the ruling in case *Van Tiggele* still stands.

It follows from this case-law that minimum prices do not fall under Article 34 unless they discriminate against imports.

Unlike a prohibition on resale at a loss or an obligation to apply certain profit margins (*Keck and Mithouard supra*, and *Belgapom*), minimum prices do not take into account the costs of

imported products which have lower prime costs than the equivalent domestic products. Consequently, there is a risk that minimum prices might discriminate against imports, depending on the level at which they are set. For example, in recent proceedings relating to minimum prices for tobacco products, Advocate General Kokott, said that:

“Where a minimum price is set by a Member State there is a danger that manufacturers from other Member States who wish to obtain a competitive price advantage on the market by charging lower maximum retail selling prices will be placed at a disadvantage. Fixing a minimum price would cancel out the competitive advantage deriving from the lower production cost of the imported product.”

In the case *Leclerc* the Court considered the effect of measures by the national authorities in France to set minimum prices for fuel. The Court confirmed that minimum prices discriminate against imported products vis-a-vis equivalent domestic products, because imported products with a lower cost base than the equivalent domestic products are deprived of their competitive advantage.

As regards the draft order at issue, the Scottish Government’s Regulatory Impact Assessment indicates that with a minimum unit price of £0.50 per unit, 73%/66% of alcohol measured in natural volumes sold in off-trade retail premises will be affected and will have to increase in price. Hence, domestic as well as imported products will be affected by the minimum pricing at issue. However, it does not follow that the imported and domestic products will be affected in the same way.

For example, as regards spirits, the price of French Brandy, sold by all the major supermarket chains would have to increase. The competitive advantage in the costs of French Brandy production (which is only required to mature for one year/6 months, depending on the size of the cask) as compared to Scotch Whisky (which is required to be matured for at least 3 years) is removed by minimum pricing. The minimum price of a 70cl bottle of both products, sold at 40% vol, will be £14.00. 82% of French Brandy is currently sold at a price lower than 50 pence per alcohol unit and only 3% of malt whiskey is sold at a price lower than 50 pence per alcohol unit, which indicates a restrictive effect of the measure on foreign produced spirit in comparison to Scotch Whisky.

Another effect of the policy is to create a barrier to entry into the Scottish market. Goods seeking to enter the market, and which could be sold (even if only initially) at a price below the proposed MUP to encourage supermarket listing and consumer trial, are denied the opportunity to do so.

The effect is particularly important because new entrants into a market, particularly a differentiated products market, typically need to offer discounts to consumers in order to induce consumers to try the new product(s). Such discounting is, however, impossible when it would imply retail prices below that implied by MUP. An example of the impact on potential new entry can be seen in relation to the cider market in the UK, where domestic producers have a strong market position. In order to enter this market, foreign suppliers – particularly from Ireland and Sweden – have used various pricing strategies such as discounting and multi-pack offers. These pricing strategies, which may be seen as necessary by the importing companies to establish a foothold in the UK cider market, will no longer be possible under a policy of MUP. More general economic evidence and experience indicates very wide recourse to such strategies in consumer goods markets, suggesting that their effective elimination could substantially raise barriers to entry into the Scottish market.

Consequently, the measure at issue, although applicable without distinction to domestic products and imported products, is capable of having an adverse effect on the marketing of the latter and should be considered as a measure having an effect equivalent to a quantitative restriction in so

far as it prevents their lower cost price from being reflected in the retail selling price.

2. Justification for the measure – the proportionality of the measure

Restrictive measures can be justified on the basis of Article 36 TFEU or on the basis of one of the overriding requirements in the public interest recognized by the Court of Justice. However, the Commission draws the attention of the UK authorities to the fact that in order to justify the measure, the Member State has to prove that such restrictive measure is necessary to achieve legitimate objectives and is proportionate to this aim i.e. the objective cannot be achieved by any other means less restrictive of intra-Union trade (Case C-104-75, *De Peijper*, [1976], ECR 613 and Case C-50/83, *Commission v Italy* [1984] ECR 1633, point 17). Moreover, according to Article 36 TFEU the measure shall not constitute a means of arbitrary discrimination.

The measure at issue is aimed at reducing alcohol consumption across the Scottish population and thus improving public health and attaining social benefits. In particular, it aims to target a reduction in consumption of cheaper alcohol products relative to their strength because the evidence shows that this type of product is more likely to be favoured by hazardous and harmful drinkers.

The Scottish authorities justify the restrictions on imports on the grounds of protecting the health and life of humans by reducing the overall consumption of alcoholic beverages. The scale and nature of alcohol-related health and social harm in Scotland is described in detail in the Scottish Government's Regulatory Impact Assessment (RIA). One example which illustrates why decisive action is called for is that over the last 30 years Scotland has had one of the fastest growing rates of chronic liver disease and cirrhosis in the world, whereas the rates are falling in many Western European countries.

Alcohol consumption in Scotland has remained at a high level since 2005, at around 12 litres of pure alcohol per year per every person aged over 16 years. This is in contrast to England and Wales where alcohol consumption has fallen somewhat from the same level as in Scotland around 2005. Although there has been a slight fall in the reported volume of alcohol consumed in Scotland too over the past year or two, the high level of drinking continues to cause harm. The number of alcohol-related discharges from general hospitals has declined from around 42 000 to around 39 000 per year. Despite the decline, alcohol-related discharges are fourfold the level in the early 1980s. Alcohol-related mortality rates, despite some fluctuation, have more than doubled since the early 1990s. More than 100 000 GP visits per year relate to an alcohol-related admission and 11% of accident and emergency admissions are alcohol related. It is estimated that 65 000 children live with a parent with an alcohol problem. In this context, the Commission fully understands and acknowledges the public health and social reasons that call for decisive action to reduce alcohol consumption in Scotland.

The Scottish Government's minimum pricing policy has a dual goal: (1) to contribute to a reduction in alcohol consumption across the Scottish population to improve public health; (2) to target, in particular, a reduction in the consumption of alcohol which is cheap relative to its strength.

The minimum pricing policy contributes to a reduction in overall alcohol consumption, and thereby to improve public health as one component in a comprehensive national alcohol strategy (*Changing Scotland's Relationship with Alcohol: A Framework for Action, 2009*). This strategy includes 40 separate measures, builds on and adds to measures already implemented and is underpinned by wider policy initiatives across sectors such as health, education and justice.

It is worth noting that total alcohol consumption is a key health indicator in the EU (ECHI 46) as a proxy for the level of alcohol related harm in a Member State .

The second goal is based on research showing that the high sales of alcohol in Scotland are to a large extent driven by high sales of cheap alcohol primarily through the off-trade.

The effects of alcoholic beverage prices on alcohol consumption and related harm and of taxation as the main instrument for controlling price levels have been researched more extensively than any other area of alcohol policy. (Summarised for example in: Anderson & Baumberg 20068; WHO 20099; Babor & al 201010; WHO 2012) When other factors remain unchanged, an increase in alcohol prices generally leads to a decrease in alcohol consumption, and vice versa, although the effects in general vary in strength between beverage categories. All alcohol consumers respond to price changes, heavy drinkers included, but in particular young people. Increasing the price of alcohol reduces both acute and chronic harm.

The study carried out by RAND Europe on behalf of Directorate-General "Health and the Consumers" of the European Commission in 2009 shed further light on this area. The study focussed on the affordability of alcoholic beverages, a function of alcohol price and consumer income. Alcoholic beverages have become more affordable in most EU countries since the mid-1990s. Of this increase, 84% was driven by increases in income, and only 16% by changes in alcohol prices which remained relatively stable or decreased. The study showed that the real value of the EU alcohol minimum excise duty rates and of Member States' alcohol taxation has decreased since the mid-1990s in most EU countries.

The Commission is fully aware of the importance of reduction of alcohol consumption among the population as a whole and in particular among the harmful drinkers. The Commission further acknowledges that the measure proposed is within Member States' competence and - from a public health point of view - within the scope of the goals and objectives of the EU strategy to support Member States in reducing alcohol related harm (COM(2006)625). While identifying priority themes for action which are relevant in all Member States and for which action and coordination at EU level has an added value, the strategy highlights that Member States have the main responsibility for national alcohol policy and that Member States are implementing, based on their particular cultural contexts, a range of specific measures to reduce alcohol-related harm.

However, the measure at issue raises doubts as to its compatibility with the principle of proportionality, therefore the Commission would like to concentrate on it and the possibility to achieve the objective by other means less restrictive to intra-EU trade.

Keeping in mind that most of the studies prove and there is a general agreement that affordability does have effect of drinking patterns, the question is only about the best way to exploit this tendency. Hence, the Commission does not disagree with the proposition that increases in the prices of alcoholic drinks could, other things being equal, be expected to lead to reduced demand for those drinks. The focus in this opinion is rather on whether a MUP policy, which would lead to higher prices of many alcoholic drinks and hence to an expectation of reduced consumption, is likely to be the least market distorting policy that could be introduced to produce such an outcome.

If the goal is, for health policy reasons, to reduce alcohol consumption via increasing the prices of alcoholic beverages, that goal can be achieved by raising alcohol taxation across the board. The price of alcohol would thus increase without causing the market distortions that, as shown above, can be expected to flow from MUP. It is the Commission's view that there is at least one alternative, regulatory option to MUP that is less restrictive of trade and less distorting of competition in relevant drinks markets.

The Court mentioned in the case *Commission v Greece* (Case C-216/98, [2000] ECR I-8921) that concerned tobacco pricing and in which article 36 TFEU was invoked: "In this case it must

be observed that the objective of protecting public health may be adequately attained by increased taxation of manufactured tobacco products, which would safeguard the principle of free formation of prices."

It could also be mentioned that in the RAND study commissioned for Directorate-General "Health and Consumers" of the European Commission it was stated that the "increases in taxation at the national level could be an effective strategy to reduce alcohol-related harms" . Indeed it seems that an increase in existing excise duty would be a better option to address the alcohol consumption problem without having the adverse effects as it would impact all products equally.

Furthermore, policy-wise the raising of duties might be a better solution because it might help to reach the goals without leading to the negative effects that MUP might have. This result feeds into further economic distortions that might arise as a consequence of the MUP. These potential distortions arise because the MUP will create greater incentives for retailers and supermarkets in particular, to sell more alcoholic beverages as a result of the fact that they will make higher margins on products affected by the policy. This will give retailers incentives to allocate increased resources to the sale of products affected by the MUP compared with what could be expected to be the case if, for example, similar average retail price increases were caused by an across-the-board increase in duty, which is an alternative policy option for reducing consumption. In economic terms, this makes MUP a less effective means of reducing consumption than duty increases.

Indeed, Union legislation provides the Member States with the possibility to control the prices of alcohol and hence choose their level of health protection by setting the excise duties. The Scottish government provided explanations in the Regulatory Impact Assessment in page 46 of why the taxation alternative was not considered as the best option.

The Commission would like to address them accordingly at the same time stressing that raising of alcohol duties is probably the more suitable measure:

1) As regards the statements that the increase of duties will affect all alcohol on the market and not only cheap alcohol and will also affect the on-trade sales, the Commission would like to note that the objective of the measure at issue is to reduce overall drinking that is shown by the chosen level of the minimum price that will affect 73%/66% of the off-trade market. Accordingly, the raising of duties option seems to be the most suitable to achieve that goal without providing any adverse effects on competition. Furthermore, the negative effects on the on-trade market can be reduced by adjusting the taxation system accordingly.

2) The Scottish authorities also claimed that increases in taxation of alcohol will not necessarily result in a proportionate or indeed any increase in the price of alcohol, as alcohol tax and duty increases are not always reflected in the price the consumer pays as some retailers engage in below cost selling to varying extents.

To this effect, it could be mentioned that the second study of RAND 2012 carried out for the Commission examined to what extent changes in alcohol taxes are passed through to consumer prices. The findings indicate that changes in consumer prices depend to a large extent on reactions in the retail sector. Sufficient data for analysis was available from four countries. The pass-through is full when for example a €1.00 increase in excise duty for a product is associated with a €1.00 increase in the consumer price (or a duty reduction is similarly associated with a drop in the price). More than full pass-through means that the price increases more than that needed to cover the duty raise. Less-than full pass-through means the price increases less, as retailers cover the tax raise from other sources. In the countries studied, pass-through in the off-trade for changes in beer duties was less than full in two cases, and more than full in two cases. There was similar variation in the pass-through for changes in spirits duties. Comparison

between off-trade and on-trade was possible for one country: there was no marked difference in the pass-through for beer, but for spirits the pass-through was more than full in off-trade and less than full in on-trade.

Hence, the Commission would like to note it is not definite that the rise in prices will not be passed through as showed by the examples.

Furthermore, in the case *Commission v Hellenic Republic (C-216/98)* the Court addressed that question stating that "The ability of manufacturers and importers not to pass on increases in excise duty on their products is in any event limited by the extent of their profit margin, with the result that excise duty increases are sooner or later incorporated in retail selling prices".

3) According to the Scottish authorities, the Regulatory Impact Assessment observes that increase in duties will not affect the low-priced products because Directives 92/83/EEC and 92/84/EEC make provision for minimum rates of excise duty on alcohol and specify methods for calculating the rate of duty. These Directives mean a rate of duty for wine needs to be based on the range of the alcoholic strength of each particular wine, rather than on the actual alcoholic strength of the wine and so prevent there being a scheme of taxation levied on a unit of alcohol.

The Commission observes that the Directives at issue provide a degree of discretion to the Member States (but at the same time observing the minimum rates) to allow them to formulate their alcohol fiscal policies. In addition, it has to be observed that in the Regulatory Impact Assessment the Scottish authorities claim that in determining the effect of the measure by modelling, the modelling does not distinguish by different types or strengths of products within a category.

To that effect, the increase of excise duty appears to be a better option to reach the goals sought.

Moreover, there are other additional measures which the Scottish Government could adopt. For instance, according to information available health related harms are concentrated in particular areas of Scotland. Measures which are specifically targeted at these areas are likely to be more effective than measures aimed at the total population.

Following the above observations the Commission concludes that the draft at issue may create obstacles to the free movement of goods within the internal market contrary to article 34 TFEU and appears to be disproportionate under article 36 TFEU. The UK authorities are invited to abstain from adopting the draft legislation at issue.

For these reasons, the Commission delivers a detailed opinion provided for in Article 9(2) of Directive 98/34/EC to the effect that the draft regulation in question would be in breach of Article 34 TFEU were it to be adopted without giving due consideration to the above remarks.

The Commission would like to remind the UK Government that under the terms of Article 9(2) of the above mentioned Directive 98/34/EC, the delivery of a detailed opinion obliges the Member State which has drawn up the draft technical regulation concerned to postpone its adoption for six months from the date of its notification.

This deadline therefore comes to an end on 27 December 2012.

The Commission further draws the attention of the UK Government to the fact that under this provision the Member State which is the addressee of a detailed opinion is obliged to inform the Commission of the action which it intends to take as a result of the opinion.

Should the text of the draft technical regulation under consideration be adopted without account

being taken of the above-mentioned objections, the Commission may be compelled to send a letter of formal notice pursuant to Article 258 of the Treaty on the Functioning of the European Union. It also reserves the right to send a letter of formal notice should it not have received the response of the UK Government by the time of adoption of the draft technical regulation in question.

The Commission invites the UK Government to communicate to it on adoption the definitive text of the draft technical regulation concerned. Failure to communicate this text would constitute an infringement of Article 4, paragraph 3 of the Treaty on the European Union as well as of Article 8(3) of Directive 98/34/EC, in respect of which the Commission reserves the right to take proceedings.

Catherine Day
General Secretary
European Commission

Contact point Directive 98/34
Fax: (32-2) 296 76 60
email: dir83-189-central@ec.europa.eu